REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 232 OF 2018

PERNOD RICARD KENYA LIMITED..................................PETITIONER

AND

THE COMMISSIONER OF CUSTOMS

& BORDER SERVICES...1ST RESPONDENT

THE COMMISSIONER OF INVESTIGATIONS

AND ENFORCEMENT..2ND RESPONDENT

RULING

INTRODUCTION

1. The petitioner first moved this Honourable Court vide petition dated 28th June 2018. The petition was later amended and filed on 26th September 2018. The petition (now amended) is supported by the Affidavit of **Craig Van der Zee**, the petitioner's finance director. The petitioner seeks the following prayers:

> **a) That this Honourable Court be pleased to declare that the Respondents have violated the Petitioner's rights as guaranteed by Article 47(2) of the Constitution by failing to provide written reasons for its value uplift.**
>
> **b) That this Honourable Court be pleased to declare that the Respondent's value uplift dated 18th May 2018 is a violation of the petitioner's rights under Article 47(1) of the Constitution.**
>
> **c) That this honourable Court be pleased to issue an order restraining the Respondents from applying a value uplift or demanding any excess tax in respect of the entry numbers 2018 MSA 6845768, 6843982, 6843891 and 6843881 pending the hearing and determination of the Petitioner's appeal filed before the Tax Appeals tribunal that is Appeal no. 25 of 2018.**
>
> **d) That this Honourable Court be pleased to issue an order restraining the Respondents from imposing duty uplifts on any of the Petitioner's products on the same basis as the dispute pending before the Tax Appeals Tribunal in Appeal no. 25 of 2018 pending the hearing and determination of Appeal before the Tribunal.**
>
> **e) Costs of this petition.**
>
> **f) Such other orders as this Honourable Court shall deem just.**

BACKGROUND

2. The Applicant/petitioner is a company incorporated and registered in Kenya, conducting the business of marketing and distributing their products in the Kenyan market. The said products are manufactured by various group manufacturers of the Applicant located across the world. Sometime in March 2017 the 1st Respondent carried out a customs post clearance audit of the Applicant's operations. This culminated into a demand dated 18th January 2018 **(annexed and marked HK1)** wherein the 1st Respondent rejected the customs value of the products imported by the Applicant and proceeded to uplift the values. The Applicant challenged the demand by way of an appeal to the Tax Appeals Tribunal (Appeal No. 25 of 2018) which is currently pending hearing before the Tax Appeals Tribunal. (herein after "the Tribunal") Whereas the hearing is pending, the before the Tribunal, the Respondents have applied a value uplift to subsequent importation by the Applicant. As a result, the Applicant filed the instant petition and Application seeking conservatory orders to stop the value uplift and to have the products released to the Applicant.

THE APPLICATION

3. Through a notice of motion filed on 10th August 2018, supported by the Affidavit of one Henry Kungu, The Applicant seeks conservatory orders in the following terms:

a) Spent.

b) That this Honourable Court be pleased to issue an ex-parte order of injunction restraining the Respondents by themselves, their agents, servants or in any manner whatsoever from applying a value uplift to the Applicant's Ballantine's products imported under entry number 29140 pending the hearing and determination of the Application.

c) That this Honourable Court be pleased to issue an ex-parte order of injunction restraining the Respondents by themselves, their agents, servants or in any manner whatsoever from refusing to release to the Applicant its product imported under entry number 29140 pending the hearing and determination of the Application.

d) That this Honourable Court be pleased to issue an order of injunction restraining the Respondents by themselves, their agents, servants or in any manner whatsoever from applying a value uplift to the Applicant's Ballantine's products imported under entry number 29140 pending the hearing and determination of the Petition.

e) That this Honourable Court be pleased to issue an order of injunction restraining the Respondents by themselves, their agents, servants or in any manner whatsoever from refusing to release to the Applicant its product imported under entry number 29140 pending the hearing and determination of the petition.

f) That this Honourable Court be pleased to issue an ex-parte order of injunction pending the hearing of this Application restraining the Respondents from imposing value uplifts on the Applicant's products which are the same products as those the subject matter of the Tax Appeal no. 25 of 2018 provided that the Applicant provides letters of undertaking confirming that should the Tax Appeals Tribunal confirm the value uplifts it will pay the tax due.

g) That this Honourable Court be pleased to issue an order of injunction pending the hearing of this Amended petition restraining the Respondents from imposing value uplifts on the Applicant's products which are the same products as those the subject matter of the Tax Appeal no. 25 of 2018 provided that the Applicant provides letters of undertaking confirming that should the Tax Appeals Tribunal confirm the value uplifts it will pay the tax due.

h) Such other orders as this Honourable Court may deem just to grant.

4. The application is premised on grounds (which are reiterated in the Applicant's submissions) that:

a) The Applicant has disputed a previous value uplift applied by the 1st Respondent pursuant to a post clearance audit before the Tax Tribunal in Tax Appeal no. 25 of 2018.

b) While the said Appeal is yet to be heard, the Respondents unreasonably, unfairly and unjustly applied a value uplift to a subsequent importation by the Petitioner under entry numbers 2018 MSA 6845768, 6843982, 6843891 and 6843881 forcing the Applicant to file the petition herein and seek conservatory orders.

c) On 3rd July a consent order was granted restraining the Respondents from applying value uplift to the products imported under the aforementioned entries and from refusing to release the products, which resulted in the release of the products to the Applicant.

d) The Applicant had also provided an undertaking on 25th June 2018 irrevocably undertaking to pay any taxes due in the event that the Tribunal decides that the uplifts were properly applied. On the basis of this understanding the Applicant's products were released.

e) The Respondents have again applied a value uplift on the Applicant's consignment of 900 cases of Ballantines Scotch Whisky imported under entry number 29140. The Ballantines product is one of the products the subject of the Appeal before the Tribunal.

f) The Applicant has undertaken to pay tax due should the Tribunal uphold the Value Uplift in the said Appeal.

g) It is only just, fair, and reasonable that the Respondents should await the outcome of the Appeal before imposing any further value uplifts and demanding excess tax from the Applicant. In applying the value uplift the Respondents have violated the Applicant's right to fair, reasonable, just and lawful administrative action as envisaged under Article 47(1) of the Constitution.

h) The Respondents refusal to accept the Applicant's undertaking is unreasonable and unjust as the Applicant has confirmed to the Respondents that it will pay any excess tax if the Tribunal confirms the value uplift. The Respondents suffer no prejudice whatsoever in releasing the product especially since they have released other consignments on the basis of an undertaking.

i) The Applicant continues to incur crippling demurrage charges as a result of the Respondents' refusal to release its product, including experiencing law stocks thus causing harm to its business and that of its customers.

j) The Applicant's business continues to experience disruptions as every time it brings in a consignment it has to engage its advocates to move court so that the consignment can be released.

k) Unless this Honourable Court grants an injunction to restrain the Respondents from imposing the value uplift and refusing to release the Petitioner's products, the Applicant is likely to continue to suffer irreparable harm and damage.

RESPONDENT'S CASE

5. The Respondents opposed the application through the Replying Affidavit of Patrick Omari dated 17th August 2018 and a supplementary Affidavit of 19th September 2018 together with written submissions dated 29th September 2018. At the hearing of the application, the Respondents highlighted their case through their advocate's oral submissions.

6. The Respondents contend that the Application is an abuse of court process and ought to be dismissed. They argue that the Tax Appeals Tribunal (Tribunal) is fully seized of the issues which are pending hearing and determination, which issues the instant Application and Petition (now amended) are seeking to have determined. It is their case that Section 229, 230 and 231 of the East African Community Customs Management Act, 2004 (EACCMA) provides for the process to be followed when a tax payer objects to tax decisions made against him and that Section 51 of the Tax Procedures Act No. 29 of 2015 replicates the same provisions. It was submitted that the outcome of such a decision escalates to the Tribunal, and that a decision of the Tribunal can be subjected to an appeal to the High Court and subsequently a further appeal to the Court of Appeal can follow.

7. It was argued that the Applicant has not demonstrated that he cannot get an effective remedy under the dispute resolution mechanism established under the Statute and that apart from clothing the alleged breaches with rights under Article 47 of the Constitution, there has to be a clear demonstration that the alternative remedy is not available, effective, and sufficient to address the grievances in question. It was submitted that in the instant case the remedy is available, effective and sufficient, and the Applicant/ Petitioner had invoked the same in TAT No. 25 of 2018. Counsel reiterated that the adjudication of the issues in the instant Application and the Petition itself which seeks inter alia, interim and final injunctive orders against the Respondents, could safely be left to the statutory provisions. For this argument, the respondents cited the cases of **Gabriel Mutava & 2 Others vs. Managing Director Kenya Ports Authority & Another[2016] e KLR** and **Damian Belfonte vs. The Attorney General of Trinidad and Tobago C.A 84 of 2004.**

8. Counsel also cited the decision of Odunga J. judgment in the case of **Republic vs. Commissioner of Domestic Taxes Ex-Parte I & M Bank Limited (2017) eKLR** in support of the Respondent's contention that the principle of constitutional avoidance requires that where it is possible to decide a case without reaching a constitutional issue, that ought to be done. The Respondents argued that the issue in this matter clearly requires the interpretation of statute, specifically the EACCMA, and maintained that in determining whether an argument raises a constitutional issue, the court is not strictly concerned with whether the argument will be successful, but rather whether the argument forces the court to consider constitutional rights or values.

ISSUES FOR DETERMINATION

A. Whether the Application and Petition (amended) raise Constitutional issues.

9. The Respondents' case was that this Court should consider whether the dispute involves explicit constitutional adjudication or whether it could safely be left to the relevant statutory provisions as impleaded herein. I humbly disagree with this approach as these are matters that will be and ought to rightly be determined in the Petition (now amended). I am guided by the wisdom of Odunga J. in the case of **Simeon Kioko Kitheka & 18 others v County Government of Machakos & 2 others [2018] eKLR** where the learned Judge held:

> ***"………………The law as I understand it is that in considering an application for conservatory orders, the court is not called and it is indeed forbidden from making any definitive finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the first condition the applicant is required to establish a prima facie case with a likelihood of success. As Musinga, J (as he then was) in Petition No. 16 of 2011, Nairobi – Centre for Rights Education and Awareness (CREAW) & 7 Others stated:***
>
> ***"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

B. Whether this Court has jurisdiction in this matter in light of the Statutory Provisions (EACCMA & Tax Procedures Act) on Dispute resolution mechanisms.

10. In **Re the Matter of the Interim Independent Electoral Commission, Sup. Ct. Const. Appl. No.2 of 2011 [2011]** the Supreme Court held that a Court can only exercise such jurisdiction as is conferred by the Constitution or statute and cannot arrogate to itself jurisdiction that it does not have.

11. It is not lost to this Court that the there is a dispute resolution mechanism set out under Section 229, 230 and 231 of the East African Community Customs Management Act, 2004 which outlines the process to be followed when a tax payer objects to tax decisions made

against him. Further, that Section 51 of the Tax Procedures Act No. 29 of 2015 replicates the same provisions. This Court is also aware that the outcome of such a decision escalates to the Tribunal, and that a decision of the Tribunal can be subjected to an appeal to the High Court and subsequently a further appeal to the Court of Appeal can follow.

12. **Sections 229, 230** and **231** of the EACCMA provide as follows:

> ***APPEALS***
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> ***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.***
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> ***(2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.***
>
> ***(3) Where the Commissioner is satisfied that, owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).***
>
> ***(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.***
>
> ***(5) Where the Commissioner has not communicated his or her decision review within to the person lodging the application for the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.***
>
> ***(6) During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner.***
>
> ***230. (1) A person dissatisfied with the decision of the commissioner under section 229 may appeal to a tax appeals tribunal established in accordance with section 231.***
>
> ***(2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner.***
>
> ***231. Subject to any law in force in the Partner States with respect to tax appeals, each Partner State shall establish a tax appeals tribunal for the purpose of hearing appeals against the decisions of the Commissioner made under section 229.***

13. **Section 51** of the Tax Procedures Act provides;

> ***51.* Objection to tax decision**
>
> ***(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.***
>
> ***(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.***
>
> ***(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—***
>
> ***(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and***
>
> ***(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.***
>
> ***(4) Where the Commissioner has determined that a notice of objection lodged by a taxpayer has not been validly lodged, the Commissioner shall immediately notify the taxpayer in writing that the objection has not been validly lodged.***
>
> ***(5) Where the tax decision to which a notice of objection relates is an amended assessment, the taxpayer may only object to the alterations and additions made to the original assessment.***
>
> ***(6) A taxpayer may apply in writing to the Commissioner for an extension of time to lodge a notice of objection.***

(7) The Commissioner may allow an application for the extension of time to file

a notice of objection if—

(a) the taxpayer was prevented from lodging the notice of objection within the period specified in subsection (2) because of an absence from Kenya, sickness or other reasonable cause; and

(b) the taxpayer did not unreasonably delay in lodging the notice of objection.

(8) Where a notice of objection has been validly lodged within time, the Commissioner shall consider the objection and decide either to allow the objection in whole or in part, or disallow it, and Commissioner's decision shall be referred to as an "objection decision".

(9) The Commissioner shall notify in writing the taxpayer of the objection decision and shall take all necessary steps to give effect to the decision, including, in the case of an objection to an assessment, making an amended assessment.

(10) An objection decision shall include a statement of findings on the material facts and the reasons for the decision.

(11) Where the Commissioner has not made an objection decision within sixty days from the date that the taxpayer lodged a notice of the objection, the objection shall be allowed.

14. The outlined provisions and indeed the relevant dispute resolution mechanisms find their bearing in the Constitution, which this Court holds sacred. Whereas it is apparent to this Court that the Tribunal is yet to determine the Appeal it is seized with, the subject matter of that Appeal is what the Applicant herein wishes to preserve, hence the conservatory orders sought herein.

15. The circumstances under which the Courts can grant conservatory orders were discussed in the case of **Judicial Service Commission v. Speaker of the National Assembly & Another [2013] eKLR** wherein the Court expressed itself as follows:

Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

16. This position was reinforced by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others [2014] eKLR** wherein the highest Court in the land held:

"Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

C. Whether the Applicant has established a prima facie case for granting the conservatory orders sought.

17. It has not been disputed that there is a tax dispute pending before the Tax Appeals Tribunal over the issue of the value uplifts on the applicant's products. The applicant's case is that while the dispute is still pending determination before the said Tribunal, the respondent has continued to impose the same value uplifts, that are subject to challenge before the Tribunal, to the goods that they have subsequently imported, thereby hampering their business. The Applicant has undertaken to pay tax due should the Tribunal uphold the Value Uplift in the said Appeal.

18. The instant Application seeks orders to restrain the Respondents from imposing value uplifts on the Applicant's products pending the hearing and determination of this petition which are the same as the subject matter of the Tax Appeal No. 25 of 2018 before the Tribunal. This Court is of the humble view that considering that the issue of the value uplifts is already the subject of the appeal before the Tribunal, the most reasonable approach would have been for the parties herein to await the decision of the said Tribunal before imposing further value uplifts on the applicant's products as to do otherwise would be to render the said appeal nugatory. This court notes that the applicant is an ongoing business concern engaged in the importation of goods from time to time and therefore it will not only costly but also impractical for the applicant to file an appeal to the Tribunal challenging the value uplifts every time a consignment of goods arrives in the country. The Applicant has notably demonstrated goodwill and good faith by making an undertaking to pay all the taxes due should its appeal before the Tribunal be unsuccessful which the Respondents have declined to accept. As I have already stated in this ruling, the applicant has a right to fair hearing under **Article 50(1)** which stipulates thus:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

19. Having regard to the above Article and my findings and observations in this ruling, I am satisfied that the applicant has demonstrated that it has a prima facie case against the respondent. Courts have severally held that for purposes of granting conservatory orders a *prima facie* case is not a case which must succeed at the hearing of the main case but is rather a case which is not frivolous. In other words the applicant

herein only needed to demonstrate that its case discloses arguable constitutional issues. To my mind therefore, the justice of this case leans in favour of granting the conservatory orders sought. I am guided by the decision of the Supreme Court in the case of **Deynes Muriithi & 4 others v Law Society of Kenya & another [2016] eKLR** wherein it was held:

> *"[48] The Supreme Court's stand, in relation to the discharge of judicial work by other Courts, has been stated in* ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 other, Sup. Ct. Civil Application No. 35 of 2014 [2014] eKLR*** *(paragraph 65) as follows:*
>
> *"Subject to the obligation on the part of all Courts to ensure efficiency and dispatch in proceedings before them, as required under the Constitution, it is an important principle guiding the judicial function, that the Courts are independent, and are committed to the judicious and conscientious discharge of their mandate. Upon this premise, this Court will in general, keep faith in the other Courts, in the absence of any plain situation to the contrary, that merits judicial notice."*
>
> *[49] However, the foregoing principle does not limit this Court's mandate if it is convinced that fundamental freedoms, as beckoned in Article 20(3)(a) and (b) of the Constitution, are compromised by the exercise of the discretion aforesaid; or convinced that values of the Constitution including human rights, equity, equality and integrity are departed from; or that grave injustice is occasioned by the decision in question; or that the decision in question is inconsistent with the same Court's earlier decisions. In such instances, the Supreme Court takes into* account *such objective criteria as it may determine, or formulate on the basis of comparative jurisprudential perspectives, being constantly guided by the object of averting any grave injustice."*

20. Apart from establishing a *prima facie* case, the applicant must further demonstrate that unless the conservatory order is granted he or she stands suffer real danger or prejudice. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011.

21. In the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi** Petition No. 16 of 2011 **Musinga, J** (ahtw) stated that:

> ***"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

22. In a majority decision in the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held as follows:

> ***"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."***

23. In the instant case I have already found that the applicant stands to suffer prejudice if the conservatory orders are not granted as its appeal before the Tribunal will, in that event be rendered nugatory. On the flipside, the respondent will not suffer any prejudice should the petition herein and the appeal fail, as in that eventuality, the applicant will have to pay all the taxes due which in any case is what the applicant has undertaken to do.

24. For the above reasons, I find that the instant application is merited and I allow it as prayed.

Dated, signed and delivered in open court at Nairobi this 21st day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mrs Kimani for Mark for the petitioner

No appearance for respondent

Court Assistant - Kombo