



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW NO. 314 OF 2011

REPUBLIC APPLICANT

VERSUS

COMMISSIONER OF CUSTOMS SERVICES.....1ST RESPONDENT

COMMISSIONER OF INVESTIGATIONS & ENFORCEMENT....2ND RESPONDENT

KENYA REVENUE AUTHORITY.....3RD RESPONDENT

MINISTER FOR FINANCE.....4TH RESPONDENT

EX PARTE KENAFRIC INDUSTRIES LTD

JUDGMENT

1. The ex parte Applicant, Kenafric Industries Limited is a limited liability company engaged in the manufacture of confectionary, footwear, food seasoning and stationery for the local and export markets.
2. The 1st and 2nd respondents are Kenya Revenue Authority's Commissioner of Customs Services and the Commissioner of Investigation and Enforcement. Kenya Revenue Authority which is the 3rd Respondent is established under Section 5(1) of the Kenya Revenue Authority Act, Cap 467 to collect and receive revenue on behalf of the Government of Kenya. Among the Acts of Parliament that are enforced by the 3rd Respondent are the East African Community Customs Management Act (EACCMA) and the Customs Excise Act, Cap 472. The 4th Respondent is the Minister of Finance now known as the Cabinet Secretary for Finance.
3. Through an agency notice dated 30th November, 2011, the 2nd Respondent appointed the Manager of National Industrial Credit Bank Ltd an agent of the Applicant for the purposes of collecting and paying the 2nd Respondent Kshs,62,376,743 as custom duties due from the Applicant.
4. The Applicant being aggrieved by the said action moved this court and obtained leave to commence these judicial review proceedings. Through the Notice of Motion dated 8th December, 2011, the Applicant prays for orders that:

“a) An order of CERTIORARI do issue to remove into this Honourable court and quash the 2nd Respondent's decision contained in the Agency Notice dated 30th November 2011 declaring the Manager, National Industrial Credit Bank an agent of the ex parte Applicant and requiring the said Agent to pay to the 2nd Respondent Kshs. 62,376,743/- as custom

import duties dues from the Applicant.

b) An order of PROHIBITION do issue to prohibit the 1st - 3rd Respondents from acting or in any manner dealing with demand notices dated 15th February, 2011 and 8th November, 2011 giving notice to enforce demand for Kshs. 62,376,743/- and Kshs. 75,234,774/- respectively being custom import duties payable for the period commencing from 23rd January 2006 to 3rd April, 2008 pending the determination of the matter by the Minister for Finance.

c) An order of PROHIBITION do issue to prohibit the Respondents from demanding 10% of the value of the Industrial Sugar imported by the Applicant for manufacture of goods for export for the period commencing from 23rd January 2006 to 3rd April, 2008 which sugar at the time was lawfully imported at zero rated duty.

d) Costs and incidentals of this application be provided for.

e) Such further and other reliefs that the Honorable Court may deem just and expedient to grant.”

5. When this matter came up for hearing, Mr. Mogeni for the Applicant, Mr. Ontweka for the 1st to 3rd respondents and Mr. Odhiambo for the 4th Respondent all agreed that the issues in question in this matter are similar to those in issue in **JR No. 313 of 2011, Republic v Commissioner of Customs Services & 2 others Ex-parte Candy Kenya Limited.**

6. The respondents' assertion that the Applicant ought to have resorted to the appellate mechanism provided by statute does not hold any water. The Applicant is complaining against oppressive and unfair action by the 1st to 3rd respondents and in such a case judicial review is available to the Applicant. The Applicant is not complaining about the assessed taxes but the manner in which it is being treated by the respondents.

7. The key question for the determination of the court herein is the import of Legal Notice No. EAC/10/2006. That Legal Notice states as follows:

“IN EXERCISE of the powers conferred upon the Council of Ministers by Article 39(c) of the Protocol on the Establishment of the East African Community Customs Union and Section 140 of the East African Community Customs Management Act 2004, the Council of Ministers has approved the following manufacturers to import the specified quantities of sugar for industrial use specified below at a duty rate of 10% for 12 months under the Duty Remission Scheme.”

8. In my view the said Legal Notice is self-explanatory and does not need additional explanation. It grants a duty rate of 10% to the listed manufacturers importing sugar for industrial use. The Applicant appears on that list. The Legal Notice does not differentiate between sugar imported for manufacture of products for the local market and sugar imported for manufacture of goods for the export market. The respondents are therefore correct that the Applicant ought to have paid duty of 10% on all the sugar it imported.

9. Even though the respondents are correct in the interpretation of the said Legal Notice there remains the fact that through the letter dated 7th November, 2011 the 4th Respondent had asked the 1st to 3rd respondents not to execute the tax demand awaiting a decision of the 4th Respondent on the application by the Applicant for waiver of the tax in question. The 2nd Respondent's decision to issue the agency notice came about three weeks after the 4th Respondent's letter. In my view, the 2nd Respondent did not act in good faith. The responsibility of granting waiver on taxes belongs to the 4th Respondent and the action of the 2nd Respondent appears to have been geared at pre-empting the decision of the 4th Respondent.

10. In the circumstances of this case, I find orders are deserved. Orders will therefore issue as follows:

a) The agency notice dated 30th November, 2011 declaring the Manager, National Industrial Credit Bank Ltd an agent of the Applicant for purposes of collecting Kshs. 62,376,743/- in custom import duties is thus called into this Court and quashed.

b) The 1st to 3rd respondents are prohibited from demanding the tax in question pending the decision on the matter by the Cabinet Secretary for Finance.

c) The Applicant's prayer for an order of prohibition to prohibit the respondents from demanding 10% of the value of industrial sugar imported from 1st July, 2006 to 31st March, 2008 for use in the manufacture of confectionary for export fails. Issuing such an order would amount to taking over the statutory responsibilities of the respondents.

d) There will be no order as to costs.

Dated, signed and delivered at Nairobi this 1st day of July, 2016.

W. KORIR,

JUDGE OF THE HIGH COURT