IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: OUKO (P), GATEMBU & SICHALE, JJ.A

CIVIL APPEAL NO. 180 OF 2019

BETWEEN

KENYA REVENUE AUTHORITY.....APPELLANT

AND

EXPORT TRADING COMPANY LIMITED.....RESPONDENT

(Being an appeal from the judgment of Wilfrida Okwany, J

dated 9th January, 2019 at Nairobi

IN

Constitutional Petition No. 148 of 2013)

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JUDGMENT OF THE COURT

The appellant, **Kenya Revenue Authority (KRA),** the respondent in the court below sought to recover a sum of Kshs 378,016,680 (inclusive of interest and penalties) being an amount of unpaid taxes by the Export Trading Company Limited (the respondent herein and the then petitioner). The appellant's move to recover the said sum was challenged by the respondent which filed a Constitutional Petition that was heard and determined in its favour by **Okwany**, J. In her conclusion the learned judge made the following orders:

> ***(a) A declaration that the demand of taxes by the Respondent constitutes an infringement of the Petitioner's right under Article 40 and 47 of the Constitution.***
>
> ***(b) An order of certiorari to bring to this court and quash the decision to demand and the demand contained in the Respondent's letter dated 27th February, 2013.***
>
> ***(c) A permanent injunction restraining the Respondent whether by itself, its officers, employees and /or agents from commencing, instituting or proceeding with any enforcement or prosecution against the Petitioner or its directors and/or officers in relation to or on account of the disputed taxes in the sum of Kshs 378,016,680/= and the interests and penalties claimed therein"***

It is this finding and orders that aggrieved the appellant. In a Memorandum of Appeal dated **2nd May, 2019**, the appellant listed 8 grounds of appeal faulting the judge: for failing to find that the appellant acted within the provisions of Section 235 of the East African Community Customs Management Act, (EACCMA), 2004, which permits the applicant to carry out post clearance audits within 5 years of importation; for finding that the appellant's action of carrying out the post clearance audit nearly four years post importation was irrational and unreasonable and an infringement of the respondent's right to fair administrative action pursuant to Articles 10 and 47 of the Constitution; for failing to find that Legal Notice No. EAC/10/2007 which prescribed the duty rate of rice from Pakistan at 35% and 75% in respect of rice from Vietnam, Mynammar and Thailand was a public document available to all and sundry; for failing to find that the Tradex /Simba System, a technological platform used by the appellant, did not oust EACCMA as well as the Legal Notice No. EAC/10/2007 and finally, for finding that a legitimate expectation had arisen in favour of the respondent On **17th June, 2020**, the appeal came up before us for virtual hearing. **Miss Odundo**, learned counsel for the appellant highlighted the appellant's written submissions dated **17th December, 2019** in which it was contended that the respondent had "***… mis-declared the country of origin of rice it had imported between the years 2008***

and 2009, which resulted in the wrong import duty rate being applied and hence the under-payment of taxes"; that the applicable rate of duty of rice imported from Vietnam, Mynammar and Thailand was 75% (and not 35% which is the rate paid by the respondent). In the appellant's letter of **20th December, 2011**, the respondent was asked to pay the shortfall of Kshs 378,016,680.00 being the tax due of Kshs 228,306,209.00, penalties of Kshs 138,295,476.00 and interest of Kshs 11,415,310.00. The appellant maintained that failure by the Tradex/Simba Systems to capture the correct tariff rate was an error attributable to human or system errors. It was counsel's position that Section. 235(1) of the EACCMA allows the appellant to carry out post audits within 5 years of the importation. Further, the appellant maintained that the respondent was fully aware of the applicable rate of duty and that in any event the respondent cannot hide under the cover of legitimate expectation as there can be no legitimate expectation which runs afoul the law.

In resisting the appeal, **Mr. Kashindi**, learned counsel for the respondent relied on the respondent's written submissions dated **8th June, 2020**. Counsel placed heavy reliance on this Court's decision of ***Krish Commodities Limited vs. Kenya Revenue Authority [2018] eKLR*** (the ***Krish Commodities case***) which is on all fours with the instant appeal. Counsel asserted that the appellant's acts of omission in failing to update the Tradex/Simba System cannot be visited upon the respondent and that since the rice was imported for re-sale and the re-sale prices were informed by the duty chargeable, it is unconscionable to demand the said taxes four years down the line. Further, that the respondent had vide its letter of **26th July, 2009** (which letter was received and stamped by the respondent) sought to know the applicable rate. However, the appellant failed and /or neglected to make a response to the respondent's query as contained in the said letter of **26th July, 2009**.

We have considered the record, the rival written and oral submissions, the authorities cited and the law. In this appeal, the appellant is aggrieved by the outcome of the respondent's judicial review application challenging the appellant's decision to demand additional duty on rice that had been cleared four (4) years prior to the demand notice. In order for us to interfere with the judge's discretion which was exercised in favour of the respondent, it must be established that the judge misdirected herself in some matter as a result of which she arrived at a wrong decision or that it was manifest from the case as a whole that the judge was clearly wrong in the exercise of her discretion and as a result there has been an injustice ***(See Mbogo and another vs Shah 1968 EA93).***

The facts of this matter are fairly straight forward. It is common ground that the respondent was in the business of rice importation. The origin of the rice imported by the respondent is also not in issue as admittedly, the rice had been imported from other countries other than Pakistan. The rate of the tax payable as per Legal Notice No. EAC/10/2007 was 35% in respect of the rice imported from Pakistan and 75% in respect of the rice imported from elsewhere. Further, it is common ground that the appellant's Tradex/Simba System (an automated tax collection and import clearance system) ascertains the applicable rate of duty and this is what informs the tax payable by importers, such as the respondent. The post clearance audit carried out by the appellant established that there was a short levy of taxes because of the wrong import duty rate which was applied in respect of rice imported from Mynammar, Vietnam and Thailand by the respondent between the years **2008 and 2009.** As per Legal Notice Number **EAC/10/2007 of 18th June, 2007**, the rate of duty was 75% save, as stated above, for rice imported from Pakistan where the rate of duty was 35%. The appellant's position is that the tariff rate reflected on the Tradex/Simba System was as a result of human and technical oversight and that the technological problems in the Tradex/Simba System did not absolve the respondent from its obligation to pay taxes due under the EACCMA. The appellant's demand for what it considered a shortfall was premised on Section 135(1) of the EACCMA which stipulates as follows:

> ***"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"***

This Court has had occasion to consider the above provision of the law vis- à-vis a post clearance audit in the decision of the Krish Commodities case (supra) which has striking similarities with the appeal before us. In the case, the Court stated:

> ***"The issue was not whether the respondent had the power to conduct the post clearance audit and demand the short levied duty. It is given that the respondent has such powers under the EACCMA, in our view, the pertinent issue was whether the manner in which the decision was made or the process followed was reasonable, fair and in conformity with Article 47 of the Constitution. It follows that the learned Judge ought to have looked into the decision making process; whether the appellant was treated fairly by the respondent in the circumstances. See this court's decision in Captain (Rtd) Charles Masinde vs. Augustine Juma & 8 Others [2016] eKLR.***
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> ***To us, the fact that the respondent was empowered to carry out the post clearance audit and demand short levied duty did not excuse the respondent from exercising such power in a reasonable, fair, efficient and effective manner. As a public authority, the respondent's obligation to act in the aforementioned manner while rendering decisions is delineated under Article 47 of the Constitution. Sub – Article (1) thereof reads:-***
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> ***"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***
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> ***Did the respondent act fairly and reasonably? We think not. There was no explanation as to why the post clearance audit and the subsequent demand for the alleged short levied duty was made about 4 years after the initial assessment and payment of the duty so assessed. Even, Mr. Nyaga was at loss of words which could explain as to why it took such a long time. It is not in dispute that Section 135(3) of the EACCMA allows the respondent to make such a***
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> ***demand within 5 years. However, that is not to say that the respondent should wait until the tail end of the said period before making such a demand. There ought to be sufficient reason(s) as to why such audit and demand is made at the tail end. In our minds, the respondent cannot simply stand behind the time limit given to justify its conduct of demanding the short levied duty in question about 4 years later".***

> ***"This Court in Fleur Investments Limited vs. Commissioner of Domestic Taxes & Another- Civil Appeal No. 158 of 2017 (unreported), while considering the absence of a rational explanation for a conduct/decision in question, such as in this case, adopted with approval the High Court's decision in Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006. Analyzing the said decision, this Court went on to state:-***
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> *"It was held that in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith"."*

During the virtual hearing of this appeal, when we asked **Ms Odundo**, learned counsel for the appellant to comment on the Krish Commodities case, her response was that the Krish Commodities case was a bad decision. On our part, we do not think it was a bad decision. We say so because the amount of duty imposed on imported goods has a financial bearing that informs the sale price. In this case, the appellant imposed a duty rate of 35% and four years later, it made a demand that the duty rate ought to have been 75%. The imported goods in this instance was rice and being a perishable commodity, it is unfathomable to expect that an importer, such as the respondent will keep the rice in its warehouse awaiting the expiry of the statutory period of 5 years within which the appellant, under the EACCMA is permitted to carry out a post clearance audit to ascertain the duty chargeable. This is inspite the fact that the rate of duty payable and the assessment thereof is done by the appellant and the respondent has no role in setting the rate applied.

In the Krish Commodities case (supra) this Court further stated:

> ***"Moreover, it is common ground that the identification of the applicable rate of duty and assessment of duty payable was done by the Simba System. The appellant had no role in declaring or setting the rate to be applied. For the respondent to turn around and pass the buck to the appellant by contending that it was aware at all material times of the right rate cannot hold any weight. More so, taking into account that the respondent's own officers verified the entries made and even inspected the consignments. The respondent's officers were not acting as a conveyor belt performing a perfunctory exercise. The reason they were there was to verify the accuracy of the entries and the duty payable before clearance of the consignments in question. Having verified the entries in issue, rate applied and assessed duty as correct, a legitimate expectation arose in favour of the appellant that the assessed duty was correct".***

In the present case, the appellant's acts of omission are further compounded by the fact that on **26th July, 2007,** the respondent wrote to the appellant and although the appellant disowned the letter, it is significant to note that the letter bore the appellant's rubber stamp, which rubber stamp was not disowned. In the letter the respondent stated as follows:

"Dear Sir,

TO.

ASSISTANT COMMISSIONER

REGIONAL HEADQUARTERS

MOMBASA

EAC CET IMPORT DUTY RATE FOR RICE

We wish to seek for your advice on the import Duty rates for rice tariff number 1006.30 from Pakistan and that from other origins outside East African Community member states.

This is owing to the fact that we have received legal notice no. EAC/10/2007 of East African Community Gazette dated 18th June, 2007 which shows that rice from Pakistan is to be charged import duty at the rate of 25% instead of the current 35%, and rice from other origins outside East African Community member states to be charged import duty at the rate of 75% or USD 200 per metric ton whichever is higher.

Kindly clarify on the above mentioned as the rates are still same for rice from all origins in the Tradex Simba System. *(Emphasis ours).*

Your quick action shall be highly appreciated.

Yours Faithfully

KALPESH PATEL

For: EXPORT TRADING CO. LTD".

It is noteworthy to state that inspite of the respondent's letter pointing out the inconsistency on the Tradex/Simba System vis-à-vis Legal

Notice No. EAC/10/2007, there was no response from the appellant.

It is also not lost to us that vide its letter of **26th February, 2011**, the appellant wrote to the respondent blaming it for mis-declaring the country of origin of the consignment of rice it had imported in the years 2008 and 2009. The letter which was addressed to the respondent stated, in part:

> ***"An audit carried out in the month of September and October 2010 revealed mis-declaration of the country of origin of goods entered as shown below resulting to application of wrong import duty rate and under-payment of taxes"***

The respondent denied the allegations made against it in its response of **2nd June, 2011.** It appears that thereafter the issue was put in abeyance until the **17th January, 2013** (1½ years later) when the appellant wrote demanding the under- paid tax of Kshs 378,016,680 and without any reference to the respondent's letter of **2nd June, 2011**. The appellant's assertions of the respondent's deceit in mis- declaring the country of origin seems to have persisted as late as **17th December, 2019** when the appellant filed its submissions as it stated that the respondent "***… mis-declared the country of origin of rice it had imported between the years 2008 and 2009, which resulted in the wrong import duty rate being applied and hence the under-payment of taxes***"

The appellant's assertion of the respondent's mis-declaration of the country of origin of the imported rice is in stark contrast with its other contention that the under-payment was due to human and technological problems of its Tradex/Simba System. In the affidavit of **Jomo Masaki Nyakoe** of **17th April, 2013** on behalf of the appellant**,** in paragraph 12 thereof it was deponed that the respondent had "***… mis-declared the country of origin of rice it had imported between the years 2008 and 2009, which resulted in the wrong import duty rate being applied and hence the under-payment of taxes***" whilst in paragraph 28 he deponed: "***This system has in the early years of its implementation which period included 2008 and 2009 experienced teething/ technological problems and it was therefore not possible to levy different rates simultaneously on a single tariff code.***

Further, the Simba system rights also being owned by the Senegalese, any such intervention or system enhancement needed time before effecting".

So, was it mis-declaration of the country of origin or was it under-collection of import duty occasioned by human and system error on the part of the appellant? In our view, there was lack of candour on the part of the appellant, which placed blame on the respondent for mis-declaring the country of origin at the same time attributing the under-assessment of duty to its Tradex/Simba System. It is also not surprising that the appellant attempted to disown receipt of a letter dated **26th July, 2007** from the respondent seeking clarification on the duty payable, yet the letter bore the appellant's rubber stamp. The act of denying this letter may, regrettably be suggestive of a lot of going-ons at the appellant's place of business, but this does not absolve the appellant from its duty of acting in a fair efficient, lawful, reasonable and with procedural fairness as dictated by Article 47 of the Constitution.

Granted, it is possible to have technological and human errors. But does it take four (4) years to detect even after it has been pointed out by an importer (such as the respondent) as early as **26th July, 2007?**

In the persuasive decision of ***Republic versus Kenya Revenue Authority Exparte Cooper K- Branis Limited [2016] eKLR.*** **Odunga**, J.stated:

> ***"That the applicant is in control of the instruments through which the actual taxes are payable is not in doubt. By not regularly monitoring its said instruments with a view to determining the actual taxes payable, the Respondent placed the applicant in the unenviable position where the applicant is being exposed to shouldering the burden which legally ought not to have been shouldered by it. In my view, the circumstances of this case cry loud against the imposition of the burden on the applicant. The Respondent, in my view by its failure to act prudently, cultivated in the applicant legitimate expectation that the position prevailing before 2001 would continue to prevail notwithstanding the 2001 amendments to the Finance Act."***

In our view, and in the circumstances of the present case, it is unfair and unreasonable for the appellant to have demanded the shortfall of duty four (4) years down the line.

The learned judge (**Okwany, J**) aptly summed up the appellant's acts of omission as follows:

> ***"I further find that the Respondents officers cannot be said to have been acting as a conveyor belt performing a perfunctory exercise while totally oblivious of their solemn duty to the public to furnish them with accurate information regarding the applicable taxation rate. It would appear that the respondent that the respondent (sic) abdicated its duty to the taxpayers by remaining tight-lipped even upon being prompted by the petitioner, through the letter dated 26th July, 2007, to declare the correct applicable tax rate, only to wake up from the slumber several years down the line and demand what it alleges is the under paid taxes. It is in the performance of their duty that the respondent was expected to verify the accuracy of the entries and the duty payable before clearance of the consignments in question. Having verified the entries in issue, rate applied and assessed duty as correct, I find that a legitimate expectation arose in favour of the petitioner that the assessed duty was correct and the respondent cannot, in the circumstances of this case be seen to hide behind the provisions of EACCMA in making a belated demand for taxes".***

Given the circumstances obtaining in the present case as already set out, we agree with the Judge.

In our view, the appellant's actions were irrational, arbitrary and capricious.

Fortunately for the respondent, Article 47 of the Constitution declares that it is entitled *"**… to administrative action that is expeditious efficient, lawful, reasonable and procedurally fair***".

We believe we have said enough to show that this appeal is bereft of merit.

It is accordingly dismissed with costs to the respondent.

Dated and Delivered at Nairobi this 23rd Day of October, 2020.

W. OUKO (P)

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR