IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 67 OF 2017

BETWEEN

KRISH COMMODITIES LIMITED.....APPELLANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Emukule, J.) dated 6th December, 2016

in

***H.C Misc. Appl. No. 59 of 2013*.)**

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JUDGMENT OF THE COURT

1. The appeal relates to the exercise of the learned Judge's (**Emukule, J**.) discretion in dismissing **Krish Commodities Limited** (the appellant's) judicial review application. The appellant was challenging **Kenya Revenue Authority** (the respondent's) decision to demand short levied duty on rice consignments that had been cleared about 4 years prior. As such, the parameters of our jurisdiction as an appellate Court is well settled and put by the predecessor of this Court in ***Mbogo & Another vs. Shah [1968] EA 93***. In order to interfere with such discretion, we must be satisfied that the learned Judge misdirected himself in some matter and as a result arrived at a wrong decision; or that it was manifest from the case as a whole that the learned Judge was clearly wrong in the exercise of his discretion and as a result there had been misjustice.

2. With the confines of our jurisdiction in mind, a brief background will place the appeal in context. The appellant is categorized as a large taxpayer who imports rice into the country. Of relevance is that in the year 2008 and 2009, the appellant imported consignments of Indian Sun Brand and Vietnamese Long Grain white rice into the country. The said consignments were cleared by the respondent under **Entry Numbers 2008 MSA 1524652, 2008 MSA 1524728, 2009 MSA 1583019, 2009 MSA 1050489, 2009 MSA 1718724** and **2009 MSA 1718645** and the assessed duty paid.

3. However, on 4th November, 2011 the respondent wrote to the appellant demanding payment of short levied duty over the said consignments totaling to Kshs.26,215,578. Apparently, the underpayment arose from the application of the wrong duty rate during the clearance and assessment of the duty payable. The rate of 35% had been applied instead of 75%. As would be expected, the appellant challenged the said demand and wrote as much to the respondent seeking clarification. Thereafter, there seems to have been a back and forth between the parties regarding the issue.

4. Interestingly, at one point the said demand escalated to Kshs.355,551,090 and subsequently, reduced to Kshs.68,395,008 as per the respondent's letters dated 13th December, 2012 and 29th January, 2013 respectively. Nonetheless, the respondent clarified that the foregoing figures were erroneous and the actual principal amount being demanded was Kshs.26,215,578. Thereafter, the respondent detained about 10 containers belonging to the appellant on 2nd October, 2013 on account of the unpaid short levied duty. This was the straw that broke the camel's back culminating in the appellant filing judicial review proceedings seeking *inter alia*:-

> ***1) An order of certiorari to quash the decision contained in the respondent's letters making demands for the sum of Kshs.26,215,578 or any other amounts on account of duty allegedly uncollected due to the application of a lower duty rate upon which such wrongful and unlawful action is premised.***

2) An order of prohibition to prohibit the respondent from continuing to wrongfully demand from the applicant any monies on account of the alleged underpayment of duty/taxes in respect of various importation of consignments of rice made by the applicant which were cleared by the respondent under Entry Numbers 2008 MSA 1524652, 2008 MSA 1524728, 2009 MSA 1583019, 2009 MSA 1050489, 2009 MSA 1718724 and 2009 MSA 1718645.

5. The appellant's application was premised on the grounds that the respondent's conduct was not only unreasonable, unfair but also contrary to the right to fair administrative action as enshrined under ***Article 47*** of the ***Constitution***. In particular, there was no justifiable reason why the respondent demanded for the short levied duty about four years after the consignments in question had been cleared and the duty then assessed had been paid. The amount being demanded would have a substantive financial implication on the appellant who will not be in position to recover the same. This is because the consignments in question had been sold at price which was determined by the duty which was initially assessed and paid.

6. Furthermore, the rate applied was determined by the respondent's automated tax collection and import clearance system, that is, the Simba Tradex System (Simba System). All the appellant's clearing agent was required to do was to input into the system the tariff number or product/goods imported and the country of origin then the system would indicate the applicable rate and assess the duty payable. The respondent's officers also verified the entries made and the consignments in question before clearance and payment of the duty so assessed. At no time did the respondent's officers raise any query on the rate applied or duty assessed. Hence, the appellant had legitimate expectation that the rate applied and the duty assessed was correct.

7. As far as the appellant was concerned, the respondent abused its power by detaining its containers on account of the short levied duty which had no basis. Last but not least, the appellant took the position that the respondent erred in applying the provisions of the ***East African Community Customs Management Act (EACCMA)***. This was because the said Act was not applicable in Kenya since it had not been ratified.

8. In an affidavit sworn by the then Assistant Commissioner of the Post Clearance Audit Unit, one Franklin Onjala Ombaka, the respondent defended its actions as being within the law stating that ***EACCMA*** was applicable in Kenya. It was within the respondent's mandate to conduct a post clearance audit in the manner it did by virtue of ***Sections 235*** and ***236*** of the ***EACCMA***. It is that audit that revealed the anomaly in issue. All rice imported outside the East African Community (EAC) Member States attracted a duty rate of 75% or USD 200/MT whichever was higher. It was only Pakistan rice which was exempted and subject to the rate of 35%. This was because Pakistan being the leading buyer of Kenyan tea had threatened to withdraw from the Kenyan market when the rate was adjusted to 75%. This saw the Kenyan government enter into negotiations with the other EAC Member States and ultimately, the EAC Council of ministers approved the reduced rate of 35% vide Legal Notice 1 of 15th September, 2005. The exemption was extended by Legal Notice No. EAC/10/2007 of 18th June, 2007 up to 30th June, 2009.

9. The basis of demanding payment of the short levied duty was ***Section 135(1)*** of the ***EACCMA*** which stipulates:-

"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."

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

11. The learned Judge upon considering the diverse positions taken by the parties agreed with the respondent and in a judgment dated 6th December, 2016 dismissed the appellant's application. In his own words he concluded as follows:

"I have looked at the various entries for importation of the commodity in question and they are clear that the rice imports were from India and Vietnam which unlike the import of rice from Pakistan were subject to a higher rate of duty at 75% or USD 200 per MT. The law is clear, that the respondent was well within its mandate to inspect and audit the import documents in terms of Sections 235 and 236 of the EACCMA, and demand the short-levied tax in terms of Section 135 of the EACCMA. For all those reasons, I find the ex-parte applicant's contentions to the contrary have no merit at all, and the application herein is dismissed with costs."

12. It is that decision that has provoked the appeal herein which is anchored on the grounds that the learned Judge erred by:-

i. Misapprehending the issue(s) arising for determination before him.

ii. Failing to determine the constitutionality of the provisions of the Treaty for the Establishment of the East African Community Act (No. 2 of 2000) in as far as the applicability of the EACCMA was concerned.

iii. Finding that the EACCMA is valid law and takes precedence over any partner states' law.

iv. Failing to appreciate the circumstances under which the Simba System assessed the duty payable over imported goods.

v. Failing to determine whether the appellant's right to fair administrative action had been infringed.

13. According to Mr. Khagram, learned counsel for the appellant, the learned Judge completely misconceived the issues arising for determination by holding that:

> ***"The ultimate question therefore is whether the action of the respondent in demanding payment of the shortfall was lawful."***

Hence, the learned Judge embarked on a journey of determining an issue not before him and arrived at the wrong conclusion. Rather the issue(s) that arose was whether the respondent's demand was reasonable, rational and in accordance with ***Articles 10*** and ***47*** of the ***Constitution***.

14. In addition, that the appellant had a legitimate expectation that the rate applied and duty calculated by the Simba System was correct. More so, since the appellant'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.

15. 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 appellant. 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***.

16. Mr. Khagram also contended that the ***EACCMA*** was not applicable for the reason that it had not been ratified and adopted by Kenya. ***Article 2(6)*** of the ***Constitution*** requires ratification of treaties and there is no such domestication of the ***EACCMA***. Therefore, in applying the provisions thereof the respondent acted unreasonably. The applicable law was the ***Customs and Excise Act*** which provides for a rate of 35% for all imported rice; that was the rate applied with respect to the appellant's consignments. Thus, there was no question of short levied duty. He finally urged us to allow the appeal on these grounds.

17. On his part, Mr. Nyaga, learned counsel for the respondent, submitted that there was no reason for this Court to interfere with the learned Judge's decision. In his view, the learned Judge appreciated the nature of the proceedings before him, in that, it was not an appeal against the respondent's decision but a review of the decision making process that resulted in the demand of the short levied duty. Buttressing that line of argument, reliance was placed on this Court's decision in ***Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others [2012] eKLR***.

18. He went on to state 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 also associated himself with the findings of the learned Judge with regard to the constitutionality and applicability of the ***EACCMA.*** In that regard, counsel urged us to be persuaded by the High Court's decision in ***Peter Anyang' Nyongo & 10 others vs. Attorney General & Another [2007] eKLR***.

19. 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.26,215,578. Pursuant to ***Section 135(1)*** of the ***EACCMA*** the respondent demanded payment of the aforementioned shortfall. All in all, the process and decision to demand the said duty was anchored on the law hence the decision was not amenable to judicial review.

20. 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. 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.

21. Despite the Simba System applying the wrong rate of duty, the appellant was aware that the correct rate was 75%. The appellant had the option of paying the short levied duty through a manual process which entailed requesting the respondent to raise the said difference manually. The fact that the appellant 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 this Court's 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***. There was nothing prohibiting the respondent assessing any short levied duty even where the same is a result of miscalculation by the Simba System.

22. In the respondent's opinion, the appellant'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.

23. Having considered the foregoing evidence, submissions by counsel and the law, we find that the appeal turns on two major issues. Whether the ***EACCMA*** is applicable in this country and whether the respondent's decision was amenable to judicial review.

24. We, like the learned Judge, find that ***EACCMA*** is valid law and enforceable in Kenya. In particular, we concur with the following sentiments by the learned Judge:

"EACCMA derives it force from the provisions of Section 8 of the Treaty for the Establishment of the East African Community, 2000 (Act No.2 of 2000). Section 8 of that Act provides as follows:

8.

I) The provisions of any Act of the Community shall, from the date of publication of that Act in the Gazette of the Community, have the force of law in Kenya.

2) An Act of the Community shall come into operation on the date of its publication in the Gazette of the Community or, if it is provided in that Act that some or all of its provisions shall come into operation on some other date (whether before or after the date of publication), those provisions shall come into operation on that other date."

Contrary to the learned Judge's assertion, the ***EACCMA*** was published in the East African Gazette Notice No. 1 of 1st January, 2005 and not the 4th of January, 2005 thus, the Act came into force on 1st January, 2005.

25. We also agree with the following observations:

"I also find and hold that the EACCMA was immediately implemented in Kenya by virtue of the Finance Act (Act No. 6 of 2005) which introduced various amendments to the Customs and Excise Act, (Cap 472, Laws of Kenya) and the Value Added Tax 9Cap 476, Laws of Kenya) by deleting references to the Customs and Excise Act, and substituting in lieu thereof the 'EACCMA'.

Likewise, by virtue of the Finance Act, 2007, the First Schedule to the Kenya Revenue Authority Act …the EACCMA and the Annexes to the Protocol on the Establishment of the East African Community Customs Union (EACCU) as (sic) part of the Acts which are administered by KRA.

In addition, Section 253 of the EACCMA provides

'This Act shall take precedence over the Partner States laws with respect to any matter to which its provisions relate.'

26. On the second issue, it is obvious the learned Judge begun on the wrong footing. 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***.

27. 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:-

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

28. 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 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.

29. 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:-

"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."

We tend to agree and hold that in the absence of an explanation as to why the post clearance audit and resulting demand for short levied duty was made after a long time can only be perceived as irrational.

30. 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.

31. Consequently, in light of the foregoing, we find that the respondent's conduct of detaining the appellant's containers was an abuse of the respondent's power. See ***Cimbria E.A limited vs Kenya Revenue Authority Civil Appeal No. 61 of 2011***. Further, as was held by this Court in ***Republic vs. Commissioner of Co- Operatives, Kirinyaga Tea Growers Co-operative & Savings & Credit Society Ltd. [1999] 1 EA 245:-***

> "***It is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith."***

32. We think we have said enough to demonstrate that the learned Judge erred in the exercise of his discretion. Accordingly, we set aside the impugned judgment and substitute the same with an order allowing the appellant's application. For avoidance of doubt we hereby issue the following orders:

> ***a) An order of certiorari is hereby issued quashing the decision contained in the respondent's letters making demands for the sum of Kshs.26,215,578 or any other amounts on account of duty allegedly uncollected due to the application of a lower duty rate upon which such wrongful and unlawful action is premised.***
>
> ***b) An order of prohibition is hereby issued prohibiting the respondent from continuing to wrongfully demand from the applicant any monies on account of the alleged underpayment of duty/taxes in respect of various importation of consignments of rice made by the applicant which were cleared by the respondent under Entry Numbers 2008 MSA 1524652, 2008 MSA 1524728, 2009 MSA 1583019, 2009 MSA 1050489, 2009 MSA 1718724 and 2009 MSA 1718645.***

The appellant shall also have costs of this appeal and at the High Court.

Dated and delivered at Mombasa this 27th day of June, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W.KARANJA

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JUDGE OF APPEAL

M.K.KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR