REPUBLIC OF KENYA

COURT OF APPEAL

AT MALINDI

CIVIL APPEAL 153 & 155 OF 2007

BETWEEN

HARSHAVADAN P. SHAH T/A VIPEES

Through the

REPUBLIC ………………...….. APPELLANT

AND

KENYA REVENUE AUTHORITY …..………………...………… RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 155 OF 2007

RAMNIKLAL SHAH

KETAN RAMNIKLAL SHAN T/A ARPEES

Through the REPUBLIC ……..…………APPELLANT

AND

KENYA REVENUE AUTHORITY …..……………..…….………… RESPONDENT

(Appeals from the Ruling and Order of the High Court of Kenya at Mombasa (Sergon, J) dated 30th April, 2007

in

H. C. Misc. Appl. No. 1030 of 2006 and H. C. Misc. Appl. No. 1031 of 2006)

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JUDGMENT OF THE COURT

The two consolidated appeals arise from two separate judicial review applications both dated 17th November, 2006 and filed in the High Court by the appellant against the respondent. In the first application i.e. Miscellaneous Application No. 1030 of 2006, the applicant sought four orders namely; an order of certiorari to quash the decision of the respondent contained in a letter dated 21st June, 2006 classifying the appellant's Herbal/Ayurvedic medicines under tariff HS Code 2106.90.90 and demanding Kshs.8,446,995/= as taxes; an order of certiorari to quash the decision of the respondent contained in a letter dated 9th November, 2006 demanding payment and appointing Investments and Mortgage Bank as the respondent's agent for the collection of the tax, an order of prohibition, prohibiting the respondent from classifying the appellant's goods under the tariff code applied, and, lastly, an order of mandamus directing the respondent to refund to the appellant all monies recovered from its account.

The facts giving rise to the application were briefly as follows:

The appellant is the sole proprietor of a firm known as Vipees which has been importing Herbal and Ayurvedic medicines which are drugs under the Pharmacy and Poisons Act. In about September 2005, the appellant imported a consignment of Herbal/Ayurdevic medicines which it declared under import entry No. 67114 of 14th September, 2005 under Tariff HS Code 3004:90.00 as medicament and paid the relevant duty.

In December 2005, Mr. G. K. Gathatwa – an officer of the respondent in Post Clearance Audit Unit while carrying the duties of post clearance audit discovered that the tariff classification on the appellant's goods was incorrect and raised a demand query dated 22nd December, 2005 for taxes amounting to Kshs.1,453,806/= to be paid within 30 days. The appellant through his agent Virshand Virpal & Sons Ltd objected to the demand query and asked the respondent to withdraw it. Thereafter the respondent asked the appellant to supply samples for chemical analysis.

The appellant duly supplied the samples covered by the impugned import entry which the respondent forwarded to Custom's Laboratory, Nairobi for analysis to enable the respondent ascertain the chemical contents of the products for correct classification. The respondent ultimately received a report from the laboratory dated 21st April, 2006 vide a letter dated 2nd May, 2006. Mr. Bernard O. Oyucho, a chemist working at the Custom's Laboratory prepared a report classifying most of the appellant's products under HS code 2106.90.90. Based on the laboratory analysis report. David Mwongela, an officer of the respondent working at Post Clearance Audit Unit, computed duty under the correct classification and by a letter dated 21st June, 2006 demanded duty amounting to Kshs.8,446,995/=. By a letter dated 28th June, 2006, the appellant's agents wrote to Senior Assistant Commissioner Laboratory, Nairobi to review the laboratory results and withdraw the demand.

By a further letter dated 11th August, 2006 the Deputy Commissioner of the respondent reminded the appellant's agent of failure to pay the duty demanded and recommended suspension of his license. On 9th November, 2006, the respondent in exercise of powers conferred by ***section 131*** of the East African Community Customs Management Act (Act) appointed the Manager, Investments and Mortgage Bank the agents of the appellant, to recover Kshs.9,227,867/=. It is the Agency Notice which precipitated the application.

In the second application, that is, ***Misc. Appl. No. 1031 of 2006,*** the appellant sought three orders namely, an order of certiorari to quash the decision of the respondent contained in a letter dated 9th November, 2006 appointing Investments and Mortgage Bank as agent for the appellant for collection of duty amounting to Kshs.1,740,841/=; an order of prohibition prohibiting the respondent from classifying the appellant's goods in various entry numbers of 11th January, 2003 under any other code other than HS code 3004.90.00, and, an order of mandamus directing the respondent to refund all the monies recovered by the bank.

The circumstances under which the Agency notice was issued in the second application are similar to the circumstances in the first application. The two applications relate to the same Herbal/Ayurvedic

medicine. The appellant declared the medicines under tariff HS code 3004.90.00 and paid the duty. On 21st June, 2006 the respondent raised an audit query demanding Kshs.1,593,563/= on the basis that the appellant declared the goods under the wrong tariff index. The appellant's agents objected to the query. The appellant subsequently supplied samples of the medicines which were duty analyzed at the Custom's laboratory. On the basis of the analysis, the medicines were re-classified and Kshs.1,740,841/= was demanded from the appellant. The appellant's agent objected vide a letter dated 24th August, 2006. When the appellant failed to pay, by its letter dated 9th November, 2006, the respondent appointed the bank as an agent for the appellant for collection of outstanding tax.

The first application was, as required by the rules, supported by a statutory statement and a verifying affidavit.

In the long Statutory Statement, the appellant averred, among other things, that the manufacturers of the medicines have classified them as medicaments; that the appellant's declared them under the tariff code 3004.90.00 which deals with medicaments; that no duty or taxes on the products is payable, that the respondent fell into error in classifying them under a different tariff without taking into account their medicinal value; that the respondent instead of addressing the issues raised by the appellant's agents in the letter dated 28th June, 2006 acted in a high handed manner and that the actions of the respondent were unlawful and illegal in that they were:

"(i) arbitrary and capricious;

(ii) contrary to East African Community Customs Management Act;

(iii) unreasonable, unfair and contrary to public policy and to rules of natural justice;

(iv) mala fides;

(v) ultra vires the powers of the respondent;

(vi) contrary to the administration of justice and legitimate expectations."

Those grounds are repeated in the verifying affidavit.

The Statutory Statement and the verifying affidavit in support of the second application cited the same grounds.

The two applications were heard on the same day one after the other. Thereafter the respective counsel agreed that the determination of the second application Misc. Appl. 1031 of 2006 should apply to the first application i.e. ***Misc. Appl. No. 1030 of 2006***. Accordingly, on 30th April, 2007, the High Court delivered a ruling in ***Misc. Appl. No. 1031 of 2006*** dismissing the two applications.

The learned Judge after perusing the documents filed in court and after hearing the submissions of the respective counsel identified two issues which emerged for determination. The first is whether or not the respondent acted without jurisdiction and the second is whether or not the respondent acted arbitrarily or capriciously and in breach of the rules of natural justice.

On the first issue the learned Judge considered the fact that the respondent carried out laboratory analysis on the samples of the appellant's products and that the analysis revealed that the appellant had used the wrong tariff index. The learned Judge concluded that the respondent acted within the provision of the Act and was entitled to demand payment of the under collected import duty under ***section 135*** of the Act. The learned Judge stated:

"My understanding of the applicant's complaint is that he thinks that the respondent applied the wrong code in determining whether or not his goods attracted import duty. His argument is that he

had previously imported similar products and did not attract the kind of duty the applicant now demands. The response to this assertion given by the respondent is that the applicant had applied the outdated harmonized commodity description and coding system of 1987 instead of that of 2002. It is quite clear that the applicant is contesting the merits of the respondent's decision. The matter before me is a judicial review application which is concerned with the decision making process and not the merits of the decision. In my view the applicant's complaint can easily be determined in the ordinary civil process and not through such proceedings."

On the second issue, the trial judge came to the conclusion that the respondent had jurisdiction under ***section 131*** of the Act to issues agency notice.

There are seven grounds of appeal the main grounds being grounds nos 1, 2 and 3 which states:

"1. The learned Judge wholly misapprehended the nature of the application before him thereby arriving at a wrong decision.

2. The learned Judge having found that the Appellants' Clearing Agent had raised an objection and/or applied for review of the respondent's decision and that no determination thereof had been made erred in failing to find that:-

(a) the respondent acted arbitrarily and capriciously in issuing the Agency notice;

(b) the respondent was statutorily barred from taking any further action against the appellant until the respondent's Commissioner had made a decision.

3. The learned Judge erred in holding that the respondent had not breached any rules of natural justice whilst it was clear the Respondent had acted in clear breach of the provisions of section 229 of the East African Community Customs and Management Act."

At the hearing of the appeal both Mr. Buti and Mr. Mogaka represented the appellant but submitted separately. On his part Mr. Buti submitted, *inter alia,* that the Judge misunderstood the application before him as one for the determination of the correct tariff; that the correctness or otherwise of the decision was not the subject matter of the application; that the contention of the appellant was that the process to appoint agent for purposes of collecting tax was wrong; that the appellant had applied for review on 28th June, 2003 under ***section 229 (4)*** of the Act and that by the time the agency notice was issued, the jurisdiction of the respondent to act had not arisen or had by effluxion of time lapsed under ***section 229 (5)***.

On his part Mr. Mogaka while adopting Mr. Buti's submissions submitted among other things, that, Agency notice was issued and money taken notwithstanding that respondent had admitted that the review application was pending for determination by the Commissioner and that the Agency notice was issued totally against the statute as there was a pending appeal.

Mr. Matuku, learned counsel for the respondent submitted on his part, that one of the grounds of the application was that the respondent was applying the wrong tariff on their goods; that the issue that there was no decision on the review application was raised before the Judge but the Judge nevertheless exercised his discretion and that the fact that the review application was pending was not the basis of the judicial review application.

In view of the grounds 1, 2 and 3 of the grounds of appeal, we have a duty to study the entire applications which were made in the superior court; the submissions of the respective counsel at the hearing of the application and the ruling of the learned Judge in order to find out firstly, the grounds on which the applications were brought. Secondly, whether or not the trial Judge misapprehended the nature of the applications.

Each of the two applications was supported by a lengthy Statutory Statement, a long affidavit sworn by

Harshavadan P. Shah and copious supporting documents. In response to each application, the respondent filed an affidavit sworn by Elijah M. Njuguna and a second affidavit sworn by Bernard O. Oyucho. The two also annexed various documents to their respective affidavits. The documents filed including the grounds of each application clearly show that the dispute brought by the appellant was essentially that the duty demanded by the appellant was not payable because the computation of the duty was based on the classification of the medicaments under a wrong tariff code. That is why the appellant objected to the audit query which led to the appellant providing samples and ultimately the laboratory analysis which verified that the appellant had previously declared the goods under the wrong tariff index. Moreover the substance of the orders of certiorari, prohibition and mandamus sought by the appellant show that the appellant's grievance was the decision classifying the medicaments under tariff HS code 2106.90.90 resulting in a demand for taxes. Furthermore, the submissions of Mr. Mabeya (as he then was) who represented the appellant at hearing of the application show that the issue raised was that the products did not attract tax. Mr. Mabeya further submitted that the appellant sought a hearing by a letter dated 28th June, 2006 and indicated why herbal medicines did not attract tax but he was not given a hearing.

The totality of the material placed before the High Court and the submissions of the counsel at the hearing do not show that the validity of the agency notice and the jurisdiction to issue an agency notice *vis-a-vis* the provisions of ***section 229*** of the Act. Indeed, Mr. Mabeya did not make submissions relating to ***section 229*** of the Act and never referred to it. As Mr. Mutuku correctly submitted the fact that a review application was pending was not made a basis of the judicial review application. The reference to the review application in the judicial review applications was merely intended to show that the issue of allegedly wrong classification of the appellant's goods and the liability to pay tax based on the classification had not been conclusively determined.

In our respectful view, grounds 1, 2 and 3 of the appeal raise new grounds of the application which were never made grounds of the judicial review applications and which were never argued before the trial Judge.

In any case, we do not know whether the appellant's letters dated 28th June, 2006 and 24th August, 2006, in ***Misc. Appl. No. 1030 of 2006*** and ***Misc. Appl. No. 1031 of 2006,*** respectively, constitute a review application to the Commissioner under ***section 229 (1***) of the Act. They were addressed to the Assistant Commissioner In-Charge of the Custom's Laboratory asking him to review the laboratory results and not to the Commissioner.

There was no evidence that the appellant made a review application to the Commissioner in respect of the letter dated 21st June, 2006 demanding Kshs.8,446,995/= or the demand letter dated 11th August, 2006 demanding Kshs.1,740,841/=.

The learned Judge was not addressed on those issues. We cannot speculate what his decision would have been had the appellant raised those issues.

On our analysis of the material placed before the learned Judge and the submissions made before him we are satisfied that the learned Judge did not misapprehend the appellants' case. It is clear, as the learned Judge correctly found, that in the application and by the judicial review orders sought, the appellant was contesting the merit of the basis of decision – the computation of liability to pay duty based on allegedly wrong classification of the medicaments. That is not the province of the judicial review jurisdiction.

The learned Judge considered the second issue and came to the conclusion that the respondent had not acted capriciously and arbitrarily in the determination of the liability of the appellant to pay tax. By ***section 135*** of the Act the respondent had power to recover any duty which had been short levied. Further by ***section 131*** of the Act, the respondent had power to issue agency notices to recover tax. The computation of the duty payable was based on the result of laboratory analysis of the appellant's products resulting in a re-classification of the goods. The respondent acted within the law.

For the foregoing reasons, we are satisfied that the High Court reached the correct decision. In any

case, judicial review remedies are discretionary. The appellant was not entitled to them as of right. In the result we dismiss the appeal with costs to the respondent.

Dated and delivered at Mombasa this 16th day of March, 2012.

E. M. GITHINJI
……….……………
JUDGE OF APPEAL

M. K. KOOME
……….……………..
JUDGE OF APPEAL

D. K. MARAGA
………..…..………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR