

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. APP. NO. 1119 OF 2007

IN THE MATTER OF:

**AN APPLICATION BY MATCH
MASTERS LIMITED FOR ORDERS
OF CERTIORARI AND MANDAMUS**

AND

IN THE MATTER OF:

**AN APPLICATION FOR JUDICIAL
REVIEW UNDER SECTION 8 AND 9
OF THE LAW REFORM ACT
CHAPTER 26 OF THE LAWS OF
KENYA AND ORDER LIII OF THE
CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF:

**A DECISION MADE BY THE KENYA
REVENUE AUTHORITY CUSTOMS
SERVICES DEPARTMENT
PURSUANT TO A LETTER DATED
2ND AUGUST 2007**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

**KENYA REVENUE AUTHORITY.....RESPONDENT
(CUSTOMS DEPARTMENT)**

EX-PARTE

MATCH MASTERS LIMITED

JUDGMENT

The Ex-parte Applicant, Match Masters Limited (*herein after referred to as the Applicant*) approached this court by way of a Notice of

Motion dated 18th October 2007 seeking the following orders;

a) An order of certiorari to remove into this court and to quash the decision of the Kenya Revenue Authority (Customs Services Department) contained in the letter dated 2nd August 2007, demanding from the applicant extra revenue in the sum of Kshs 8,231,421.00 on account of Legal Notice EAC/08/2006.

b) An order of prohibition to prohibit the Kenya Revenue Authority from demanding, enforcing, collecting or in any other way taking any step or action in respect of, or connected with, the demand of extra revenue as contained in the letter dated 2nd August 2007 addressed to the Applicant in which the Kenya Revenue Authority:

- Demanded extra revenue in the sum of kshs 8,231,421/-
 - Applied penalties.
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c) An order of prohibition, to prohibit the Kenya Revenue Authority from taking any further or other action against the exparte Applicant to recover the alleged extra revenue or any part thereof or at all.

d) An order of Mandamus compelling the Kenya Revenue Authority to refund to the Applicant any amount received or collected pursuant to or connected with the demand for extra revenue by the Respondent through the letter dated 2nd August 2007.

e) That costs of the application be costs in the cause.

The application was filed Pursuant to leave granted by this court on 11th October 2007. It is supported by a statutory statement dated 11th October 2007 accompanying the application for leave and the facts set out in the verifying and further affidavits sworn by Kushal Shah, the Applicant's Managing Director on 11th October 2007 and 28th May 2008 respectively.

The Application is based on various grounds which can be summarized as follows;

- 1) That by letter dated 2nd August 2007, the Respondent unlawfully demanded extra revenue from the Applicant in the sum of Shs.8,231,421/- including penalties as the revenue due for the period 1st July 2006 to 21st August, 2006 on account of

Legal Notice AEC/08/2006 dated 30th June, 2006 which was published on 21st August 2006.

2) The Protocol on the Establishment of the East African Customs Union, under which the Legal Notice was promulgated, makes no provision for retrospective application of any of the Community Customs Laws.

3) The Respondent placed an Agency Notice on the Applicant's bank accounts on 20th September 2007 without notice to the Applicant and thus managed to procure part payment of the demanded extra revenue.

4) The demand for extra revenue is void and without any legal basis.

Before proceeding to analyses the facts of this case, I think it is important at this stage to give a brief description of the parties.

The Applicant is a limited liability company incorporated under the Companies Act, Chapter 486 of the Laws of Kenya. It carries on the business of manufacturing and importing match boxes.

The Respondent on the other hand is an agency of the Government of Kenya which is established under **Section 5(1) of the Kenya Revenue**

Authority Act, Cap 469 Laws of Kenya (KRA Act). Under the KRA Act, the Respondent is mandated to collect and receive revenue in the form of taxes on behalf of the Government of Kenya. The Respondent is also mandated under **Section 5(2)** of the KRA Act to administer and enforce all provisions of the written laws set out in Parts I and II of the First Schedule of the KRA Act which includes the East Africa Community Customs Management Act (*hereinafter referred to as the EACCM Act*). Under both the KRA and EACCM Acts, the Respondent is responsible for the management and control of customs, which includes the collection and accounting for customs revenue in the Republic of Kenya, one of the partner states to the treaty under which the EACCM Act was enacted.

The background against which the application was filed is that the Republic of Kenya is subject to the Protocol on the Establishment of the East African Customs Union (the Protocol). The protocol provided for the establishment of the East African Customs Union pursuant to Article 75 of the Treaty for the establishment of the East African Community. Under Article 12 of the Protocol, a Common External Tariff was established and the Council of Ministers (established under the Treaty) was given power to review the structure of the Common External Tariff when necessary for the implementation of the Protocol or for

safeguarding Community interests.

In June 2006, the Council of Ministers reviewed the customs duty rates payable on various goods. This review affected the import duty rate payable on matchboxes, which was raised from 35% to 50%. The reviewed rates were published in Legal Notice No. EAC/08/2006 in the East African Community Gazette dated 21st August 2006. On the face of the legal notice, it was expressly stated that the revised tariffs on the various products specified therein were to apply with effect from 1st July 2006:

On 13th November 2006, the Respondent conducted a post-clearance audit on the Applicant's imports for the period between January 2004 to September 2006 and compiled an audit report detailing its various findings - *See annexure marked H.K.1 attached to the Respondent's replying affidavit.*

In a letter dated 2nd August 2007, the Respondent demanded a total of ~~Kshs 8,231,422 from the Applicant being the sum of unpaid duty on~~ match boxes imported in the period of the audit including penalties levied under Section 135(2) of the EACCM Act. In arriving at the amounts demanded, the Respondent applied the revised tariffs contained in Legal Notice No. EA/081/2006 since according to them,

the revised rates were applicable from 1st July 2006. The Applicant denied liability to pay the extra taxes demanded by the Respondent maintaining that the revised tariffs were effective from 21st August 2006 and that it was unlawful for the Respondent to apply them retrospectively.

The Applicant then declined to pay the amount demanded and consequently, on 20th September 2007, the Respondent acting under the provisions of the EACCM Act issued an agency notice addressed to the Applicant's bankers with the aim of recovering the unpaid duty and penalties thereon. According to the Applicant, at the time of filing this suit, the Respondent had already recovered a sum of Kshs.2.1 Million from the Applicant's bank account.

The correspondence exchanged between the parties exhibited as annexures to their respective affidavits show that after some negotiations by the parties, the agency notice was lifted after the Applicant issued post-dated cheques towards settlement of the demanded taxes on a without prejudice basis. The insistence by the Respondent that the Applicant was liable to pay extra taxes on the basis of the revised tariffs in the Legal Notice aforesaid is what aggrieved the Applicant and led to the filing of the current judicial

review proceedings.

~~The Applicant's case is that the tariffs in the Gazette Notice emanated~~
from directives issued by the East African Council of ministers and that
by virtue of Article 39(c) of the Protocol, they formed part of the
Customs Law of the Partner States which the Respondent had applied
retrospectively.

Mr. Oraro, Learned counsel for the Applicant correctly submitted that
the Protocol made no provision in respect of the date or manner in
which any tariff structure approved under Article 12(3) of the Protocol
would come into effect and that the effective date was predicated upon
the legislation of the partner states. In this case, counsel submitted, the
relevant legislation was the Customs and Excise Act, Chapter 485 of
the Laws of Kenya, which at Section 124(1) provides that duty is
payable at the rate in force at the time when the goods liable to duty
entered the country for home use.

The Applicant contends that the revised tariffs in the Legal Notice
which formed the basis for the impugned assessment and demand for
payment of extra taxes by the Applicant were supposed to take effect
on the date of publication of the Legal Notice. Mr. Oraro maintained
that the Legal Notice was published on 21st August 2006 and this was its

effective date and not 1st July 2006 as claimed by the Respondent. In support of his submissions that a Gazette Notice is only effective from the date of its publication, counsel relied on Section 119(1) of the Customs and Excise Act, Section 27 and 28 of the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya.

Mr. Oraro urged the court to find that the impugned decision was made ultra vires the Customs and Excise Act and invited the court to quash it and grant the Applicant the other reliefs sought in the application.

The Application is opposed through the Replying Affidavit sworn on behalf of the Respondent by Hippolyte Bollo Komutho, the officer in-charge of the Respondent's Post Clearance Audit Division, Customs Service Department. The affidavit was sworn on 28th March 2008.

In a nutshell, the Respondent's case is that the Applicant's motion lacks merit and that therefore the relief's sought are not available to the Applicant. In the Replying affidavit sworn on its behalf, the Respondent stated that the decision to demand additional taxes arising after the 1st of July 2006 was lawful and ought to be upheld as it had been made in accordance with the law and within the Respondent's statutory mandate.

Ms. Lavuna, Learned counsel for the Respondent submitted that there was no imposition of duties or penalties retrospectively and that the only penalties that had been levied were those imposed due to the default, delay and refusal of the Applicant to pay the outstanding taxes being the extra duties payable from the date of commencement of the Gazette Notice which was 1st July 2006.

Counsel argued that the date of 21st August 2006 was not the date of publication of the Gazette Notice but was merely a footnote which indicated the date when the Minister signed or forwarded the legal notice for publication. She urged the court to accept the Respondent's position that the date of publication of the Gazette containing the legal Notice was 30th June 2006 as displayed on the face of the notice not 21st August 2006 as submitted by counsel for the Applicant.

Ms. Lavuna in conclusion submitted that as the Applicant had not shown that the Respondent had abused its statutory power or used the wrong procedure in arriving at the impugned decision, the application

should be dismissed with costs for lack of merit.

Having considered the pleadings and affidavits filed by the parties herein alongside the written and oral submissions made by their respective counsel, I find that the dispute between the parties in this

case arose as a result of their different interpretations regarding the effective date of the revised tariffs contained in Legal Notice No.

EAC/08/2006 published in the East African Community Gazette.

The Applicant holds the view that the effective date of the Notice was the date of its publication which was 21st August, 2006. The Respondent on the other hand maintained that the date of Publication of the legal notice was 30th June 2006, while the commencement date of the revised tariffs was 1st of July as expressly stated on its face. Both parties were however in agreement that it is trite law that subsidiary legislation contained in a Gazette Notice took effect on the date of its publication unless otherwise stated.

In order to resolve the dispute between the parties in this case, I find that the questions or issues that must be determined by this court are the following:

- 1) What was the date of publication of the subject Gazette/Legal Notice?
- 2) Was the date of publication of the Legal Notice the same date as the effective date of the revised tariffs?
- 3) Depending on the answer to issue No 2, did the impugned

decision amount to retrospective application of the law?

4) Is the Applicant entitled to the reliefs sought?

Starting with the first issue, I wish to begin by defining the term 'publication'. Publication is defined in the *Black's Law Dictionary, Ninth Edition* as: "**Generally, the act of declaring or announcing to the public**".

The term is derived from the word 'publish' which according to the same dictionary means; "**To distribute copies (of a work) to the public**".

From the foregoing definitions, it is clear that the date of publication of the East African Community Gazette which conveyed the legal notice in question can only refer to the date on which it was printed for dissemination of its contents to members of the public in the partner states. It was only after printing that the Gazette could be distributed to members of the public.

Though the parties availed to the court a copy of the page of the gazette in which the Legal Notice containing the revised tariffs was carried, I was able to obtain a copy of the entire East African Community Gazette (the Gazette) containing the said legal notice.

On the face of its first page, the Gazette indicated the date on which it

was printed and also lists down its contents. Just above the list of contents, the following words appear;

"Vol. AT1-No.003 ARUSHA, 30th June 2006 Price \$1,00".

From the date appearing on the face of the Gazette, there cannot be any doubt that the Gazette was printed on 30th of June 2006 and since this was the date on which it was published, this became the date of its publication. The Legal Notice containing the revised tariffs was carried in the said Gazette and it goes without saying that it was also published on the same date. That is why the date of 30th June 2006 appears on its top right corner. It therefore follows that the submission by Mr. Oraro that the date of publication of the Legal Notice was 21st August 2006 is factually incorrect and cannot be sustained.

Mr. Oraro's submissions appear to be based on the date indicated at the bottom of the text of the Legal Notice namely 21st August 2006. Though ideally the date indicated at the bottom of Legal Notices is supposed to signify the date of the Legal Notice or when it was presented for publication as can be seen from the sample Legal Notices availed to the court by the Respondent, it is important to note that the date of the notice is more often than not different from the date of its publication.

The date 21st August 2006 indicated in this case cannot possibly be the date of the Legal Notice in this case since it is not logically possible to have a document dated about one and a half months after its publication. The normal or usual practice is to have documents including Legal Notices dated or signed by their authors before they are either published or forwarded for publication. In my humble opinion, the indication of the date of 21st August 2006 as the date of the Legal Notice herein was clearly a mistake possibly caused by a clerical or typographical error.

Turning now to the issue whether the date of publication was also the commencement date of the Legal Notice, I think it is important to understand what is meant by the term 'effective date'.

The term 'effective date' is defined in Black's Law Dictionary, Ninth Edition as;

"The date on which a statute, contract, insurance policy or other such instrument becomes enforceable or otherwise takes effect. This date sometimes differs from the date on which the instrument was enacted or signed."

The equivalent of the Interpretation and General Provisions Act

Chapter 2 of the Laws of Kenya in the laws governing the East African Community is the Laws of the Community (Interpretation) Act (the community interpretation Act). According to the Community Interpretation Act's preamble, the legislation was enacted and assented to by the Presidents of the Member States of the East African Community:

"to make provision in regard to the construction and interpretation of any enactment of the Community, and to make certain general provisions with regard to such law and for other like purposes."

Having read through the provisions of the Community Interpretation Act, I take the view that Sections 25 and 26 thereof makes provision for what should be the effective date for subsidiary legislation made under the auspices of the East African Community.

Section 26 which is a replica of our Section 27 of the Interpretation and General Provisions Act states that;

"Any subsidiary legislation published in the Gazette shall come into force on the date of such publication or, if it is provided either in the subsidiary legislation or in an Act that such subsidiary legislation or any

provisions of it shall come into force on some other date, such subsidiary legislation or those provisions of it shall, subject to section 25, come into force on that date".

Section 25 is in the following terms;

"All subsidiary legislation shall, unless it is otherwise expressly provided in any Act, be published in the Gazette and shall be judicially noticed."

A reading of these sections shows clearly that for subsidiary legislation to come into force in any of the East African States, it must be published in the East African Community Gazette. The date it comes into operation will be either the date of its publication or any other date expressly stated in the Legal Notice or in any other law.

In this case, though the date of publication of the East African Community Gazette was 30th June 2006, the text of the legal notice expressly indicated that the revised tariffs were to come into force on 1st July 2006. Since the Legal Notice expressly stated the date on which the revised tariffs were to come into effect and guided by the provisions of Section 26 of the Community Interpretation Act and Section 27 of the Interpretation and General Provisions Act, I find that

in this case, the effective date of Legal Notice No.EAC/08/2006 was 1st of July 2006 and not 21st August 2006 as submitted by the Applicant.

Having made a determination on the Legal Notice's effective date, let me now turn to a consideration of whether the extra taxes demanded by the Respondent related to goods imported into the country either before or after the Legal Notice's effective date.

In its pleadings, the Respondent claimed and this was not controverted by the Applicant, that the assessment of additional taxes and demand for their payment was based on its discovery during the audit exercise that the Applicant had underpaid duty for goods imported into the country between 1st July 2006 and 30th September 2006. The underpayment had been caused by use of the old tariff of 35% instead of the revised rate of 50% introduced in the Legal notice - See annexure to the replying Affidavit marked H.K.1 at paragraph 5.

As this claim was not disputed by the Applicant and considering that in law what is not disputed is deemed to be admitted, I find as a fact that the extra taxes demanded by the Respondent related to underpaid duty on goods imported by the Applicant between 1st July 2006 and 30th September 2006. As noted earlier, the revised tariffs had come into effect on 1st July 2006 and needless to say, all goods listed in the

Legal Notice imported into any of the Partner States after 1st July 2006 attracted duty as per the new rates indicated on the Legal Notice.

In view of the foregoing, it is my finding that the Respondent's decision to demand payment of Ksh.8,231,421.00 from the Applicant being the sum of underpaid taxes and penalties for goods imported into the country between 1st July 2006 and 30th September 2006 did not amount to retrospective application of the Legal Notice. The Applicant and indeed all importers of goods affected by the Legal Notice were liable to pay duty as per the revised tariffs from 1st of July 2006. It therefore follows that the Applicant's submission that the impugned decision was tainted with illegality on account of retrospective application of the revised tariffs has no legal basis and is totally without merit.

Is the Applicant then entitled to the reliefs sought?

The Applicant has sought for the remedies of Certiorari, Prohibition and Mandamus. The circumstances under which each of these remedies can issue were discussed at length by the Court of Appeal in the case of **Republic Vs. The Kenya National Examination Council Ex-parte Geoffrey Githinji and 9 Others, Civil Appeal No. 266 of 1996.**

The court held, inter alia that the order of Certiorari, like the order of Prohibition, issues where an applicant had established that the decision under challenge had been made either in excess of or without jurisdiction or in breach of the rules of natural justice. The court also held that the remedy of Mandamus will issue where a public body has failed or refused to perform a public duty imposed by statute to the detriment of the aggrieved party. There is also case law to the effect that a decision can be quashed on grounds of irrationality, unreasonableness or for procedural impropriety.

In this case, it has not been pleaded nor proved by the Applicant that the impugned decision had been made in excess of or without the Respondent's jurisdiction or that it was made without following the rules of natural justice. It has not also been pleaded or proved that the decision had been made irrationally or without following the statutory procedure prescribed under the applicable law.

Taking into account the pleadings in this case and particularly the correspondence exchanged between the parties, it is clear that the impugned decision cannot be said to have been made irrationally or unreasonably given that it was based on audit findings and the Applicant was clearly made aware of the basis for the decision.

The Respondent was mandated under Section 236 of the East African Community Customs Management Act to conduct audits on taxpayers like the Applicant and under Section 135 of the same Act, the Respondent had power and authority to demand payment of short levied duty. There is therefore no doubt that the Respondent had jurisdiction to make the decision challenged by the Applicant in this case. And as the extra taxes lawfully demanded from the Applicant remained unpaid despite notice that recovery measures would be employed to secure payment of the same, the agency notice that followed was issued in accordance with the law and any money recovered as a result thereof was lawfully recovered. The Applicant is therefore not entitled to a refund of any monies recovered by the Respondent after the issuance of the agency notice since it is not alleged that the amount recovered exceeded the amount demanded as unpaid taxes.

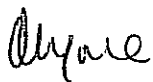
In view of the foregoing, it is my finding that the Applicant in this case has not established any basis upon which this court can intervene by way of judicial review. I make this finding because the court cannot quash a decision which was made by a public body within its jurisdiction and in accordance with the law nor can it prohibit a

statutory body from performing its duties in accordance with its
statutory mandate.

Considering all the material placed before the court, I am persuaded
to find that in this case, the Applicant has failed to demonstrate that it is
deserving of any of the reliefs sought in its application.

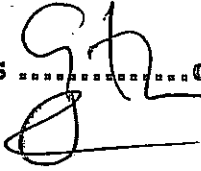
In the end, it is my conclusion and decision that the Applicant's Notice
of motion dated 18th October 2007 lacks merit and it is hereby
dismissed with no orders as to costs.

DATED and SIGNED this 7th.....day of May.....2013


C.W. GITHUA

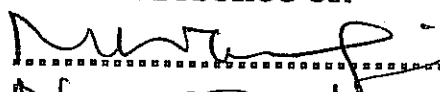
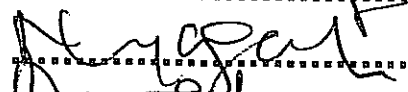
JUDGE

DELIVERED and SIGNED this 7th.....day of May.....2013


W.K. KORIR

JUDGE

In the Presence of:

..... Court Clerk
..... for Applicant
..... for Respondent