THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - MC - 30 - 2009

CLASSY PHOTO MART LTD :::::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

THE COMMISSIONER
CUSTOMS UGANDA REVENUE AUTHORITY :::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

R U L I N G:

This is an application for Judicial Review brought under Sections 33, 36, 37 and 38 of the Judicature Act (Cap 13) and Rules 6, 7 and 8 of The Judicature (Judicial Review) Rules S. I. 11 of 2009 for the grant of various prerogative orders.

The facts of this case are fairly straightforward. The Applicant in July 2009 imported into the country 1,050 cartons of photographic paper duty was assessed and taxes of Ug.Shs.26,520,926/= paid. However, the Respondent queried the assessment made by the Applicant's clearing agent and the Respondent reassessed the taxes by uplifting its value to Ug. Shs. 33,002,729/=. This is because the Respondent rejected the Applicant's self assessment based on cartons and submitted values based on rolls. The Applicant then appealed against the uplifted value by letter dated 30th July 2009 to the Commissioner Customs. On the 21st October, 2009, the Commissioner Customs of the Respondent replied stating that it had

reviewed the appeal but declined to change the revised assessment. The Applicant now seeks orders that a declaration be made that the Respondent's decision was illegal, of no legal consequence, an abuse of discretionary powers and ultra vires the powers of the Respondent under the relevant customs law.
The Applicant also further prayed for orders of certiorari, quashing the Respondent's decision, prohibition against taking further action on the impugned decision and mandamus to release the said goods.

Mr. T. Kavuma appeared for the Applicant while Mr. H. Arike appeared for the Respondent. Both oral submissions and skeleton arguments were used.

At the hearing of the motion, Counsel for the Respondent raised a preliminary objection that the application before court was premature. It is the case for the Respondent that before applying for Judicial Review, the Applicant must have exhausted the appeal procedures under the East African Community Customs and Management Act (hereinafter referred to as *"EACCMA"*). Counsel for the Respondent submitted that S. 230(1) of the EACCMA requires a person dissatisfied with the decision of the Commissioner to appeal to a Tax Appeals Tribunal (TAT) established under Section 231(2). Counsel for the Respondent submitted that the Applicant had not appealed to TAT but applied to court for Judicial Review.

Counsel for the Respondent submitted that an Applicant for Judicial Review should first exhaust whatever other rights he has by way of appeal. In this regard he referred me to the holding of **Lord May LJ** in the case of

> **R Vs Chief Constable of the Merseyside Police Exparte Calveley & Ors** [1986] 1 All E.R. 257 at P. 263.

He further submitted that Judicial Review is not available where an alternative remedy exists and that Judicial Review is a collateral challenge. Where Parliament has provided by statute appeal procedures, as in a taxing statute it will only be very rarely that court will allow a collateral process of Judicial Review to be used to attack an appealable decision. In this regard, I was referred to the decision of **Lord Scarman** in

Preston V IRC [1985] 2 All ER 327 at 330.

Lastly, he submitted that in the absence of any averments in the Applicant's pleadings that the remedy available in the statute was not adequate or for any other reason which makes the use of discretionary remedy preferred to an appeal in the Act, then the Applicant should opt for an appeal as a matter of course. In this regard, I was referred to the decision of **Bamwine J.** in the case of **Micro-Care Ltd V Uganda Insurance Commission** M.A. 218 of 2009.

Counsel for the Respondent therefore prayed that the application be dismissed.

Counsel for the Applicant in reply prayed that the preliminary objection be dismissed. He submitted that Section 230(1) of the EACCMA provides

> *"…A person dissatisfied with the decision of the Commissioner under Section 229 may appeal to a Tax Appeals Tribunal…"*

Counsel for the Applicant submitted that based on its wording and the use of the word *"may"*, Section 230 (1) was not mandatory in its application.
Counsel for the Applicant further submitted that under Article 139(1) of the Constitution of the Republic of Uganda 1995, the High Court has unlimited original jurisdictions in all matters which includes matters such as the present application. Counsel for the Applicant submitted that Section 230 of the EACCMA sought to curtail the constitutional powers of this court which was void.

He submitted that similar objections to that of the Respondent in this application were raised in the case of

> **Commissioner General of Uganda Revenue Authority V Meera Investments Ltd.** CA 22 of 2007 (sc)

but the objections were dismissed.

Counsel for the Applicant submitted that this court had ever reviewed the decision of the Commissioner Customs in the case of

Joshua Kasibo V The Commissioner Customs URA MA 844 of 2007

He further submitted that Section 36 of the Judicature Act which allows for the grant of prerogative powers does not make them an alternative remedy and so there is no basis for that argument.

I have heard and considered the submission of both Counsel for which I am grateful.

In the case of **Joshua Kasibo** (supra), I held that the grant of prerogative orders is discretionary in nature. I further held that in exercising its discretion with respect to prerogative orders, the court must act judicially and according to settle principles.
I take this opportunity to reaffirm my above stated position in this application. One cardinal principle of prerogative orders is that they look to the control of the exercise and abuse of power by those in public offices, rather than at providing final determination of private rights which is to be done in normal civil suits.

In the case of **Micro-Care** (supra), **Justice Bamwine** relying on cases cited by Counsel for the Applicant raised other principles that need to be taken into when granting prerogative orders.
The first is that an Applicant for Judicial Review should first exhaust whatever other rights he has by way of appeal. He further held that Judicial Review is a collateral process which should rarely be used to attack an appealable decision. In such a situation the Applicant's pleadings must show that the alternative remedy is not adequate or for other sound reason.

Counsel for the Applicant has tested these principles against the original jurisdiction of the High Court as provided for in the Constitution of Uganda. In this regard, the decision in **Meera Investments Ltd** (supra) is instructive. In that case the taxpayer contested assessments made with regard to Corporation and VAT taxes. It was the argument of the Uganda Revenue Authority then as it is in this application that the correct procedure was for the taxpayer to

appeal to TAT. In the **Meera Investments Ltd** case (supra) **Justice G. Kanyeihamba** (JSC as he then was) agreed with agreed with holdings of **Justice G. Okello** (JA as he then was) when he stated

> *"The conferment of appellate jurisdiction on the High Court by Section 27 of the Tax Appeals Tribunal has no effect on the original jurisdiction of the High Court conferred by Article 13(1) of the constitution. That means that a party who is aggrieved by the decision of the tax authorities on tax matters may choose either to apply to the Tax Appeals Tribunal for review or file a suit in the High Court to redress the dispute. The choice is his/hers. Once he/she goes direct to the High Court, that court cannot chase him/her away on the ground that it lacks original jurisdiction in the matter…"*

That is indeed the position of law as decided by the Supreme Court. There are however some important differences between the **Meera Investments Ltd** (supra) and the **Micro-Care** case (supra). The **Meera Investments Ltd** case (supra) first came to the High Court by way of a ordinary suit (filed as High Court Civil Suit No. 185 of 2005) whereas the **Micro-Care** case (supra) like this present application was filed for Judicial Review. As stated earlier the grant of prerogative orders by way of Judicial Review is discretionary which is different for how an ordinary suit is handled. In Judicial Review the Applicant must meet the necessary tests for the court to exercise its discretion. In this application it is clear that the Applicant has decided to use the collateral process of Judicial Review to attack an appealable decision. There is no averment in the Applicant's pleadings to justify this course of action. On what basis then can court exercise its discretion in this application absent a good reason? Whereas Judicial Review was used in the case of **Joshua Kasibo** (supra), I agree with Counsel for the Respondent that in that particular case, they did not object to that procedure. I am sure they must have had good reasons for that.

I take the view then that great care should be taken in preparing an application for Judicial Review. I agree that Section 230 of the EACCMA is not mandatory but that does not in itself low the bar required in the courts exercise of judicial discretion. I can do no better than re echo the words of **Bamwine J**. in the **Micro-Care** case (supra) when he said

> *"…I should perhaps add that it is becoming increasingly fashionable these days to seek Judicial Review orders even in the clearest of cases where alternative procedures are more convenient. This trend is undesirable and must be checked…"*

I agree. In this era of case management, it is the duty of a trial Judge to see that cases are tried as expeditiously and in expensively as possible (See **Lord Roskill** in **Ashmore V Corporation of Lloyds** [1992] All ER 486 at 488) and this also means ensuring that unjustified short cuts to the Judge's docket are eliminated.

That being the case, I uphold the preliminary objection and the application must fail for this reason on account of being premature in law. It is struck out with costs.

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Geoffrey Kiryabwire

JUDGE

Date: 24/02/2010

24/02/2010

9:48 a.m.

Judgment read and signed in open court in the presence of;

- T. Kavuma for Applicant
- C. Ouma for Respondent

In Court

- Mr. Amin for Applicant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 24/02/2010