



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. E043 OF 2021

MAUR ABDALLAH BWANAMAKA

FEDERAL COMMERCIAL INVESTMENT LIMITED

ALI MOHAMMED AHMED

CAPTAIN SHIPPING AGENCIES LTD

ABDULLA HUSSEIN MEHER.....APPLICANTS

-V/S-

REPUBLIC.....RESPONDENT

RULING

1. The Applicants were charged with the offence of making a false report contrary to Section 24 (6) (b) as read with Section 209 of the East African Community Customs Management Act. Particulars of the offence are that on the 28th day of October 2019 at Old Port and Kilindini ship boarding office within Mombasa County being Directors of Limited Companies and Limited Companies respectively, unlawfully made false report namely Transire, in relation to cargo aboard MV ALFAZAL registration number Z 1438 to wit 1000 bags of 25 kgs of rice and 10 tonnes of scrap metal instead of 15,045 bags of 25kgs of rice and 16 tonnes of scrap metal all valued at Kshs. 22,532,619 with tax implication of Kshs. 13,142,066.

2. The Applicants were charged with a second count of conveying imported goods contrary to Section 199(b) (i) of the East African Community Customs Management Act 2004. Particulars of the offence are that on the 28th day of October 2019 at Kilindini ship boarding office within Mombasa County, being the master of a Marine Motor vessel namely MV AL FAZAL registration number Z 1438 was found to be conveying rice and scrap metal which had been under declared vide Transire No. OCV KLD 075 2019 in contravention of the East African Community Customs Management Act to wit 1000 bags of 25 kgs rice and 10 tonnes of scrap metal all valued at Kshs. 22,532,119 with tax implication of Kshs. 13,142,066.

Application

3. By the Notice of Motion Application dated 23rd November 2021, pursuant to Articles 22, 23, 27, 47, 48, 50, 159, and 165 of the Constitution of Kenya 2010, Section 193, 193A, 216, 217, 218 of the Criminal Procedure Code Cap 75 of the laws of Kenya, Sections 7 of the Fair Administrative Actions Act 2015, and all other enabling provisions of the law, prayed for the following orders:-

a) That the Honourable Court be pleased to Order/Set aside/vary/review the orders of the Court issued on the 22nd October 2021 to the extent:-

(i) That the Consignment of white rice grade 1 – Sunflower Brand Importer vide Entry Nos. 2019MSA7384055 and 7384078 respectively be re-shipped back to the country of origin.

(ii) That the Kenya Bureau of Standards be ordered/directed to extend the period of re-shipment of the subject goods and to provide an advisory to the court on the subject goods reshipment and consequently to facilitate the reshipment of the goods accordingly.

b) That the Honourable Court be pleased to order/direct that Kenya Revenue Authority confirms if there's any tax liability over the consignment order entries No. 2019MSA and 7384078.

- c) That the Honourable Court be pleased to order/direct that goods were deposited vide notice of goods deposited to custom warehouse dated 20th November 2019 and consequently be ordered that the same be released to the party/entity who deposited forthwith.
- d) That the Honourable court be pleased to order/direct that Kenya Revenue Authority be directed to release the Customs Warehouse waiver as granted by the treasurer as per the letter dated 2nd June 2021.
- e) That the Honourable Court be pleased to issue any other order(s) it may deem fit in the circumstances.
- f) That the costs of the application be provided for.

4. The application was supported by the annexed affidavit of Maur Abdallah Bwanamaka and on the following grounds:-

- a) That in the ruling delivered on the 22nd October 2021, the Learned Judge indicated that there was no proof of extension from Kenya Bureau of Standards. However, the letter dated 1st November 2021 KBS were ready and willing to sanction and reship vide its letter dated 20th January 2021 and 11th February 2021 only that they are holding back because of the Appeal.
- b) That the Trial Magistrate has since released the subject vessel as per the annexed order issued on 1st October 2021.
- c) That the subject goods having been converted to export goods by Kenya Revenue Authority attract no tax liability and if any the Applicants are willing to pay to have the goods reshipped.
- d) That the subject goods are perishable and their continued stay in the godowns are deteriorating as they accrue port charges, subjecting the Applicants to huge costs.
- e) That the Taxing Master through the Kenya Revenue Authority has confirmed the subject goods do not have any tax liability whatsoever.
- f) That the subject goods were part of a larger consignment which the trial court allowed tax payment and collection vide consent order dated 27th June 2020.
- g) That the release of goods will not render the Appeal nugatory as the Appeal is mainly on the sentence and fine which shall be heard and determined on merit and as per the law.
- h) That it is only in the interest of justice that the goods are released for reshipment to the country of origin.

Response

5. The Replying Affidavit was sworn on 1st December 2021 by Mary Muthoni from the Kenya Revenue Authority's Investigations and Enforcement Department in opposition to the Applicant's Notice of Motion dated 23rd November 2021 as follows:-

- a) That even before the Applicants were convicted, the subject rice was already declared by Kenya Bureau of Standards as expired hence unfit for human consumption.
- b) That on conviction, the court ordered that the subject rice be destroyed.
- c) That the applicants appealed against the entire conviction and sentence and among the 30 grounds of appeal that are still pending before the court is that the learned Magistrate erred in law and fact by ordering/directing that the subject property being rice be destroyed by a multi-agency team.
- d) That the appeal has not been determined yet and therefore the current application seeking an order directing that the expired rice be reshipped back to the country of origin is premature.
- e) That until the determination of the appeal, the rice stands condemned.
- f) That the effect of a conviction is provided for under Section 217 of East African Community Customs Management Act that where anything is condemned under the Act, then the condemnation shall, subject to any appeal in any proceedings which resulted in the condemnation be final and, save as provided in Section 218, no application or proceedings for restoration or in detinue by any person shall lie.
- g) That in response to prayer 5 for an order directing KRA to release waiver on rent granted by the treasury, after the parties entered into a consent on 27th June 2020, the Applicants were allowed to pay taxes for the rice. Based on this consent, the applicants applied for waiver of warehouse rents both to KRA and Kenya Ports Authority (KPA) vide letters dated 21st August 2020 and 8th December 2020 respectively.

h) That vide letters from KRA and KPA dated 7th December 2020 and 21st December 2021 respectively, the said applications were allowed and the applicants granted 14 days and 7 days to remove the rice from the warehouse by KRA and KPA respectively.

i) That the applicants only paid taxes for rice that was declared under 1 entry but failed to pay taxes for rice that was declared under 3 other entries. The rice whose duty was paid was released to the applicants.

j) That the applicants therefore failed to comply with the waiver conditions by failing to pay taxes and removing the consignment within the timelines provided by both agencies.

k) That later vide a letter dated 20th January 2021, KEBS wrote to KRA stating that the rice had expired and exhibited signs of weevil infestation and that the importer to reshipe them back country of origin within 30 days failure to which, the same would be destroyed at the importer's cost. Again, the applicants failed to comply with this directive.

l) That vide a letter dated 1st November 2021, the applicants wrote to KRA requesting to know whether taxes were payable on re-exportation of the now condemned rice.

m) That vide a letter dated 8th November 2021, KRA responded and stated that the subject goods stood condemned pursuant to the provisions of Section 215(1) of the East African Community Customs Management Act, 2004 following their conviction for the various offences.

Submissions

6. The Applicants submit that on the 20th November 2019, their client was arrested and charged in court on allegations of contravening the East Africa Customs Management Act 24 (6) an offence which specifically focuses on the Shipping Agent, or the Master of the Vessel and has nothing to do with the importer who does not even have access to the inside of the port.

7. The Applicants submit that everything the client did as to the importation of the rice was procedural, and in compliance with the law. That when the commodity landed was inspected by the KEBS, issued with certificate of conformity dated 18th November 2019, and was released after payment of taxes, and Waiver of Customs warehouse rent letter reference KRA/C&BC/WAIVER/MSA/0001/012/20, dated 7th December 2020 five months after the date of the Consent Order.

8. The Applicants submit that Lot 3, 4 and 5 could not be released by KEBS due to being time barred as the register expiry date had been eroded by above 75% as per KEBS standards due to the bureaucratic delays caused by the Kenya Revenue Authority in waiving the Customs Warehouse rent against what they claim to be Court Exhibit in court, but treat as the normal import goods to frustrate the clearance of the same as per the Consent Order dated 27th June 2020.

9. The Applicants submit that failure to clear the consignment in total after registering the consent order dated 27th June 2020 was as a result of bureaucratic bottlenecks placed by a party to the same agreement MS Kenya Revenue Authority which acted in violation of the Consent Judgment since the motivation behind the criminal charges were motivated more by a mission to destroy business than to collect taxes, and that is why they were more keen over the destruction of the rice, which is not a contraband commodity, than realization of taxes which they claimed had been evaded when that is not possible when the goods are at their Custody at a Customs warehouse, and the entries for the full consignment was entered as per the law by the Importers Agent.

10. The Applicants submit that it is against the background that the prosecution was influenced to prefer charges against the appellant jointly with the two accused herein for false declaration yet the Importer/Appellant herein is on record for doing the right thing, he made proper declaration, for the whole consignment, lodged entries with the Kenya Revenue Authority samba system which were in fact caveated by an officer of the Complainant on 15th November 2019 not to be processed then accuse the importer of evading taxes, when they were frustrating the collection of the same taxes in vendetta to enforce their false narrative of tax evasion when that can only be determined by the declaration of the goods on the Custom Entry Only and not any other document in Tax Law.

11. The Applicants submit that the entries were presented but were ignored by the Trial Court at the defence stage, strangely the same entries were later acknowledged by the same court at the judgment to confirm what was paid courtesy of the Consent Judgment, and what was the balance, a clear indication that there was no reason to condemn the rice, which was not compliant with KEBS standards of importation, should be allowed to go back to where it was imported for conversion to animal feeds, instead of vouching for destruction which won't gain Kenya Revenue Authority, but will destroy the importer in total.

12. The Applicants submit by pointing out two issues for determination which are whether the Chief Magistrate's Court had the jurisdiction to entertain and condemn the rice, and whether review of the direction in Article 13 of the order made by the Honourable Court on the 28th June 2021 on the destruction of the rice may be due to misinformation.

13. The Applicants submit on the issue of whether the Chief Magistrate's Court has the jurisdiction to condemn the rice that upon the complainant entering into an out of court settlement with the Appellant that resulted into the Consent Judgment dated 27th June 2020, which the magistrate was party to as was represented by the Attorney General. Therefore, the course of action ceased to exist since that by itself confirmed the goods were under the control of the complainant courtesy of the Respondent Affidavit filed on the 26th November 2019 against the JR No. 198 of 2019 Article 18, therefore relinquished jurisdiction to deal with rice, and should have only delved with the alleged criminal offence.

14. The Appellants further submit that since the determination of the question on jurisdiction could, on its own, be dispositive to the matter,

the first issue the learned magistrate should have dealt with is whether she still had jurisdiction under the Act to continue to entertain the matter after the out of court settlement between Kenya Revenue Authority and their client registered on the 27th June 2020 in compliment of the Alternative Dispute Resolution Mechanisms, which was raised but she ignored. (Civil Appeal No. 50 of 1989 *Owners of moto vessel 'Lillian S' vs Caltex Oil Kenya Ltd*)

15. The Applicants further submit to the above that the learned magistrate after realizing the subjected matter had muted into a new status should have downed her tools, or directed the prosecution to amend their charge sheet to reflect the new status as the importer had been exonerated from liabilities accrued from the mis-declaration of the Transire the born of contention in this subject, and the master, the agent, were fined for the mis-declaration, they paid the fine, they were released, and the vehicle has since been released after having been confirmed she was detained illegally.

16. The Applicants submit on the review of the direction in Article 13 of the order made by the Honourable Court on 28th June 2021 on destruction of the rice that the current case of the subject goods raises a clear case of *Res Judicata* since the matter was settled by the consent judgment dated 27th June 2020.

17. The Applicants submit that after conversion of the goods from local import to export goods and in compliance with the Kenya Revenue Authority procedures, the client made an application to the treasury for the waiver of customs warehouse rent through KRA which they approved and was also approved at the treasury by letter Ref: DFN 415/07, dated 2nd June 2021 but currently withheld and therefore legally obstructing the compliance of the KEBS order while citing Article 13 of the 24th June ruling where their clients pray for release of the waiver or reviewed by the court.

18. The Applicants submit that the goods are not subject to any criminal offence courtesy of the consent order, the direction of KEBS, and the waiver granted by the treasury of Customs Waiver of Demurrage, courtesy of KRA but are only victims of the confusion propagated before the bench by KRA which is playing a double head where one can have a court relief on one hand then denied to enjoy the same through another hand which amounts to mischief and abuse of the justice system.

Analysis and Determination

19. The High Court is vested with powers under **Article 165** of the **Constitution** which provides that:-

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

20. Further, **Section 362** of the **Criminal Procedure Code Cap 75** provides as follows:-

“Power of the High Court to Call for Records:

The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate court.”

21. From the foregoing, this court has considered the charges preferred against the Applicants, the Notice of Motion application and affidavit in support, the affidavit in reply, the annexures therein and submissions by both parties in coming up with its determination.

22. The Applicants on the one hand submitted that they had an out of court settlement with the Respondent which led to a consent judgment dated 27th June 2020 where the course of action ceased to exist and that the learned magistrate should have downed her tools or directed the prosecution to amend their charge sheet to reflect the new status. The Applicants further submitted that the current status of the subject goods raises a clear case of *res judicata*. The Applicants also submitted that after compliance with the Kenya Revenue Authority procedures, they made an application to the treasury for waiver of customs warehouse rent through KRA which they approved and which was approved at treasury by the letter Ref: DFN 415/07 dated 2nd June 2021 which is currently withheld and therefore obstructing compliance with KEBS orders. That the Applicants were issued with a court order but denied enjoyment of the same.

23. The Respondents on the other hand submitted that parties entered into a consent on 27th June 2020 where Applicants were allowed to pay taxes for the rice. Based on this consent, they applied for waiver of warehouse rent both to KRA and KPA through the letters dated 21st August 2020 and 8th December 2020 respectively. The said applications were allowed by both KRA and KPA through the letters dated 7th December 2020 and 21st December 2020 respectively where they were granted 14 days and 7 days by KRA and KPA respectively to remove the rice from the warehouse. The Respondents submitted that the Applicants only paid taxes for the rice under one entry and failed to pay taxes under the other three entries. Therefore, they failed to comply with the waiver conditions and timelines provided by the agencies. The Respondents submitted that through the letter dated 20th January 2021, KEBS wrote to KRA stating that the rice had expired and exhibited signs of weevils' infestation and that the importer reships it back to the country of origin within 30 days failure to which the same would be destroyed at the importer's cost. Again the Applicants failed to comply with this directive.

24. After perusal of annexures to both the affidavit in support of the Notice of Motion application dated 23rd November 2021 and the

Affidavit sworn on 1st December 2021 in reply to the application, this court has established the following:-

- a) On **7th December 2020**, the Kenya Revenue Authority wrote to the Applicants acknowledging their letter Ref: 002/KRA CRENT/8/20 dated 21st August 2020 where KRA approved the Applicant's request for the 100% waiver on the accrued customs Warehouse Rent and required the Applicants to remove the subject consignment within 14 days from the date of the letter failure to which enforcement measures would be instituted.
- b) On **21st December 2020**, the Kenya Ports Authority wrote to the Applicants making reference to their letter dated 8th December 2020 requesting or waiver of storage charges which the KPA management decided to grant waiver of 100% of the accrued storage charges only and that other mandatory port charges due on the cargo would be raised in full. KPA also requested the Applicants to clear the consignment from the port area within 7 days from 21.12.2021.
- c) On **20th January 2021**, KEBS wrote to KRA and the letter was copied to the Applicants that cargo at old port customs warehouse that had been imported by the Applicants had expired in October 2020 and January 2021 as per the package labeling, and exhibited signs of weevil infestation. KEBS went further to state that the consignment had been rejected and advised the importer to reshipe the consignment back to the country of origin within 30 days from the date of the letter failure to which the same would be destroyed at the importer's cost.
- d) On **11th February 2021**, KEBS wrote to the Applicants acknowledging receipt of their letter Ref: FC1002/COC RICE/JAN21 dated 9th Feb 2021 requesting to be granted 30 more days for the rejected consignment. KEBS stated that they had no objection on the request and granted 30 more days from the date of the letter to finalise the whole process, and asked the Applicants to comply with requirements of other regulatory authorities as guided by KRA (customs).
- e) On **2nd June 2021**, the National Treasury and Planning wrote to KRA and copied to the Applicants making reference to the letter dated 11th May 2021 on waiver of customs warehouse rent and that 100% waiver had been approved.
- f) On **25th October 2021**, the Applicants wrote to KEBS making reference to their letters dated 20th January 2021 and 11th February 2021 seeking a further extension to comply with their order stating that their delay was as a result of a lengthy litigation at the High Court which required them to demonstrate that they were ready to comply with the order.
- g) On **1st November 2021**, KEBS wrote to the Applicants acknowledging receipt of their letter dated 25th October 2021 requesting to be granted a further extension but KEBS stated that the matter is still pending in court and requested that they await the court decision.
- h) Also, on **1st November 2021**, Marende Necheza & Company Advocates for the Applicants wrote to KRA requesting for confirmation as to whether they have any tax demand or liability in favour of KRA.
- i) On **8th November 2021**, KRA responded to the advocate's letter dated 1st November 2021 and stated that the subject goods stood condemned pursuant to the provisions of Section 215 (1) of the East African Community Customs Management Act, 2004 following the conviction of the Applicants for the various offences as charged. That the Applicants have since filed an appeal against the said conviction which appeal is still pending at the High Court and that they will be guided by the High Court's decision after determination of the appeal.

25. In the case of *Board of Governors, Moi High School, Kabarak & Another v Malcolm Bell*, Sup. Ct Applications Nos. 12 and 13 of 2012, it was held as follows:-

"...The Court has jurisdiction to hear and determine such interlocutory applications with special regard to the circumstances of each case. Where necessary, this Court may also exercise its discretion to decline to grant interlocutory relief, if the same may imperil the ultimate function of the Court – to render justice in accordance with the Constitution and the ordinary law."

26. Further in the case of *Equity Bank Limited v. West Link MBO Limited*, Civil Application No. 78 of 2011 (UR 53/2011), it was held:-

"For purposes of judicial proceedings an appeal is broadly speaking, a substantive proceeding instituted in accordance with the practice and procedure of the Court, by an aggrieved party, against a decision of a Court to a hierarchically-superior Court with appellate jurisdiction, seeking consideration and review of the decision in his favour"

27. From the foregoing, this court finds that the Applicants have lodged an appeal against the decision of the lower court and some of the grounds of appeal are the same orders being sought in the Notice of Motion Application dated 23rd November 2021 in respect to the subject goods that the Applicants are seeking to have them reshipped back to the country of origin. Additionally, the subject goods are exhibits which should not be allowed to leave the jurisdiction until the appeal herein is heard and determined.

28. In conclusion, the application herein lacks merit and the same is dismissed. The subject goods to be preserved until the appeal is heard and determined. Hearing of the appeal to be expedited. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 28TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel- Court Assistant

Mr. Mulamula for Respondent

Ms. Kyalo advocate holding brief for Mr. Shimaka for Appellant

HON. LADY JUSTICE A. ONG'INJO

JUDGE

Ms. Kyalo Advocate: I have instructions to seek directions on how to dispose off appeal.

Order: Mention on 18.2.2022 for Appellant to supply Record of Appeal and directions to be taken

28.1.2022