



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NOS. 226 & 227 OF 2017

1. SUPERIOR SPIRITS PRIVATE LTD

2. SUPERIOR SPIRITS LTD.....APPELLANTS

VERSUS

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. KENYA PORTS AUTHORITY

3. KENYA REVENUE AUTHORITY

4. PMG HOLDINGS LTD

5. RWAGACHA SUPPLIERS LTD

6. PIL KENYA LTD.....RESPONDENTS

(An appeal from the judgment of Hon. E.K Makori Chief Magistrate, delivered on 30th November 2017 in Chief Magistrate'

Court at Mombasa Criminal Case CMCC Misc. CR. Application No. 376 of 2016)

JUDGMENT

1. This is an appeal from the order of Hon. Makori Chief Magistrate delivered on 30th day of November 2017 in Mombasa Chief Magistrate's Court Miscellaneous Criminal App. No. 376 of 2016, Hon. Makori determined that application to release containers held by Kenya Revenue Authority is incompetent as the court did not have jurisdiction to make orders in the nature of certiorari and mandamus which exclusively the mandate of the High Court as the containers were held under the East African Community Custom Management Act and that Section 178 C.P.C deals with stolen property while section 389(a) C.P.C deals with forfeiture of goods.

2. The appellants were aggrieved by the order they petitioned this court on the following grounds:-

1) That the trial magistrate erred by proceeding to make his ruling based on misapprehension of facts that the application brought under section 178 and 389(b) (c) and (2) of Criminal Procedure Code and the Constitution thereby reaching an erroneous decision.

2) That the trial magistrate erred in fact and in law by consolidating Miscellaneous CR. Application Nos. 375 and 376 of 2016 and proceeded to write and deliver a consolidated ruling for the 2 separate applications yet the 2 applications were separate and sought different prayers.

3) That the honourable magistrate erred in law a fact in failing to address all the issues raised in the application.

4) The honourable magistrate erred in law by disregarding the supporting affidavit and submissions made on behalf of the appellants in support of the application for release of containers and failing to give reasons for not being persuaded by the submissions made thereto.

5) What the learned trial magistrate erred in misdirecting himself to consider only a part of and not all the evidence and

submissions presented to him particularly the evidence and submissions presented by the appellants.

6) That the learned trial magistrate misdirected himself and erred in law and fact by holding that he did not have jurisdiction to grant the orders sought.

7) That the learned trial magistrate misdirected himself and erred in law and fact in finding that the application was fatally defective and proceeded to dismiss it due to lack of jurisdiction.

8) That the honourable magistrate erred in law by disregarding the circumstances under which the previous application relating to the application in miscellaneous 375/2016 and miscellaneous No. 376/2016 was struck out.

9) The learned trial magistrate erred in misdirecting himself in disregarding all the evidence and submissions presented to him by the appellants consequently arriving at an erroneous decision.

10) That the learned trial magistrate greatly misdirected himself in treating the submissions of the appellant very superficially thereby erroneously arriving at a wrong conclusion. The appellant prayed that the appeal be allowed and ruling delivered on 30th December, 2015 with all the consequential orders be set aside and substituted by the ruling of the court.

3. The appeal was canvassed by way of written submissions.

4. The appellant's submissions dated 16th March 2021 which is applicable to appeal herein as well as appeal No. 226 of 2017 grounds 6 and 7 were clustered together and grounds 1, 2, 3, 4, 5, 8 and 9 were also clustered together and argued.

5. The court was urged to re-evaluate, re-assess and re-analyse the evidence on record and then determine whether the conclusion reached in the trial court should hold. It was argued that the application dated 29th November 2016 was brought under sections 212(2), 216(b), 218, part XVII of the East Africa Community Custom Management Act 2004, the Constitution of Kenya and all other enabling provisions of the law. The appellants argued that they did not move the court under provisions of the criminal procedure code.

6. It was submitted that section 220(1) of the East African Community Customs Management Act provided that prosecution of an offence under the Act may be heard and determined before a subordinate court. It was argued that the trial court being a subordinate court had jurisdiction to hear and determine the application.

7. It was argued that the application was brought under section 212(2), 216(b), 218 and part XVII of EACCMA 2014 and the trial magistrate misapprehended that same was brought under sections 178 and 389(1)(b) and 2 of the Criminal Procedure Code. That the trial court did not reach a justifiable decision and consolidation of Misc. Application Nos. 375 and 376 of 2016 was also wrong as they were different causes of action.

8. Appellants counsel argued that Misc. Application No. 375 of 2016 sought that an order issues compelling the investigating officer in CR.C. No. 368 of 2016 and 369 of 2016 to take photos of containers No FCIU3416218, TEMU4420840, PCIU2789958, TRHU1864697 and PCIU1085506 to be used as exhibits in court and release the said containers for reshipment while Misc. App. No. 376 of 2016 the appellants sought for the release for purposes of reshipment of seized goods in containers No. PCIU219358, CDIU3215160, PCIU1033415, PCIU1691798 and PCIU1056869 as per provisions of section 26 of the EACCMA of 2004 which provides for reshipment of seized goods and section 212(2) of the Act which allows for restricted goods to be reshipped and not made subject of forfeiture where the shipper was not aware that the goods were restricted goods as is the case herein. It was argued that the 2 applications No. 375 of 2016 and 376 of 2016 presented different facts and ought to have been handled independently as they were never consolidated and it was erroneous to write a joint ruling to the 2 files in which ruling the different facts were not captured.

9. The appellants also submitted that the trial magistrate erred in law and fact by ignoring the submissions filed in support of the appellant's case. It was argued that the appellants had indicated that they were incurring loss of USD 335600 and requested the court to consider the use of photographic evidence during trial in CR.C. No. 368 of 2016 and 369 of 2016 and release the containers to them for reshipment and sale elsewhere so as to mitigate their losses and relied in the authority of **Republic vs John Nganga Mbugua [2014] eKLR**.

10. The respondents in opposing the appeal filed their written submissions dated 5th May 2021 argued that although the appellants submitted that the trial magistrate had jurisdiction to determine the application under section 220(1) of EACCMA they never quoted that section. It was submitted that sections of the law quoted are on reference to the Commissioner of Customs and his/her discretionary powers under the Act

11. The respondent counsel argued that sections 212(2) EACCMA, section 216(b) and section 218 EACCMA did not empowers the trial court to compel the investigating officer to take photographs in lieu of having exhibits brought physically to court. It was submitted that the respondents filed a preliminary objection to the application and the court was right in dismissing the applications for want of jurisdiction because the application was brought under the wrong provisions of the law. It was argued that had the court acted under section 212(2), 216(b) and 218 of EACCMA it would have rendered the criminal suit against the applicants moot.

12. It was argued that the appellants were accused in MSA CR.C. No. 369 of 2016 where they were charged with offences involving Customs and Taxes and the containers were exhibits.

13. It was submitted that appellants were aware that, provisions of law used to come to court were the exclusive discretion of Commissioner of Customs and KRA and had made an attempt to formally write to Commissioner of Customs and KRA in order to have the container released to them for re-export under section 212 EACCMA and the same provisions of the law could not avail them the remedies they sought before the trial court.

14. The respondents questioned why the appellants did not make the applications in the court handling the criminal matters

15. On issue of misapprehension of the law and facts the respondents argued that jurisdiction is everything and that once a court finds that it has no jurisdiction it cannot make one more step. The respondents counsel argued that by filing several applications in respect of the same containers the appellants were upto mischief and were forum shopping. It was indicated that Misc. CR. Nos. 146 of 2016, 375/2016 and 376 of 2016 are all related to release of containers to the same appellants in different courts with the hope that one court could at least make orders releasing all or some of the containers.

16. Ms. Karanja argued that the end result sought by appellants in both applications was that the containers be released to them. It was argued that the court did not misapprehend the facts rather it was the appellants who were in the wrong. The respondent State Counsel urged the court to uphold the trial magistrate's ruling.

17. I have re-evaluated and analysed the application in Mombasa Chief Magistrate's Court Misc. CR. App. Nos. 375 and 376 of 2016 and found that application dated 29th November 2016 in App. No. 376 of 2016 and application in No. 375 of 2016 were both brought under sections 212(2), 216(b), 218 and part XVII of the East Africa Community Customs Management Act.

18. The containers sought to be photographed for purposes of production as exhibits before the criminal trial court and to be released to the appellants in Misc. CR. App. No. 375 of 2016 is what appears to be different from the ones in Misc. CR. Application No. 376 of 2016 but from the pleadings all of them were used to import alcoholic products – extra neutral alcohol – to Kenya and they allege that upon arrival at the Port of Mombasa, the consignment became subject of CR.C. Nos. 368 of 2016. The appellants claim they never knew the goods were restricted and/or controlled goods as per the provisions of the laws of Kenya.

19. In Misc. CR. App. No. 375 of 2016

The containers were Nos. FCIU3416218, TEMU4420840, PCIU2789958, TRHU1864697 and PCIU1085506.

20. In Misc. CR. App. No. 376 of 2016

The containers were Nos. PCIUxxxx, CPIUxxxx, PCIUxxxx, PCIUxxxx and PCIUxxxx.

21. The appellants acknowledge that the containers and goods were in possession of KPA pursuant to Seizure Notices issued by KRA under the provisions of EACCMA. Their concern then was that the Ethyl Alcohol (Extra Neutral Alcohol) had definite effective shelf life and shall be perishable and shall deteriorate in quality if not released to them immediately and shipped back.

22. I do find that the ground that the trial magistrate erroneously applied the same ruling to the 2 applications as misdirected as the subject matter in the 2 applications is similar. The appellants are applicants in both applications as well as in Misc. CR. App. No. 146 of 2016 where their application for similar order was dismissed.

23. It is not in dispute that the applications Nos. 375 and 376 of 2016 are in respect of criminal trial in CR. C. Nos. 368 and 369 of 2016 and I do agree with the Respondent that the trial magistrate in conduct of the criminal cases was best suited to determine under the proper provisions of the law whether and on what terms the containers could have been released to the appellants.

24. As it stands the provisions of the law under which the appellants brought their application does not permit the court to deal with containers or goods that have been seized by KRA. In that regard I do agree that the trial magistrate did not have jurisdiction to decide that the appellants should have made the application under section 220 EACCMA when the advocates for the appellants did not cite the said section. Having found that he did not have jurisdiction the holding in **owners of the motor vessel "Lilian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** applied. The appeal lacks merit and the same is dismissed.

25. This judgement shall apply in Appeal No. 226 and 227 of 2017 respectively.

Orders accordingly.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 24TH DAY OF JUNE, 2021.

HON. LADY JUSTICE ADWERA ONG'INJO

JUDGE

In the presence of:-

Ogwel – court assistant

Ms. Odhiang Adv. holding brief for Ms. Mboku Adv. For Appellants

Ms. Karanja for State

Appellants – N/A

COURT

Copies of judgment to be supplied by close of business on 25.6.2021.

HON. LADY JUSTICE ADWERA ONG'INJO

JUDGE

24.6.2021