



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 68 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

BETWEEN

FINEJET LIMITED.....APPLICANT

VERSUS

THE COMMISSIONER OF CUSTOMS SERVICE.....RESPONDENT

RULING

The Application

1. Fine Jet Limited, (hereinafter “the Applicant”) filed an application by way of Chamber Summons dated 16th March 2020 seeking leave to apply for judicial review orders of certiorari and prohibition against the the Commissioner of Customs and Border Control, the Respondent herein. The said application arises from a demand notice issued on 5th March 2020 by the Respondent, demanding that the Applicants Bank, Absa Bank Kenya PLC, liquidates the Applicant’s Transit Security Bond and makes good the guaranteed sum of Kshs 10,045,265/= in relation to a number of transactions.

2. The said Chamber Summons application was heard by Hon. Mr. Justice Mativo on 19th March 2020, who directed the Applicant to serve it on the Respondent, and that the question of whether the leave sought shall be granted be argued *inter partes*. Upon perusal of the file, I note that the Applicant has not provided any evidence of service of the said Chamber Summons on the Respondent as directed and ordered by the Judge. In addition, I note that the impugned demand letter dated 5th March 2020 was issued pursuant to the provisions of section 109 as read with regulation 38 of the East Africa Community Customs Management Act (EACCMA) and regulations thereto.

3. Sections 229 and 230 of the (EACCMA) in this regard provides for a procedure to be followed in the event that a person is aggrieved by any decision made by the Commissioner of Customs and Border Control under the Act, and within certain timelines. In particular, an aggrieved person is required to the Commissioner of Customs for review of the decision within thirty days, and the Commissioner is required to give a decision within thirty days of receipt of the application. If still aggrieved, the person is required to appeal to Tax Appeals tribunal within forty five days.

4. The Court therefore needs to confirm compliance if any, with the provisions of section 229 and 230 of EACCMA before it can grant any leave to commence judicial review proceedings, and particularly so in light of the provisions of Article 159 (2)(c) of the Constitution and section 9(2) (3) and (4) of the Fair Administrative Action Act that require parties to first exhaust alternative remedies before seeking judicial review. Section 9(2) (3) and (4) of the Fair Administrative Action Act provides as follows in this regard:

“(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

The Orders

5. In light of the foregoing observations and findings, and to expedite the hearing of this matter, I direct and order as follows:

I. The Applicant shall serve the 1st and 2nd Respondents with the said Chamber Summons dated 16th March 2020, and skeletal submissions thereon, together with a copy of this ruling, within fourteen (14) days from today's date for *inter partes* hearing.

II. Upon being served with the said pleadings and documents, the Respondent shall be required to file and serve their reply to the said Chamber Summons and skeletal submissions thereon within fourteen (14) days from the date of service.

III. The ruling date for the said Chamber Summons shall be reserved on 27th May 2020.

IV. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the Applicant's Chamber Summons dated 16th March 2020, on the basis of the electronic copies of the pleadings and submissions filed. In this respect, the *ex parte* Applicant shall avail an electronic copy of its Chamber Summons dated 16th March 2020.

V. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleading or document.

VI. The parties shall avail and file their electronic pleadings, applications and written submissions by sending them to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

VII. The service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also email a copy of the documents so served to the Deputy Registrar of the Judicial Review Division at judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

VIII. The parties shall also be required to send to the Deputy Registrar of the Judicial Review Division their respective affidavits of service evidencing personal service, by way of electronic mail to judicialreview48@gmail.com with copies to asunachristine51@gmail.com.

IX. The Deputy Registrar of the Judicial Review Division shall send a copy of these directions and the extracted orders to the Applicant by electronic mail by close of business on Thursday, 30th April 2020.

X. The Deputy Registrar of the Judicial Review Division shall put this matter on the Division's causelist for mention on 27th May 2020 and bring it to the attention of a Judge in the Division on that date for reservation of a ruling date.

XI. The Applicant shall serve the Respondent with a copy of these directions and a mention notice within seven (7) days from today's date.

XII. Parties shall be at liberty to apply.

6. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF APRIL 2020

P. NYAMWEYA

JUDGE