



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 544 OF 2014
IN THE MATTER OF APPLICATION BY PETER NGURE KIMINGI
AND
IN THE MATTER OF RELEASE OF IMPORTED GOODS
AND ITEMS HELD BY THE KENYA REVENUE AUTHORITY
BETWEEN
PETER NGURE KIMINGI.....PETITIONER
-VERSUS-
KENYA REVENUE AUTHORITY.....RESPONDENT
JUDGMENT

PETITIONER'S CASE

1. The Petitioner through a Petition dated 18th September 2014 seek the following reliefs:-

- a) Declaration that the Petitioner's right and fair administrative action has been violated.*
- b) A mandatory injunction do issue against Kenya Revenue Authority or forthwith release the goods of the Petitioner.*
- c) Damages for breach of Petitioners Constitutional right.*
- d) The Respondent be condemned to pay costs of suit together with interest.*

2. The Petitioner's case is that on 11/5/2013 or thereabout, he bought the undersigned good which were under or on transit to the Democratic Republic of Congo being:

1 X 20' Container DRYU2344714

Entry No.T810 No.2013MSA 3976198

Entry No. T812 No.2013 MSA 4030782 consisting of 19 once) used motor bike Chs. 5 digy 4498 K 33068, 1 (one) Toyota Hilux Pickup Chs. Pn 133 JV 2508518609, 1 (one) Electric Generator amongst other goods, marked PNK1" and of documents of proof the goods underwent all necessary process at the Respondent and were duly permitted for conversion into home use by the Respondent. (See ONK2) documents of proof.

3. The goods were subsequently cleared by the Respondent and marked for release. The Petition sought release of the goods but the Toyota Hilux CHS. PN 133JV 2508518605, took a year to be released but other goods were not released and were marked for auction.

4. Its Petitioner contention that on one occasion, an officer of the Respondent demanded Kshs.300,000/= from the Petitioner as an

inducement for the officer to release the goods to the Petitioner though the goods had been cleared and marked for release. The said officer is currently facing criminal charges in ACC No. 5 of 2014 (MSA) R Vs. Aaron Kili Ngea.

5. The Petitioner aver that the Respondent claim the goods are non-compliant while others were meant for import. It is Petitioners case that the goods were cleared for conversion for home use and there is no justification or at all for the Respondent to refuse to release the goods to the Petitioner. The Petition contend he is being deprived the use of this goods which are still being detained at the Respondent's yard.

6. It is Petitioners contention that his constitutional rights to fair administrative action by the Respondent has been violated and continues to be violated. That despite demand and notice of intention to sue the Respondent has persistently failed refused and /or neglected to make good the Petitioner's claim.

RESPONDENT'S CASE

7. The Respondent denies the Petitioners claim and has in opposition filed Replying Affidavit by Aquilino Mwithalii sworn on 28th May 2015, a supervision customs services Department Kenya statement Authority.

8. The Respondent contend that in February 2013, a container number DRYU 2344754 arrived at Kilindi Port Mombasa, on board ship MV CMA CGMLA TOUR under Bill of lading number EPIRAEESAD 130583 manifest number 2013 MSA 106980 with the following details:

Shopper: High live Trading Co. LLC –

P. O. Box 19965 Sharjah, UAE

Consignee: Albert Jojoma Kijemba

P. O. Box 1143

Lumumba Avenue Lubumbashi

Democratic Republic of Congo (DRC) Tel: 243997024846

No of P kgs / cntr

Description of package and goods

9. The container was manifested as Transits to Congo and the consignee as Albert Jojoma Kijemba of Muma Avenue 1143 Lulumbashi Congo (DRC).

10. The container 1 x 20' had the following goods:

a) 1 used car and spare parts

b) Toyota Hilux 2009 model Chassis No. PN133V2508518609

c) Moto Byke 2002 model Chassis No. 5HD1GY4498K336068

d) Electric Generator

e) Auto Parts and accessories"

11. The goods were on transit to democratic Republic of Congo to Albert Jojoma, Lulumbashi but were bought by the Petitioner.

12. The goods were verified by the Respondent and the following were found:-

a) Motor vehicle Toyota Hilux, year of manufacture 2009, double cabin Chassis PN Chassis No. PN133V2508518609

b) Moto Vehicle Jeep wrangler 4 x 4 Chassis Number V4FY1957VP460262, year of manufacture 1996, which was in a disassembled state.

c) Harley Davidson Motor Bike Chassis number 5HD1GY4498K336068.

d) Dustbins, Flowerpots with artificial flowers, iron board, beddings, decorations, gym equipment, carpets, floor mats, television set, used clothing, gift wrappers, assorted gifts, brooms, flower toughs and used clothing.

13. The Respondent has no issue with the motor vehicle Toyota Hilux, to which the Petitioner paid duty of Kshs.480,621/= and it was

registered as KBY 417W and by a letter dated 5/8/2014 the Petitioner was to go for the release of the goods described in 5(d) but the Respondent was at liberty to apply administrative measures to facilitate the release.

14. The motor vehicle Jeep wrangler was a 1996 model and an over-age vehicle. It is neither included in the Bill of Lading (annexture AM-1) nor in the Entry number 2013 MSA 3976198 (annexture AM-2) and 2013 MSA 4124568 (annexture AM-4). The Harley Davidson Motor Bike is a 2002 model and not a 2008 model as alleged by the Petitioner. It is indicated as 2002 model in the Bill of lading (Annexture AM-1). It declared in the Entry as No.2013MSA3976198 (annexture AM-2) as a 2002 model.

15. The Respondent relies on the details of goods described in the Bill of lading and any changes on the details a formal application, supported by evidence, ought to be made. The inspection report produced by the Petitioner, is contended that it contradicts the details in the Bill of lading.

ANALYSIS AND DETERMINATION

16. I have carefully considered the Petition, the Affidavits in support and annexures thereto, the Replying Affidavit, Counsel rival written submissions and oral submission and from the above the following issues arises for consideration:-

a) Whether the Kenya Revenue Authority acted ultra vires in impounding the Petitioners property for purportedly being non-compliant with Kenya standards?

b) Whether the Kenya Revenue authority's decision to impound the Petitioner's property for being purportedly non-compliant with Kenya standard was irrational and bad in law?

c) Whether the Kenya Revenue Authority's decision was actuated with malice?

A. WHETHER THE KENYA REVENUE AUTHORITY ACTED ULTRA VIRES IN IMPOUNDING THE PETITIONERS PROPERTY FOR PURPORTEDLY BEING NON-COMPLIANT WITH KENYA STANDARDS?

17. It is trite law that a decision of public body can be invalidated by Court of law if it is demonstrated that such a public authority acted ultra vires. The burden of proof that the public body acted ultra vires is on he who alleges so. The Petitioner herein urges that the Respondent, in deciding to impound the Petitioner's goods, bestowed upon itself powers that were not conferred upon it by the Article. The Petitioner avers that this is evident from what he refers to as various facts.

18. It is Petitioners contention that the Respondent stated that it impounded the Petitioners property and specifically the Petitioners motor cycle and spare parts because the said items affected provisions of the Kenya standard 1515:2000 and more specifically clause 2.2 which sets an age limit on vehicles that can be imported into the country.

19. The Respondent avers that the motor jeep wrangler is a 1996 model and noted it was neither included in the Bill of Lading (annexture AM-1) nor in the entry number 2013 MSA 3976198 (annexture AM-2) and 2013 MSA 124568 (annexture AM-4). On the Harley Davidson Motor Bike the year of manufacture is 2002 and not 2008 model in the Bill of Lading (annexture AM-1) and its also declared in the entry No. 2013 MSA 3976198 (annexture AM – 2) as a 2002 model. The Petitioner had not applied to change the details in the Bill of Lading by way of a formal application as required, supported by evidence. The Petitioner's inspection report, therefore contradicts the details in the Bill of lading in respect of the year of manufacture of the motor bike.

20. The Petitioner insists that the said motor bike was manufactured in the year 2008 and that it is well within the age limit. The Respondent refers to its photograph and especially (annexture 5(d)) which show the chassis of the motor bike and the year of the manufacture as 2002. This has not been controverted in anyway by the Petitioner and therefore I find the year indicated in Respondent's photographs as regard the year of manufacture to be genuine.

21. The East Africa Community Customs Management Regulations 2006 at Regulation 18, provides thus:-

“The contents of every package and of all cargo bulk intended for discharge at a port or place in the community shall be reported in accordance with the description in the relevant bill of landing or airway bill.”

It is the description of the goods in the Bill of Lading therefore that the Respondent relies upon.

22. It is from the evidence which is not in dispute that both the motor vehicle Jeep wrangler and the motor bike are over-age and fall within the class of restricted goods as defined under Section 2 of the East Africa Community Customs Management Act, 2004 (EACCMA) as follows:

“any goods the importation, exportation, transfer, or carriage coastwise, of which is prohibited, save in accordance with any conditions regulating such importation, exportation, transfer, or carriage coastwise, of which is in any way regulated by or under the Customs laws”.

23. From the above both the motor vehicle jeep wrangler and the motor bike herein above are restricted goods since they do not conform to the Kenyan standards under the Kenya Bureau of Standards.

24. It is clear that the Respondent is mandated to restrict the importation of a motor vehicle older than 8 years from the date of manufacture

under section 18 paragraph 1 of parts A and B of Second Schedule of EACCMA – over-age motor vehicle are prohibited goods within the meaning of EACCMA. Section 18 of EACCMA states: -

“1) The goods specified in part A of the Second Schedule are prohibited goods and the importation thereof is prohibited.

2) The goods specified in Part d of the Second schedule are restricted goods and the importation thereof; save in accordance with any conditions regulating their importation is prohibited.”

25. Further it is clearly provided under the Kenya Standard 1515:2000 code of practice for inspection of Road Vehicles under clause 2.5 as follows:-

“Age limit – all road vehicles which are more than eight years old from the date of manufacture shall not be allowed for importation.”

26. From the above clause it is clear that both prohibited goods and restricted goods in terms of **Section 18 of the EACCMA** have specific legal provision not to have them allowed for importation.

27. I do not find the Petitioner's basis of claiming the goods which have clearly been demonstrated to be over 8 years old by the time they were imported, why they should be allowed in the country. I find no basis of the Petitioner's relying on the inspection report that contradicts the details in the Bill of Lading with regard to the year of manufacturer of the motor bike and further when the Respondent's photograph (annexure 5(d) clearly show the chassis of motor bike and the year of manufacture as 2002. The inspection report relied upon by the Petitioner is incorrect and is intended to mislead the Court. I reject the same and find that it is not genuine.

28. I therefore find that nothing stopped the Petitioner if he wanted to have both the motor vehicle and the motor bike registered from obtaining consent from the relevant authority at Kenya Bureau of Standard. In the instant Petition it is clear the Petitioner bought transit goods and tried to declare the restricted goods, which is an offence under Section 200 of EACCMA. Section 200 (a) (ii) provides:-

“A person who imports or carries coastwise any restricted goods contrary to any condition regulating goods contrary to any condition regulating the importation or carriage coastwise of such goods, whether or not the goods are unloaded, commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the durable value of goods involved, or both”

29. It should be noted that though the consignment was initially on transit, the goods had names of people within Kenya address and Safaricom telephone numbers (Annexure AM 7a, b, c, d, e, f and g) one wonders why goods on transit should have items with local telephone numbers. The answer is clear that the intention is also clear that the goods were meant for domestic use. This in my view is a design employed to evade payment of taxes.

30. **Section 42 of EACCMA** mandates the Respondent to have such goods sold by public auction. **Section 41(1) of the Act** provides :-

“where any goods which have been deposited in a Customs warehouse are not lawfully removed within thirty days after deposit, then the Commissioner shall give notice by publication in the Gazette that unless such goods are removed within thirty days from the date of notice they shall be deemed to have been abandoned to Customs for sale by public auction and may be sold in such manner as the Commissioner may deem fit.”

31. In **Nairobi Judicial Review Case No. 102 of 2013; Republic –v- Kenya Bureau of Standards & 2 Others Ex parte Gladys Nyawira Wanjohi**, the Court stated as follows:

“it is also not disputed that the Kenya Standard Code of Practice for Inspection of Road Vehicles OKS 1515:2000as amended in July, 2008 at Clause 2.5 provides that:

“Age limit – All road vehicles which are more than eight years old from the date of manufacture shall not be allowed for importation”.

This requirement can, however, be waived by the Minister upon the advice of the National Standards Council”.

32. From the facts of this suit, it is clear that by the time the motor vehicle Jeep wrangler manufactured in 1996 and the motor bike manufactured in 2002, arrived in Mombasa in February 2013, they were over-aged and could not be allowed into Kenya. My understanding of interpretation of the rule accords with the intent of the standard, that is to prohibit over-age goods such as vehicles in Kenya and protect Kenya from over-exploitation and get value for their money.

33. In view of my findings herein above, I am satisfied that the petitioner has failed to demonstrate that the Kenya Revenue Authority acted ultra vires in impounding the Petitioner's property. I find the Respondent acted in accordance with the law in impounding the Petitioner's property for being non-compliant with Kenya standards.

B. WHETHER THE KENYA REVENUE AUTHORITY'S DECISION TO IMPOUND THE PETITIONER'S PROPERTY FOR BEING PURPORTEDLY NON-COMPLIANT WITH KENYA STANDARD WAS IRRATIONAL AND BAD IN LAW?

34. Irrationality in the context of administrative decision was defined by Lord Diplock in the case of *Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935* and quoted with approval in the case of *Republic v National Water Conservation & Pipeline Corporation & 11 Others [2015] eKLR* as follows:

By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness” (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B.223). It applies to a decision which is so outrageous in its defiance of logic or for accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within the category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

35. The Petitioner contention is that the Respondent by its own admission made its decision to impound the Petitioner’s motorcycle based on the following factors: -

i) The Bill of Lading is alleged to indicate that the Motor Cycle was manufactured in the year 2002 and for this reason did not meet the 8 year age limit set on motor vehicle imports by Kenya Standard 1525:2000

ii) The date of manufacture was allegedly inscribed on the body of the motor cycle.

36. The Respondent submitted that the motor vehicle jeep wrangler is a 1996 model and the same is an over-age vehicle. That it was neither included in the Bill of lading (annexture AM-1) nor in the Entry numbers 2013 MSA 3976198 (annexture AM-2) and 2013 MSA 4124968 (annexture M-4); whereas motor bike is a 2002 model and not 2008 model as alleged by the Petitioner. The Bill of Lading in respect of the motorbike indicated that it was a 2002 model (annexture AM-1). It was also declared in the Entry No. 2013MSA 3976198 (annexture AM-2) as 2002 model.

37. The Respondent further stated it relies on the details of goods described in the Bill of lading and in case of any changes on the details, a formal application, supported by evidence, made has to be furnished.

38. From the foregoing, I find that the Petitioner did not apply by way of a formal application to change any details if there was need to do so, as required by law. It is not correct for the Petition to turn around and urge the Respondent decision to impound the Petitioner’s property for non-compliant with Kenya Standards was irrational and bad in law. It has not been demonstrated what was irrational of the Respondent in complying with the law. I find no basis in this ground and I reject the same.

C. WHETHER THE KENYA REVENUE AUTHORITY’S DECISION WAS ACTUATED WITH MALICE?

39. It is Petitioner’s averment that the Respondent’s action of impounding the Petitioner’s property was actuated with malice. It is urged that the Respondent had on 10/4/2014 given its approval for the import of the Petitioner’s goods by stamping the Petitioner’s single administrative document. That everything went smoothly until petitioner sought to clear his goods, when an employee of the Respondent sought a bribe from the Petitioner to clear the goods, which led to the Petitioner to report to the Ethics and Anti-Corruption Commission who arrested the Respondent’s employee for attempting to solicit a bribe from the petitioner. It is alleged the Respondent took a sudden turn and declined to release the Petitioner’s goods claiming the goods were over-age and did not meet Kenyan standards.

40. It is further urged that the evidence of malice is in the fact that even the motor vehicle pick-up 2009 model which was in Petitioner’s container was also impounded by the Respondents for same reasons for apparently being over-age even without disputing that the vehicle was 2009 model. It is alleged it took the intervention of Ethics and Anti-corruption Commission, by way of a letter, for the Respondent to release the motor vehicle pick-up, almost a year later.

41. In the instant Petition it is not in dispute the goods were on transit to Democratic Republic of Congo to Albert Jojoma Kijembe and not the Petitioner. However the goods were not transited to the Democratic Republic of Congo as they were bought by the Petitioner, Peter Ngure Kimigi. The Respondent had no issue with motor vehicle Toyota Hilux, for which the petitioner paid duty of Kshs.480,621/2 and it was registered as KBY 447W. The petitioner was informed through a letter dated 5th August 2014 to go for the release of goods described under item No. (d) of the verified goods but he was at liberty to apply for administrative measures to facilitate the release.

42. I note the Petitioner’s contention is that by 10/4/2014 the Respondent had given its approval for importation of the Petitioner’s goods by stamping the Petitioner’s single Administrative Document. He also alleges the situation changed when he reported Respondents’ employee for seeking a bribe from him. I have very carefully perused the Petitioner’s pleadings and it is clear that there are no particulars of malice on part of the Respondent nor is there evidence of the Respondent’s action having been actuated with malice. The Petitioner urges the Toyota Hilux was impounded by the Respondent for the same reasons of apparently being over-age. This is not so since it is not pleaded in the petitioners petition nor is there allegation that it was released on intervention of the Ethics and Anti-Corruption Commission. Had the Respondent acted with malice as submitted there is nothing that would have stopped the Petitioner from pleading so. I find the absence of such pleadings can be drawn as a clear inference that the Respondent’s actions were not actuated with malice but the Respondent acted lawfully as mandated by the relevant provisions of the law in discharging of its duties.

43. To the extent of my findings, I am not satisfied that the instant petition is meritorious and I proceed to dismiss the same with costs to the Respondents.

Dated, Signed and Delivered at Nairobi on this 28th day of May, 2020.

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J. A. MAKAU

JUDGE