



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIVIL APPLICATION NO. 40 OF 2013

REPUBLIC.....APPLICANT

VERSUS

SENIOR ASSISTANT COMMISSIONER

(ENFORCEMENT PORT OPERATIONS.....RESPONDENT

COMMISSIONER OF CUSTOMS SERVICES.....RESPONDENT

KENYA REVENUE AUTHORITY.....RESPONDENT

EXPARTE

LIBERTY FREIGHTERS LIMITED

BRIEF

Background

1. The applicant moved the court by a Notice of Motion dated 23th July 2013 supported by an affidavit sworn by Geoffrey Ogola the Director of the Company. The applicant is a limited liability company that engages in the business of clearing and forwarding within the Country and the East African Community. Its place of business is the port of Mombasa. The 1st respondent (is appointed under section 13 of the Kenya Revenue Act) and the 2nd respondent are employees, officers, agents or staff of the 3rd respondent, Kenya Revenue Authority who is a statutory body established in 1995 under the Kenya Revenue Act a central body for assessment and collection of revenue as provided in section 5(1) but also administration and enforcement of all laws relating to revenue.

PETITION

2. The 1st respondent, Senior Assistant Commissioner –enforcement Port Operations on 29th April 2013 wrote a letter to the applicant demanding tax from goods lost in transit. The goods were covered by entry 2012MSA3519911 in container CRXU9899488/40. The applicant avers that the respondents were in violation of Regulation 104(22) and (23) of the East Africa Community Customs Management Regulations 2006 which provided that a person who diverted goods on transit committed a criminal offence and was to be punished through payment of a fine. The transit goods had been cleared at the Mombasa port for transit to Kampala. The Kenya Police investigated the matter and made arrests. A criminal case was opened vide Mombasa Cr. case no. 1921/2012.

3. The applicants further aver that the 1st respondent demand for payment of tax in respect of the lost goods was made without due regard to the effort made by them in assisting to retrieve the lost goods and arrest of suspects and the truck. The 1st respondent also failed to consider the pending criminal case and further held the truck and the applicants were not given an opportunity to show cause why they should not be held liable to pay the tax.

4. The applicants were stopped from accessing the 3rd respondent's online clearance/ tax system, *simba system* on 21st May 2013 but the same was reinstated on 27th June 2013. This suspension was in breach of the natural justice because it sabotaged the business occasioning great losses. Section 14 of the Kenya Revenue Authority Act, 1995 provides that any person employed by the Kenya Revenue Authority is personally liable for their wrongful acts or omissions. The respondents' action also violated their right under Article 47 of the Constitution of Kenya, 2010 to administrative action that is lawful, reasonable and procedurally fair.

5. Mr. Geoffrey Ogola the 2nd petitioner's director averred as follows in his affidavit.

a) On 13/6/2012 a container no. CRXU9899488/40 with entry number 2012MSA3519911 containing 502 bales of second hand clothes for onward transit to Kampala. Zabibu Transporters were contracted on 14/6/2012 to transport the cargo using truck no. KAX 723R/ZC 6169. The truck was to have crossed the border on or before 17/6/2012, which was not the case. A report was made to the Port police station over the disappearance of the said truck. On 17/6/2012 the transport agent Mr. Fred Muya arrested two suspects who were charged in court on 19/6/2012. The truck was recovered and it was revealed that the right registration number was KAZ 580W and not KAX 723R as at the time of the contract.

b) The empty container was recovered in Nairobi. On 3/11/2012 the truck was taken to the customs warehouse for safe custody pending the conclusion of the criminal case. On 29th April 2013 the Senior Assistant Commissioner (Enforcement Port Operations) wrote to the 2nd petitioner demanding for payment of Ksh 1,238,844.67 as tax within seven days. The respondents suspended the system password.

c) The applicants sought for the following specific reliefs.

I. That an order of Certiorari be issued to remove into the High court and quash the demand note/ obligation to pay customs duty (Ksh 1,238,884.67 or any sum thereof) dated 29th April 2013 given to the applicant by the 1st respondent on behalf or with authority of the 2nd respondent and/ or 3rd respondent over the lost goods(used clothing)covered by entry 2012MSA3519911 container CRXU9899488/40.

II. That an order of prohibition be issued to stop or restrain the respondents or their employees or servants or agents or officers from demanding customs duty (Ksh 1,238,884.67 or any sum thereof) from the applicant based on the demand of duty dated 29/4/2013 over lost transit goods (used clothing) covered by entry 2012MSA3519911 container CRXU9899488/40.

III. That an order of prohibition be issued to stop or restrain the respondents or their employees or servants or agents or officers from blocking or suspending or in any manner unlawfully limiting the applicant's access to or use of the 3rd respondent's online clearance/ taxation system-*Simba system* arising from the demand note/ obligation to pay customs duty dated 29/4/2013 over the lost transit goods (used clothing) covered by entry 2012MSA3519911 container CRXU9899488/40.

IV. The costs of this application be to the applicant.

RESPONSES

6. The 3rd respondent swore its replying affidavit through Aquilino Mwithali who was the Ag. Senior Revenue Officer. He averred to have read and understood the Notice of Motion application dated 23th July 2013. It was not true that tax demand in respect to lost goods is founded on an error of law since under section 130 the 3rd respondent is mandated to charge duty on goods. The applicant herein was liable for the acts of his agents as provided under sections 147 and 148 of the EACCMA. The sections are as provided below: 147-*"a duly authorised agent who performs any act on behalf of the owner of any goods shall for the purposes of this Act be deemed to be the owner of such goods and shall accordingly be personally liable for the payment of any duties to which the goods are liable and for the performance of all Acts in respect of the goods which the owner is required to perform under this Act."*

7. The clearing agent is responsible for the cargo once they are released from the port. The applicants had a duty to ensure that the cargo exited the country before he could cancel the bond in force on the cargo. The goods had been moved without the authority of the officers and thus became uncustomed goods and were liable to be dealt with under the provisions of section 210 of EACCMA Act 2004 which provides as follows: ***"in addition to any circumstance in which goods are liable for forfeiture under this Act. The following goods shall be liable to forfeiture-a) any uncustomed goods,(b) any goods subject to customs control which are moved altered or in any way interfered with except with the authority of any officer."*** The truck also was to be forfeited to the state for nonpayment of duty as provided in section 211 and it could not be used as a setoff to the outstanding taxes. In this case the truck is in the 3rd respondents warehouse.

8. In addition to the above the suspension of the applicants use of the *simba system* was not unreasonable since that was in line with the discretionary powers provided under section 145(3) of the EACCMA 2004 which provides as follows; *" The commissioner may refuse to issue a license or may by order suspend, revoke or refuse to renew, any such license on the ground that the applicant or holder has been found guilty of an offence under the customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reason that the commissioner may deem fit."*

9. They further aver from their advocates advice, which he believed that their actions were not unconstitutional or illegal. Further that the applicant has not demonstrated how its constitutional rights have been infringed and the application fails to meet the minimum threshold for grant of the orders sought for the offences committed by its agents, employees or servants.

Supplementary response

10. The applicants Director Geoffrey Ogola filed a supplementary affidavit on 7/4/2014 stating that he had contracted truck KAX 723R/ZC 6169 which disappeared with the goods. On 17/6/2012 some suspects were arrested. He came to know that a transit goods license (TGL) had been issued under the fake number plate by KRA, which was a negligent act, by the 3rd respondent. The criminal matter had been taken to court and the suspects were liable to pay the taxes since they had diverted the cargo.

SUBMISSIONS

Ex-parte's written submissions

11. The counsel urged the court to refer to Regulation 104 (22) and (23) of the East Africa Community Customs Management Regulations, 2006. It provides that, “*a person who diverts goods that are in transit from Kenya to an East African Community Member State commits a criminal offence and may also be penalized by the Kenya revenue authority through imposition of a fine.*” The Kenya Police was engaged to investigate the said theft and arraigned the suspects in court.

12. The respondents failed to consider the assistance that the ex-parte applicant had given to law enforcement officers to investigate the loss of the goods. The respondents did not take into account that they contributed to the theft of the truck by issuing a transit goods license under the fake number plate, which revealed a weakness in KRA's system.

13. The suspension of the *simba system* by the respondents. Section 14 of the Kenya Revenue Authority Act 1995 provides that any person employed by K.R.A is personally liable for their wrongful acts or omissions. The suspension was in violation of Article 47 of the Constitution to administrative action that is lawful, reasonable and procedurally fair.

Respondents written submissions

14. The respondents narrowed the issues for determination as follows:

- a) Whether the action by the respondent to demand tax in respect of lost transit goods was founded on an error of law, unreasonable or irrational.
- b) Whether suspension from the *simba system* was oppressive, in breach of the rules of natural justice and a violation of the ex-parte applicant's right under Article 47 of the Constitution for failing to give it an opportunity to be heard.
- c) Whether KRA was complicit in allowing fraudsters to obtain Transit Goods License using fake registration plates.

15. On the first issue the respondents urged the court that the applicant had to demonstrate that they had departed from the law by misrepresentation of the law. Section 130 of the EACCMA is clear that where goods are liable to duty such shall be charged on the goods in respect of which the duty is payable and the owner shall pay. The goods in this case were uncustomed goods since they had been moved without the authority of the officers of the 3rd respondent. Section 2 defines uncustomed goods as follows, “*includes dutiable goods on which the full duties due have not been paid and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the customs laws.*” Further the truck is in their custody and it will be forfeited to the state under section 211 of the EACCMA. The argument by the applicant that it may be auctioned to recover any tax due does not arise.

16. Section 147 and 148 empowers the respondent to hold the agent liable for the payment of any tax due. In *SDV Transami Kenya Limited v. Commissioner of Customs Services [2012] eKLR* where Justice Warsame held that, “*My understanding of section 147 & 148 is that the respondent is empowered to hold the agent liable for the payment of any Duty to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform. It is also clear that an owner of any goods who authorizes an agent to act for him shall be liable for the acts and declaration of such duty by authorized agent. Consequently, the respondent was perfectly right in making a demand against the applicant and interested party as it did in the letter dated 30th December 2010.*”

17. In view of this the respondent did not act in violation of the law. The applicant had a remedy under section 229(1) of the EACCMA Act which provides as follows: “*A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.*” There has to be an exceptional case for the orders in judicial review to be granted. In *Republic v. National Management Authority ex-parte Sound Equipment Limited [2011] eKLR* where the court stated that the principle was that where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and the court had to look at the case at hand.

18. On the second issue raised by the respondents on suspension of the *Simba System*, the respondents urge that it was in line with the section 145(3) of the EACCMA 2004 which provides as follows: “*The Commissioner may refuse to issue a license or may by order suspend, revoke or refuse to renew any such license on the ground that the applicant or holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reason that the Commissioner may deem fit.*” Therefore they acted within the discretionary power that they have been given.

19. In addition to the above they urge that fair administrative action and hearing is meant to ensure that a party has the opportunity to present their case. The respondents issued a demand notice dated 29th April 2013, with a seven (7) day window period to pay the outstanding duties failure to which enforcement measures will be instituted. In *Dry Associates Limited v. Capital Markets Authority & Aor Nai Pet No. 328 of 2011* where Justice Majanja referred to Article 47(1) and observed that there was flexibility in Article 47. The primary consideration was whether the procedure adopted was fair. See also in *Pearlberg v. Varty (Inspector of Taxes)[1972] 1 WLR 534* where it was held that fairness does not require a plurality of hearings or representations. If there was too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Therefore in view of this Justice Majanja held that Article 47 not only has the element of procedural fairness but also provides that administrative action must be expeditious, efficient, lawful and reasonable. In *Commissioner General Kenya revenue Authority v. Onema Omwaki t/a Marenga Filling Station CA Kisumu Civil Appeal No. 45 of 2000(UR)* the court held whether there is a fair hearing a case has to be looked into. *Karina v. Transport Licensing Board [2004] 2 KLR* where the court held that it is not in every case that a person is entitled to fair hearing. What the requirement of fairness demands depends on the character of the decision making body, the kind of decision it has to make the statutory or other framework in which it operates.

20. The online system helps in movement of goods in a strictly controlled method to prevent revenue loss through diversion of goods to the domestic market. The taxpayer maintains documentation to track the goods imported and exported, therefore it was not unreasonable for the respondents to demand the applicant to explain any discrepancies in its documentation. In **Crywan Enterprises Limited v. Kenya Revenue Authority. Nai Petn No. 322 of 2011** where the court emphasized the importance of fair administrative action. The applicant was given time to show cause why the enforcement action should not proceed.

21. Further the respondents deny the applicant's claim that they allowed the fraudsters to obtain Transit Goods License using fake registration plates. In **Republic v. Kenya Revenue Authority Ex-parte African Boot Company limited [2012] eKLR** where Korir J. dealt with the issue alleged fraudulent activities by the activities on the part of the KRA employees by stating that the 3rd respondent does not authorize its employees to engage in fraudulent activities. Finally they urged the court to find that they have demonstrated that its action were within the law and its mandate as outlined in the KRA Act Cap 469 and they have not breached Article 47 of the Constitution in any way.

ANALYSIS

22. The court has referred to the statement in the notice of motion, the responses, affidavits sworn in support of the application and the written submissions and has framed the following questions for determination by this Honorable court.

- a) Whether or not the respondents acted ultravires.
- b) Whether the respondents were in breach of the rules of natural justice by suspending the *online simba system*.
- c) Whether the applicant is entitled to be granted the orders sought.

23. It is trite law that Judicial Review is concerned with the process of decision-making and not with the merits of the decision itself. This court in **R v. The Commissioner of Customs & Excise Mombasa Misc Civil Applic No. 48/2013** held that it is trite that where a statute has made provisions for dealing with disputes, that procedure should be strictly followed. See the case of **Speaker of National Assembly v. James Njenga Karume(2008) 1KLR EP 425**.

24. Section 216 (4) of the Act provides significantly as follows:

1. *Where any proceedings have been instituted in accordance with this section, then—*

(a) If the court is satisfied that a thing was liable to forfeiture under this Act, the thing shall be condemned;

(b) if the court is not so satisfied, the thing shall be released to the claimant:

a) Provided that the court shall not release the thing to the claimant unless it is satisfied that the claimant is the owner or, by reason of any interest in the thing, is entitled to the possession thereof and if the court is not so satisfied, the thing shall be condemned as if no claim had been made.

25. I respectively agree with the decision in **Republic v. Kenya Revenue Authority ex parte Modern Coast Builders and Contractors Limited High Court JR. Misc. Appli. No. 631 of 2009: Majanja J held as follows**

The regulations governing transit of goods are to be found in the East African Community Customs Management Regulation, 2006 ("EACCM Regulations"). Regulation 104 which set out how transit goods are to be treated for the protection of the revenue. These regulations provide inter alia, for the licensing of vehicles carrying transit goods by the Commissioners, the mode of identification of trucks licensed to carry transit goods and the manner in which transit goods are conveyed.

These regulations are made pursuant to section 251 of EACCMA, 2004 that empowers the Council of Ministers to make generally for giving effect to the provisions of the Act. Under section 251(2) any regulations made under subsection (1) may provide that any person contravening any of the provisions thereof commits an offence and may provide a penalty for the infraction. Such a penalty is enacted under Regulation 215, which provides that a person who commits an offence under the regulations is liable to a fine not exceeding five thousand dollars.

26. The respondents had to demand tax for the uncustomed goods. Section 210(2) defines ***uncustomed goods as those dutiable goods on which full duties had not been paid and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the customs laws.*** The applicant had not paid for the taxes and it was within the said provision that tax had to be paid. The clause read with Section 147 of the EACCMA 2004, which holds the applicant herein as an agent who performed an act on behalf of the owner of the goods, and within the Kenyan territory the applicant is deemed as the owner. The court agrees with the decision in **SDV Transami Kenya Limited v. Commissioner of Customs Services [2012] eKLR** whereby the court held that the respondent (KRA) was empowered to hold the agent liable for the payment of any duty to which the goods were liable in respect to which the owner was required to perform.

27. The applicant urged the court to rely on Regulation 104(22) and (23) of the East Africa Community Customs Management Regulations, 2006 which provides as follows:

(22) A person who diverts from the transit route specified under sub regulation (4) commits an offence and shall be liable to a fine not exceeding fifty per cent of the value of the goods and the goods which are the subject of the offence, shall be liable to forfeiture.

(23) Where goods in transit cannot be traced, the person referred to under sub regulation (22) shall pay to the proper officer the penalty to bond in addition to the fine.

28. . The above clause is in relation to a person who diverts goods. My understanding of this is that a person can only be found to have committed a criminal offence if only the court determines so. In the absence of any conviction a person cannot be held liable. In this instant case there is an ongoing criminal case and it has to be concluded before the 3rd respondent can impose a fine. The demand by the 3rd respondent to the ex-parte applicant to pay a sum of Ksh 1,238,844.67/= within seven (7) days was unfair. It is not in dispute that some suspects had been arraigned in court and not the ex-parte applicant. The 3rd respondent has not shown anywhere that the applicant was involved in the diversion and theft of the transit goods. It is also not disputed by the respondents that the container that contained the 502 bales of second hand clothes for onward transit to Kampala by Zabibu Transporters never reached the border. The ex-parte applicant made a report to the Port Police station over the disappearance of the said truck. It is when an arrest of the transport agent and two other suspects was made and they were charged in court on 19/6/2012. The empty container was recovered in Nairobi and the truck was taken to the customs warehouse for safe custody. This is a clear illustration on what transpired to the loss of goods and the respondents have not shown if at all the applicant contributed in any way.

29. I respectfully agree with the Court of Appeal decision in *Kenya Revenue Authority v. Spectre International Limited [2013] eKLR* where the judges held as follows:

“We are in full agreement with the learned judge when she says in concluding the judgment:

“It is trite law that persons charged with statutory powers and duty ought to exercise the same reasonably and fairly and that the discretionary (sic) ought [not]to be used whimsically (sic), unreasonably arbitrarilyor against the tenets of natural justice.If the discretionis used arbitrarily or unreasonably, the court may step in to remedy the situation. The respondent has not shown any ground or reason why it formed the opinionthat the ex-parte applicant diverted the goods. Indeed the respondent admits that investigations are not complete, that notwithstanding the respondent rushed to demand payment. In a situation where the appellants' officer has not offered an explanation on circumstances leading to loss of part of a consignment and the appellant issues demands for tax payment on the ground that goods destined for export have been diverted to the local market where no investigations are carried out at all, weare satisfied that the learned judge did not err at all and was entitled to issue the prerogative orders which shedid and which we confirm.”

30. In *Pastoli v. Kabale District Local Government Council and Others [2008] 2 EA 300*: the court held that:

“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality.”

In view of this the court finds that the 3rd respondent's action to demand for payment of tax from the ex-parte applicant was contrary to the law.

31. Section 145 of EACCMA provides as follows:

“(1)The Commissioner may license persons to act as agents for transacting business relating to the declaration or clearance of any goods or baggage other than accompanied non-manifested personal baggage of a person travelling by air, land or sea.

2. The Commissioner shall not license any person to act as agent under this Act unless the Commissioner is satisfied that, that person has the capability, office equipment, a registered office and documents to effectively transact business in accordance with the provisions of this Act and any other conditions as may be prescribed by regulations.

3. The Commissioner may refuse to issue a licence or may by order, suspend, revoke or refuse to renew, any such licence on the ground that the applicant or holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reason that the Commissioner may deem fit.”

Applying the provision to this matter the 3rd respondent could only suspend the license if the applicant had been found guilty of an offence or for other reason *eiusdem generis*. In the instant case the criminal case as stated by the applicant is not against them and, in any event, the provision requires something in the nature of final orders finding the subject guilty of an offence under customs law, fraud or other similar misconduct. There had been no evidence adduced before the court that either the applicant or it's employees or agents were involved in any fraud or misconduct to amount to loss in revenue by the 3rd respondent.

32. The criminal case has not been concluded for the access to *simba system* to be suspended. Above all, it must always be remembered that the judicial function for the finding of guilt for offences under the customs law or other law is the purview of the courts and not of the administrators of tax system. In the absence of this the court finds that the 3rd respondent acted wrongly by suspending the ex-parte applicant's online registration but in view of the finding on the principal complainant against the imposition of the tax, and the fact that the applicant's access was restored, nothing turns on it in this proceedings.

Orders

33. Accordingly, for the reasons set out above, the court makes an order to the extent only that prayers 1 and 11 of the application dated 23rd

July 2013 is hereby allowed with costs to the ex-parte applicant.

EDWARD MURIITHI

JUDGE

DATED AND DELIVERED THIS 25TH DAY OF MAY, 2018

E.K. OGOLA

JUDGE

Appearances

Njeru & Advocates for the ex-parte applicant.

Andambi Chabala Advocates for the Respondents.