



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 499 OF 2014
IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION AND/OR THREAT OF
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40,
47 AND 50 AS READ TOGETHER WITH ARTICLES 2 (4) & (5), 2, 10, 19, 20, 21, 22, 23, 24, 25,
26 (1) & (3), 201, 209, 210, 258, 259 & 260 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF EXPORT PROCESSING ZONE ACT

AND

IN THE MATTER OF EAST AFRICAN COMMUNITY CUSTOM MANAGEMENT ACT

AND

IN THE MATTER OF ARTICLE 210 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT

BETWEEN

REDINGTON KENYA EPZ LTD.....PETITIONER

VERSUS

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

COMMISSIONER OF CUSTOM SERVICES.....2ND RESPONDENT

JUDGEMENT

The key issue for determination in this case is whether or not the petitioner is entitled to recover from the Respondents a total sum of **Ksh.13,895, 951/=** in respect of monies paid by the petitioner to the Respondents on diverse dates as import duty and a further sum of **Ksh. 16,818,073/=** being VAT paid by the petitioner to the Respondents on diverse dates details whereof are particularized in paragraph 13 of the amended petition. The petitioner also prays for declarations that that the demand by the Respondents' that the petitioner pays taxes offends the provisions of the Export Processing Zones Act[1] and the East African Community Customs Management Act and that same amounts to illegal taxation hence unconstitutional.

The background relevant to the issues at hand is that the petitioner carries on the business of importation, production and refining of edible oils and related products under the provisions of the Export Processing Zones Act[2] and the East African Community Customs Management Act and that the Respondents without due process and regard to the provisions of the above two statutes demanded that the petitioner pays taxes on the products imported under the auspicious of the Export Processing Zone Act[3] and the provisions of the East African Community Customs Management Act.

At the outset it is important to point out that the Export Processing Zones Act[4] is an Act of Parliament which *inter alia* provides for the establishment of export processing zones and the Export Processing Zones Authority and for the promotion and facilitation of export oriented investments and development of enabling environment for such investment and for connected purposes.

Section 2 of the act defines Export Processing Zones as:- **“export processing zone”** means a designated part of Kenya where any goods introduced are generally regarded, insofar as import duties and taxes are concerned, as being outside the customs territory but are duly restricted by controlled access and wherein the benefits provided under this Act apply.

Also relevant to the issues raised in this case are the clear provisions of section 29 of the Export Processing Zones Act[5] provides for benefits accruing to export processing zone enterprises, etc. The said section provides as follows:-

29 (1) The export processing zone enterprises, the export processing zone developers and the export processing zone operators shall be granted exemption from all existing and future taxes and duties payable under the Customs and Excise Act (Cap. 472) and Value Added Tax Act on all export processing zone imports for use in the eligible business activities of the export processing zone enterprise including machinery and equipment, spare parts, tools, raw materials, intermediate goods, construction materials and equipment, office equipment and supplies, and transportation equipment subject to the limitations on goods specified in the Second Schedule to this Act and according to the conditions specified in the Customs and Excise Act and the Value Added Tax Act.

(2) Subject to subsection (1) and without prejudice to any other written law, the export processing zone enterprises, export processing zone developers and the export processing zone operators shall be granted the following exemptions—

(a) exemption from registration under the Value Added Tax Act;

(b) exemption from the payment of excise duties as specified in the Customs and Excise Act (Cap. 472);

(c) exemption from the payment of income tax as specified in the Income Tax Act (Cap. 470) for the first ten years from the date of first sale as an export processing zone enterprise, except that the income tax rate shall be limited to twenty-five percent for the ten years following the expiry of the exemption granted under this paragraph;

(d) exemption from the payment of withholding tax on dividends and other payments made to non-residents during the period that the export processing zone enterprise is exempted from payment of income tax under paragraph (c);

(e) exemption from stamp duties on the execution of any instruments relating to the business activities of an export processing zone enterprise;

(f) exemption from quotas or other restrictions or prohibitions on import or export trade with the exception of trade in firearms, military equipment or other illegal goods;

(g) exemption from exchange controls on payments for—

(i) receipts of export processing zone exports;

(ii) payments for raw materials, intermediate goods, tools, and spares, supplies, construction equipment and construction materials, capital equipment, office equipment, repatriation of royalties, management fees, technology transfer fees, profits, dividends, advertising expenses, inspection fees for quality control, debt service and any other legitimate business expenses; and

(iii) capital transactions, except on capital funds raised from Kenya residents subject to exchange control in which case remittance of dividends, profits, debt service and any other returns to such capital invested shall be subject to the Exchange Control Act (Cap. 113);

(h) exemptions from rent or tenancy controls; and

(i) any other exemptions as may be granted by the Minister for the time being responsible for finance by notice in the Gazette.

Also relevant is section 167 of the East African Community Customs Management Act which provides that:-

167. (1) Subject to the Customs laws, goods in export processing zones or freeports, whether of foreign or of domestic origin shall be entered for—

(a) export after undergoing processing in an export processing zone; or

(b) re-export in the same state from a free port.

(2) Goods entering an export processing zone or a free port shall be exempt from duty in accordance with the Protocol.

The petitioner avers that it imported its goods under the above provisions and the Deputy Commissioner of the Respondent wrote a letter dated 16th February 2009 stating that "it has been decided that you pay taxes on the importation and after re-exportation and proof thereof, you lodge a refund claim voucher" and in compliance with the said letter the petitioner proceeded to pay taxes on consignments destined for free port and Export Processing Zones for export contrary to the above express provisions of the law. The petitioner states that the Respondent has been making piecemeal refunds but decided to invoke provisions of the local taxes thereby unlawfully denying the petitioner the said sum. The Respondent's refusal was based on reasons such as the claim is time barred, that the petitioner has not used the correct form for payment of taxes or that the voucher used for the claims does not have the correct code but as stated below, the reasons kept changing.

The petitioner avers that the demand for payment of taxes offends the provisions of law cited above and article 210 of the constitution and violates the right to fair administrative action under articles 47 & and also offends article 10 of the constitution.

The Respondent's case is that it imposed conditions pursuant to sections 106, 107 and 170 (2) of the East African Community Customs Management Act. This explanation differs from the reasons cited by the

Respondent in the above cited letter. The said letter which triggered this petition does not mention conditions at all. The East African Community Customs Management Act is an Act of the Community to make provisions for the management and administration of Customs and for related matters and section 167 cited above is very clear.

The Respondent also stated that the petitioner has not justified the refund claimed and that the details provided do not tally and are inconsistent and that the petitioner is ready and willing to pay the said sums subject to verification, hence the petition is premature. Again, valid as this point may appear, it was not mentioned in the letter cited above and one wonders why the Respondent has been shifting positions and giving different reasons.

Even though the letter complained of clearly refers to taxes, in a further affidavit filed on 26th August 2016 the Respondent avers that sections 106, 107 and 170 (2) of the East African Community Customs Management Act empowers the second Respondent to impose conditions on Export Processing Zone and states that that no taxes has been imposed but security for all imported raw materials and that such security is refundable to the petitioner upon exporting the finished goods, that the Respondent is yet to refund the "security" for the taxes to the petitioner because the petitioner has failed to furnish the commissioner with the relevant proof that the imported materials were exported as finished goods. To me, this is a further shift from the original position. In any event, the letter dated 16th September 2009 clearly states *"it has been decided that you pay taxes on the importation and after re-exportation and proof thereof..."* If at all, the intention was to impose conditions, then the Respondents could have stated so in clear terms in the said letter. The evident change of reasons and shifting positions leaves this court with serious doubts on the position taken by the petitioner which to Me is unreliable.

In a supplementary affidavit in response to the Respondents above averments, the petitioner avers that the Respondent cannot impose conditions which purport to impose or authorize taxation contrary to section 210 of the constitution and that the Respondent has no powers to impose taxes where the law expressly forbids nor can a condition be construed to mean taxes. It is also averred that under section 229 of the East Africa Community Customs Act is not applicable since the Respondent is only mandated to demand security while imposing conditions for the performance by the petitioner of its obligations as an Export Processing Zone registered firm.

Also in response to the inconsistencies referred to in the Respondents affidavit, the petitioner exhibited the documents marked as AKA in the replying affidavit, and explained that the petitioner could not export the same goods in the same quantity as when imported since orders were normally received from different clients in different countries for different quantities, but nevertheless, the final tallies corresponds with the imported quantities.

Petitioners counsels submissions.

Counsel for the petitioner reiterated the genesis of the dispute being the letter dated 16th February 2009 mentioned above and submitted that the petitioner is an importer at the Export Processing Zone, that it imports various electronic products and does processing for export out of the country as provided under the law and in particular the provisions of the law reproduced above.

Counsel submitted that the petitioner pursuant to the above provisions imported finished products, and then re-exported them to various markets in Africa as the regional distributor and cited the exemptions stipulated under the above provisions, hence the letter dated 16th February 2009 referred to above was in total violation of the above clear provisions of the law. Counsel referred the court to documents appearing at pages 2 to 18 in volume two of the petitioners bundle of documents which documents support the claims for tax refund. It is also submitted that that the petitioner complied with the initial notice requiring tax payment and lodged refund claim documents. Counsel reiterated that the consignments are imported into the country in various numbers and exported as per the market and at the point of release the customs officers notes the quantity as evidenced by the document at page 1082 in volume two and after the customs officers certifies the quantity, the consignment is sealed and exported.

Counsel referred the court to the letter appearing at page 1084, volume two of the petitioners bundle of documents in which the first Respondent stated that claims lodged after 12 months without reasonable grounds and those lodged after 24 months are disallowed in totality and insisted that in the supplementary affidavit the petitioner did attach all the supporting documents. Counsel also took issue with the position adopted by the first Respondent in the Replying affidavit which is a shift from the earlier position and the decision violates article 210 (1) of the constitution, and that there must be a provision of the law authorizing taxation. Counsel also submitted that under the law, the petitioner is exempted from VAT and Import Duty.

Counsel also invited the court to interpret the provisions of section 170 cited above in relation to this case as read with article 210 of the constitution and in particular submitted that the right to impose conditions does not include the right to impose taxes. Section 170 provides:-

170. (1) The Commissioner shall be notified in advance of any industrial, commercial or service activity authorized by the operator of an export processing zone or a free port.

(2) The Commissioner may impose conditions on the activities referred to in subsection (1), having regard to the nature of the goods concerned or the requirements of customs control.

(3) The Commissioner shall not permit any person who does not provide the necessary guarantees of compliance with the provisions laid down in this Act from carrying on any activity in an export processing zone in a free port.

Counsel also cited sections 106 and 107 of East Africa Community Customs Act and submitted that the first Respondents decision to impose taxes is not provided under the law, hence it is illegal. Counsel also submitted that the decision complained of offended Article 47 of the constitution and cited the case of *Kenafri Industries Ltd vs Commissioner of Domestic Taxes & Others*^[6] in which the case of *Dry Associates Ltd vs Capital Markets Authority & Another*^[7] was cited whereby the court held that administrative review is to be measured against the standards established by the constitution. Counsel urged the court to allow the petition and award interests at 19 % on delayed payment and also damages and costs of the case.

Respondents Counsels submissions

Counsel for the Respondents submitted that the letter dated 16th September 2009 was pre-2010 constitution and the letter was meant to secure security for taxes. I must point out that the letter is very clear and does not mention security at all. Counsel also submitted that the Respondent is no-longer raising the issue of the claim being time barred and stated that the dispute is whether the goods left the country. Again the issue whether or not the goods left the country was not mentioned or alluded to in the letter in question and one wonders why such a fundamental issue is being introduced at the eleventh hour if at all it existed. The picture painted is an attempt to shift from one position to another to evade the payment or justify a decision that has already been taken.

Counsel also submitted that security is provided for under sections 106 and 107 of East Africa Community Customs Act, and that Article 24 of the constitution provides for limitation of rights and that the Respondent has justified the limitation and that the Respondent has a duty to collect taxes and protect local goods and that the Respondents did not act against article 47 of the constitution and that the Respondent only insisted on production of certificate of exportation, hence the decision complained of is not unreasonable but is in line with article 20 (b) (1) of the constitution but the decision was within the law and that taxation is a burden imposed by the state. Further it was submitted that article 201 (b) (1) of the constitution provides that taxation should be shared equitably by all and the matter ought to have been referred to the tax appeals Tribunal. Counsel cited *Republic vs Kenya Revenue Authority* ^[8] and urged the court to refer the case to the Tribunal since it is the right forum.

Application of the constitution of Kenya 2010

The Respondent avers that the challenged letter is 'a pre-2010 letter'. My understanding is that the Respondent states that since it was written prior to the promulgation of the 2010 constitution, the provisions of the constitution do not apply to the decision complained of. However, Part two of the sixth schedule to the constitution is relevant. It is entitled 'Existing Obligations, Laws and Rights.' Rule 7 (1) provides that:-

(1) *"All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."*

(2) *If, with respect to any particular matter—*

(a) *a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and*

(b) *a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.*

The above provisions are clear. All law must conform to the Constitutional edifice. It follows that the Respondents' action now the subject of this petition must meet constitutional threshold prescribed by the constitution. In *The Law Society of Kenya vs The Kenya Revenue Authority & Another* [9] I observed that 'our Constitution is highly valued for its articulation. One such astute drafting is the fact that the Constitution of Kenya gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law.' [10]

Jurisdiction

On jurisdiction **Article 165(1)** of the Constitution establishes the High Court and vests in it vast powers including the power to 'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened' and the jurisdiction 'to hear any question respecting the interpretation of the Constitution.' **Article 23** provides that; "23. (1) *The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*"

Article 165 (6) provides that "The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function." Article 165 (7) provides that "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."

Article 2(1) of the Constitution provides that '*This Constitution is the Supreme Law of the Republic and binds all persons ...*' **Article 260** defines person to include company, association or other body of persons whether incorporated or unincorporated. **Article 259** of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under **Article 159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. The provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. [11] The Constitution of Kenya gives prominence to national values and principles of governance. Article 10 (2) of the Constitution provides the national values and principles of governance which include integrity, transparency and accountability.

Still on jurisdiction, I find it fit to recall the words of Atkin, L.J. who summed up the law on this point in *Rex vs. Electricity Commissioners* [12] when he said:-

“Whenever anybody or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”

On reliefs available from this court, Article 23 (3) provides that the court may grant appropriate relief including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right, compensation and an order of judicial review.

The constitution has expressly granted the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50.

Any decision making process that does not adhere to the **constitutional tests** either on constitutional rights or on procedural fairness, cannot stand court scrutiny.

A statutory body is bound to adhere to mandate stipulated in the statute creating it and its actions must conform to the constitutional prescriptions as clearly provided in our transformative constitution. As **Sedley J** put it in *R vs Somerset CC Ex parte Dixon*(COD)[13]:-

"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."

Broadly, in order to succeed, the applicant will need to show either:-

*a. the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; **or***

*b. a decision or action that has been taken is '**beyond the powers**' (in latin, 'ultra vires') of the person or body responsible for it.*

Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be **"illegal."** Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers. Upon clear construction of the relevant provisions of the law cited above, I find that the first Respondent acted outside their powers as stipulated under the law.

Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. The body must act impartially, and the decision must conform with the provisions of article 47 of the constitution. The decision in question must not be arrived at arbitrarily and must meet the constitutional threshold of fairness. I find that the decision complained of does not meet the foregoing constitutional threshold and that it cannot meet the **rationality and proportionality** test.

Courts must intervene to quash a decision if it is considered to be demonstrably unreasonable as to constitute **'irrationality'** or **'perversity'** on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*[14]:-

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

The role of the court is to ensure that public bodies do not exercise their powers unlawfully. Considering the facts of this case, the law and the authorities as enumerated above, I find that the Respondents acted outside their statutory powers. The provisions of the law cited above clearly demonstrate that the petitioner enjoyed benefits conferred by the law which include exemption from payment of the taxes in

question. I also find that no reasonable basis has been offered by the Respondents as to why the amounts claimed cannot be paid.

As Lord Russel of Killowen in *Inland Revenue Commissioner vs. Duke of Westminster* [15] stated that:- “.....The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case”

The provisions cited earlier exempt the petitioner from taxation. The letter complained of mentioned of taxes. The letter was not backed by any provisions of the law. In *Partington vs. Attorney General* [16] the House of Lords that:- “As I understand the principle of all fiscal legislation it is this: if the person sought to be taxed, comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.”

I find that the Respondent has not demonstrated that the petitioner who is exempted from taxation under the law comes within the letter of the law to justify the Respondents claim or refusal to refund the amounts in question.

The upshot is that I find that this petition has merits, hence I allow the petition and enter judgement as follows:-

1. ***That*** a declaration be and is hereby issued declaring that the Respondents' demand requiring the petitioner to pay taxes on goods destined for the Export Processing Zone for export was unlawful and contrary to the express provisions of the East African Community Customs Management Act and the Export Processing Zones Act and therefore illegal, null, void and unconstitutional.
2. ***That*** a declaration be and is hereby issued that the demand for taxes on goods destined for the Export Processing Zone and subsequent rejection of the petitioners claim for refund of the amounts claimed in the petition is unlawful, arbitrary and a violation of the petitioners rights to property guaranteed under Article 40 and a violation of Article 210 of the constitution.
3. ***That*** an order be and is hereby issued directing the Respondents, their agents and or servants to refund to the petitioner the sum of **Ksh. 13,895,951/=** import Duty and **Ksh. 16,818,073/=** value added tax being the sums unlawfully collected from the petitioner which sums were not payable under the provisions of the East African Community Customs Management Act and the Export Processing Zones Act.
4. ***That*** further and or in the alternative judgment be and is hereby entered in favour of the petitioner against the Respondents jointly and severally for the total sum of **Ksh. 30,714,024/=** plus interests thereon at court rates from the date of filing suit until payment in full.
5. ***That*** the Respondents do pay to the petitioner the costs of this petition plus interests thereon from date of taxation.

Orders accordingly.

Dated at Nairobi this 24th day of March 2017

John M. Mativo

Judge

[1] Cap 517, Laws of Kenya

[2] Ibid

[3] Ibid

[4] Ibid

[5] Ibid

[6] Pet No. 99 of 2011

[7] Pet No. 328 of 2011

[8] Pet No. 393 of 2014

[9] Pet No. 39 of 2017

[10] Article 10 (1) (a)-(e)

[11] See *Tinyefunza vs A G of Uganda*, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[12] 1924-1 KB 171 at p.205 (C)

[13]{1997} Q.B.D. 323

[14] {1948} 1 K. B. 223, H.L.

[15] {1936} AC 1 24

[16] {1869):- 4 HL 100, 122