



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 4 OF 2014

**IN THE MATTER OF: ARTICE 22 (1) OF THE CONSTITUTION OF
THE REPUBLIC OF KENYA**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 10, 47, 48, 50 AND 73 OF
THE CONSTITUTION OF THE REPUBLIC OF
KENYA**

CIVICON LIMITED PETITIONER

VERSUS

KENYA REVENUE AUTHORITY 1ST RESPONDENT

KIVUWATT LIMITED 2ND RESPONDENT

JUDGMENT

Issue

0. By its ruling herein dated 5th May 2014, the court partially granted the 2nd Respondent's application for the striking out of the petition, to the extent that the issues of contractual claims by the Petitioner against the 2nd Respondent and the claim of a lien over the 2nd Respondent's Separator machine of both which were the subject of court rulings in previous proceedings before the High Court in HCC NO. 36 of 2013 and HCC NO. 117 of 2013, respectively, shall not be dealt with in this petition. There then remained only the aspect of petition on the validity of the consent letter dated 18.11.2013 between the Respondents to proceed to hearing.

Background

0. It is common ground that the Petitioner, which operates a transit godown in Mombasa in which the 2nd Respondent's machine known as a Separator was stored on transit to Rwanda. The Petitioner claimed a lien over the Separator for contractual claims and handling charges against the 2nd Respondent, and has sued the 1st Respondent authority challenging as unconstitutional breach of its right to property a consent entered by the authority with the 2nd Respondent purporting to authorize release of the said Separator machine to its owner the 2nd Respondent in a suit filed for that purpose by the 2nd Respondent against the authority, being *Mombasa High Court Civil Suit Number 117 of 2013: KivuWatt Limited versus The Commissioner, The Kenya Revenue Authority, Customs Services Department*. Earlier, the Petitioner had unsuccessfully sought to be joined in the aforesaid suit.
0. The Petitioner unsuccessfully sought an injunction, in a previous suit *Mombasa High Court Civil Suit Number 36 of 2013: Civicon Limited versus KivuWatt Limited*, to restrain the 2nd Respondent herein from taking over any of its assets in the possession of the Petitioner pending arbitration of the dispute in accordance with construction contracts between the parties. The court (Muya, J), refused the injunction and stayed the suit pending the hearing and determination of arbitration proceedings in accordance with the contracts.
0. As I found in the ruling of 5th May 2014, the court in which the consent letter of 18.11.13 was filed for adoption (in HCCC 117 of 2013) did not deal with the issue of '*the propriety, legality, constitutionality or lack thereof of the consent*'. The court (Kasango, J) did however determine the question of the Petitioner's lien over the Separator in the ruling of 18th December 2013 in HCC No. 117 of 2013. Accordingly this court in its ruling, took the view that the issue of Petitioner's lien cannot be reopened by constitutional petition but only by appeal to the Court of Appeal or by application for review before the High Court.
0. I therefore found that as the twin issues of the Petitioner's contractual claims for dues and equipment against the 2nd Respondent and the claim to a lien over the Separator machine have already been determined by the High Court in the previous suits respectively HCC No 36 of 2013 and HCC No. 117 of 2013, the same cannot be re-litigated by way of the constitutional petition now before the court and that the only issue which remains valid in the petition is whether the Respondents could lawfully enter into a consent for the release of the Separator machine without involving the Petitioner who has undisputed right to charge storage and handling charges over the property.

The facts

0. The petition is supported by the affidavit of Allan Arthur Munyua of 31.12.2013 and the Respondents have responded to it by replying affidavits of Ratemo Mokuwa of 24.1.2014 and Nick Biketi of 9.1.2014, respectively.
0. It is not disputed that the Separator was taken into the custody of the Petitioner, a transit warehouse licenced by the 1st Respondent, through a letter dated 17.10.12 by the 2nd Respondent's agent requesting that the Petitioner stores the cargo pending transportation to Rwanda. Consequently, the Petitioner issued its letter of the same date confirming to the 1st Respondent that the goods were stored in a transit shed. The Separator has been stored in the transit shed all along this litigation relating to its release through the various cases filed in court.

Submissions

0. Counsel for the Petitioner, Mr. Kashindi, presented a two-fold argument that being the licenced operator of the Transit shed, it was entitled to be consulted by the 1st Respondent authority in the formulation of the consent letter on account of the accrued storage and handling charges with respect to the storage of the machine the subject of the consent and on account of legitimate expectation and fair administrative action under Article 47 of Constitution. The Petitioner pointed to section 42 (8) of EACCMA as the statutory basis for storage and handling charges under the 'other charges' payable before release of goods, and submitted that even if no money was payable to the owner of the transit shed, the 1st Respondent had no statutory power to order physical

release of goods in transit.

0. The 1st Respondent's case was that the petition was misconceived having been based on misapprehension of the terms and effect of the consent letter of 18.11.13. Conceding that the 1st Respondent had no statutory authority to grant physical release of goods, it was contended that the consent did not and could authorize the physical release of the Separator but only confirmed its release on the electronic customs system. The 1st Respondent's counsel, Mr. Ado, explained the consent as necessary only to have the suit formally marked as settled subject to payment of the 1st Respondent's costs in the suit which had been filed by the 2nd Respondent without just cause as the 1st Respondent had already effected systems release of the Separator long before the filing of the suit in *HCCC No. 117 of 2013*. **It was emphasized that the release referred to in the consent letter of 18.11.13 was stated to be in accordance with section 42 (8) of the East African Community Customs Management Act which provided for customs release only. It was also conceded that 'the Petitioner as an owner of a Transit Shed is entitled to handling charges [and] that the payment of the handling charges is by the importer and can only be made after release by the Commissioner (1st Respondent) of the cargo in question.'**
0. For the 2nd Respondent it was argued by its counsel, Mr Ongoya, that there was no dichotomy on the meaning of release in the consent letter of 18.11.13 and that the same could only mean physical release in context of the suit HCCC 117 of 2013. As regards the charges sought by the Petitioner, it was submitted there was no provision for the levy of the charges in the law and regulations applicable and the Petitioner had based its claim to the storage and handling charges on the contractual relationship between the parties and that whether the claim had merit was the subject of the arbitration proceedings in Switzerland. Counsel for the 2nd Respondent contended that the 2nd Respondent had paid warehouse rent to the 1st Respondent in accordance with section 43 of the EACCMA pursuant to the declaration by the Court in HCCC NO. 117 of 2013 that the 1st Respondent was the owner of the warehouse and there was no basis for the payment of any further charges. It was further contended that the Petitioner had not prayed for the payment of the charges by particularizing them and claiming the amount of the charges, and that the Petitioner should have proved the charges first as a basis for challenging the consent, citing *Bernadette Wanjiku Kimani v. Cheboi*, Nakuru HCCC No. 373 of 2008 for the proposition that special damages must be specifically pleaded and proved. The 2nd Respondent contended further that the Petitioner had failed to demonstrate how any of the constitutional rights cited in the petition had been violated or threatened in relation to it.

Findings

0. Whether the consent letter of the 18.11.13 will be adopted as an order or judgment of the court is a matter for the court before which the relevant suit HCCC No. 117 of 2013 is heard. This court sitting as a constitutional court cannot direct or supervise the High Court sitting in the commercial and tax division or any other division to adopt or reject the consent letter entered between the parties.
0. The issue of a lien over the Separator has been determined by the decision of Kasango J in HCCC NO. 117 of 2013; the same cannot be raised in the present constitutional petition. The issue of contractual charges between the parties were the subject of HCCC NO. 36 of 2013 in which an injunction to stop the 2nd Respondent herein from taking over the Separator was declined for want of jurisdiction in view of arbitration clause binding the parties.
0. This court sitting as a constitutional court may only pronounce itself on the validity of the consent in terms of its effect on the Petitioner's rights and fundamental freedoms where these are violated or infringed by the terms of the consent or its operation. And the question before the court, therefore, is - what is the effect of the consent letter of 18.11.2013: is it an infringement of the Petitioner's rights, or can the Petitioner's rights be achieved and protected regardless of the consent?
0. The Petitioner submitted that its possession of the Separator was contractual following upon the 2nd Respondent's request by letter of its agent of 17.10.12. If the charges were based on contract, then they must be the proper subject of the arbitration proceedings in Switzerland and in view of

the Court order in HCCC NO. 36 of 2013, they cannot be re-litigated in the constitutional petition to support the challenge on the consent letter of 18.11.13.

0. The Petitioner did not specifically plead and prove the storage and handling charges and clearly demarcate these charges as based on statute or contract. The Petitioner simply pleaded at paragraphs 15-16 of the petition that –

“15. By virtue of its capacity as (i) the owner of the transit godown and (ii) its contractual relationship with KivuWatt, an equipment known as a Separator was imported and deposited in Civicon’s transit godown on 18.08.12 or thereabouts and has remained so deposited.

16. Consequently, the Separator has attracted, and continues to attract various charges payable to Civicon with effect from 18.08.12 until the date of payment. The amount outstanding as of 17.12.13 from KivuWatt stood at the sum of United States Dollars 72,750. In addition, there are outstanding loading transport, security and related charges that have accrued and which remain unpaid.”

No particulars were given with regard to basis of the charges, the applicable rates and computation of the 72,750 US Dollars claimed.

0. If the claim for charges was based on statute, the Petitioner should have pointed to the section of the law or regulations that prescribed the charges and also plead the amount of such charges as at the date of the petition to which the Respondents would respond in their replying affidavits. The admission by the 1st Respondent that the Petitioner would be entitled to storage and handling charges did not admit that the charges were statutory and payable to the extent claimed. Before the Petitioner could assert a right of ownership over the charges, it ought to have established that such charges were due and payable, even if final assessment and payment were to be done when the 2nd Respondent sought to take the Separator machine from the Petitioner’s Transit shed.
0. Accordingly, I find that the Petitioner has not proved that it is entitled under the applicable statute or regulations to the storage and handling charges over and above the rent charges payable under section 42 of the East African Community Customs Management Act (EACCMA). The Petitioner may be entitled to the payment of such charges under the contractual arrangement between it and the 2nd Respondent on the basis of its acceptance of the request by the 2nd Respondent’s agent by letter of 17.10.12 to allow the temporary storage of the Separator and give acceptance letter to the 1st Respondent. As contractual dues they would have to be proved under the pending arbitration. Having found that the charges claimed by the Petitioner have not been proved, it cannot be said that the Petitioner’s right to property has been infringed by a consent letter seeking to have the Separator released. In view of the pending arbitration proceedings, it also cannot be said that the Petitioner has been denied an opportunity to recover its proved claim.
0. As regards the consent letter of 18.11.13, there is contention between its makers on the understanding of the word ‘release’. The 1st Respondent contends that it gave its consent to the only release it could give- which is a customs systems release and not actual physical release. The 2nd Respondent contends that the suit HCCC 117 of 2013 was about physical release of the Separator and the consent must be understood in the context of that suit. That is a matter for the court hearing HCCC NO. 117 of 2013 to determine in reaching a decision whether to accept the consent letter and adopt it as the judgment of the Court. This court cannot dictate its view to any other High Court sitting in any division or station.
0. It follows however that if the 1st Respondent intended and only consented to a customs release of the Separator, it need not have consulted the Petitioner over a transaction that only it was involved – the systems release of the cargo to facilitate the actual release of the goods after 2nd Respondent approached the Petitioner for that purpose. In these circumstances, the Petitioner cannot be heard to say that its right to fair administrative action under Article 47 of the Constitution and legitimate expectation to be consulted before such a consent was drawn, had been infringed. The subject matter of the consent – the systems release of the goods did not concern the owner of the transit shed where the goods were physically stored. Moreover, as contended by counsel for the 1st Respondent, if the consent to release was subject to the provision of section 42

- (8) of the Act, no prejudice would be suffered by a systems release.
0. On account of its foregoing findings, the court does not find it necessary to make a finding as to whether the 1st Respondent has statutory power to grant or enforce a physical release of goods.

Order

0. Accordingly, for the reasons set out in this judgment, the court makes the following determinations:
 1. The Court does not find that the Petitioner's constitutional rights have been infringed or that they are likely to be infringed as alleged by the Petitioner with respect to the consent letter the subject of the petition.
 2. The court, therefore, declines to interfere with the consent letter dated 18.11.2013 entered into between the 1st Respondent and the 2nd Respondent with respect to both the parties' right to enter into an agreement compromising a suit and the specific content of the agreement.
0. The Petitioner will pay to the Respondents the costs of the petition.

EDWARD M. MURIITHI

JUDGE

Dated and delivered this 25th day of June, 2014.

MARY KASANGO

JUDGE

In the presence of:

Ms Obala holding brief Kashindi for the Petitioner

Mr. Miketi holding brief M. Ado for the 1st Respondent

Mr. Miketi for the 2nd Respondent

Mr. Ibrahim - Court Assistant