



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Application 17B of 2012

**IN THE MATTER OF : AN APPLICATION FOR JUDICIAL
REVIEW ORDER IN THE NATURE OF MANDAMUS**

AND

**IN THE MATTER OF : THE PROVISIONS OF THE
CUSTOMS & EXCISE ACT**

**IN THE MATTER OF : THE PROVISIONS OF THE LAW
REFORM ACT (CAP. 26 OF THE LAWS OF KENYA)**

BETWEEN

REPUBLICAPPLICANT

V E R S U S

**THE COMMISSIONER OF CUSTOMS SERVICES
KENYA REVENUE AUTHORITY RESPONDENT
EX PARTE: UGANDA PROPERTY HOLDINGS LIMITED**

JUDGEMENT

1)These Judicial Review proceedings invites this Court to discuss the scope of the power of The Commissioner of Customs Services to appoint or revoke an appointment of an Internal Container Depot. The Exparte Applicant having obtained the leave of Court on 31st July 2012 seeks the following orders in the Motion of 1st August 2012-

(i) An order of Mandamus to compel the 1st Respondent to de-gazette the license issued to CPC Freight Services Limited on Plot 2448, Makupa Causeway in Mombasa owned by the Applicant herein.

(ii) An order of Mandamus to compel the Respondent to issue a license to Unifreight Cargo Handling Limited – Port Freight Terminals Limited to an Inland Depot on Plot 2448, Makupa Causeway Mombasa owned by the Applicant.

2)The facts of the dispute are not so involved. The Applicant owns Plot No. 2448 at Makupa Causeway, Mombasa. It leased this property to CPC Freight Services Ltd (CPC) for five years. It is common ground

that The Commissioner of Customs Services appointed CPC to operate an Internal Container Depot/Container Freight Station. That appointment which is dated 17th July 2009 shows the limit of area to be Plot No. 2448 Makupa Causeway, Mombasa.

3) As sometimes happens, relationships between landlords and tenants turn sour. So it did between the Applicant and CPC. Following some Arbitral proceedings, the Applicant was able to successfully terminate the tenancy with CPC. The Applicant thereafter informed the Commissioner of this development and in a letter of 29th June 2012 made the following specific request-

“It is our conviction that the earlier license was given to CPC Freight Services Limited after proof that they had an existing lease agreement from UPHL for the facilities, therefore upon termination of the same, the license automatically ceased since the license would not continue running without the facilities.

The purpose of this letter therefore is to request you to de-gazette the existing license in the names of CPC Freight Services Limited for the inland car port on Plot 2448, Makupa Causeway in Mombasa, Kenya to enable the new tenant for the same facility (M/s Unifreight Cargo Handling Limited – Portside Freight Terminals Limited) obtain a licence to operate a Transit Shed on Plot 2448, Makupa Causeway, Mombasa, Kenya.”

4) It is the contention of the Commissioner that it could not oblige to the request by the Applicant for the following reasons:-

(i) No application for de-gazettement had been

received from CPC.

(ii) No application as contemplated by regulation

57(1) of The East African Community Customs Management Regulation 2006 had been received from Unifreight Cargo Handling Limited for consideration.

The Commissioner communicated its decision to the Applicant vide a letter of 16th August 2012. That letter says the following, in part-

“We have noted the legal problems you have had with your tenant. However, we wish to inform you that we can only de-gazette the facility upon application for the same by the gazetted transit shed operator M/s CPC Freight Services Ltd.”

These proceedings are a reaction to that letter.

5) In replying to the application the Commissioner reaffirmed the position it had taken earlier and in addition doubted that the Applicant demonstrated sufficient interest to bring these proceedings as it is not the entity seeking to be gazetted as a transit shed operator. That entity is Unifreight. The Applicant had explained that Unifreight was its new tenant on Plot 2448 and that-

“The refusal to de-gazette the said licence has made it hard and/or difficult for the Applicant to effectively carry out business/deal with the present client on the premises since the present company can not be licenced and/or has not been licenced by the Respondent due to the existence of the previous licence.”

6) This determination will start by testing whether or not the Applicant has demonstrated sufficient interest. This is a question as to whether the Applicant has standing to bring these proceedings. It is observed that although leave was granted to take out these proceedings, the Commissioner is perfectly entitled to take up the issue of sufficiency of interest at the substantive hearing. At the permission stage the Court is simply concerned with whether the Applicant presents an arguable case. It may not be the

occasion, save for obvious cases, for the Court to decide the question of standing. This does not, however, preclude the Court from considering the question once raised at the substantive hearing. That question now taken up by the Commissioner is alive for determination.

7) The approach to be taken in determining this question as correctly proposed by the Applicant is a liberal approach. This is what Justice Nyamu said of it in **Mureithi & 2 Others –Vs- The Attorney General & 4 Others KLR (EA) 707-**

“Judicial Review Courts have generally adopted a very liberal approach on standing for the reason that judicial review is now regarded as an important pillar in vindicating the rule of law and constitutionalism. Thus a party who wants to challenge illegality, unreasonableness, arbitrariness, irrationality and abuse of power just to name a few interventions ought to be given a hearing by a Court of law.”

But, as usual, each case must turn on its own facts and circumstances.

8) If I understood the Applicant well, and I hope I did, its argument is that from a commercial viewpoint a prejudice to its tenant affects it as a landlord. This is how the Applicant submitted on this point-

“It is therefore our submission that it doesn’t matter what type of interest but the fact that the subject of the whole issue is a premise belonging to the ex-Applicant which (sic) for business purposes. Therefore failure to deregister the former company remains an injury to the owner.”

From a commonsense point of view a landlord benefits if its tenants business flourishes. When this happens the tenant is more likely to meet its tenancy obligations. I would accept therefore that if Unifreight is prejudiced because of a lack of licence then that prejudice could infect its relationship with its landlord, the Applicant. So although the decision of the Commissioner may not affect the Applicant directly it nevertheless encroaches on its interests as a landlord indirectly. I hold the view that the Applicant has demonstrated sufficient interest but I must wonder why Unifreight who would be directly aggrieved did not commence these proceedings alone or in partnership with the Applicant. So much for the question of locus standi!

9) The issues, as I see them, that now must be determined are as follows-

(a) What is the procedure for the revocation of a licence for an Internal Container Depot issued by Commissioner?

(b) Has the Commissioner breached that procedure?

(c) Is there a proper application by Unifreight for the Commissioners consideration?

10) The authority for the Commissioner to revoke a licence

for an Internal Container Depot is found in Section 14(1) and (2) of East African Community Customs Management Act (hereinafter ‘EACCMA’). These provide as follows-

“(1)The Commissioner may, on application,

license any internal container depot for the deposit of goods subject to Customs control, and the Commissioner may refuse to issue any such licence and may at any time revoke any licence which has been issued.

(2)The Commissioner shall give reasons for his or her refusal to grant a licence or for revoking a licence under subsection (1).” (my emphasis)

11) These provisions should be read in conjunction with

Section 12 of the same Act which gives power to the Commissioner to revoke the appointment of any customs area if he or she is satisfied that the conditions imposed for the grant have not been complied with. For full effect the entire Section is reproduced below-

“12(1) The Commissioner may, by notice in the Gazette, appoint-

(a) boarding stations;

(b) Customs areas;

(c) Sufferance wharves;

(d) Places for the landing and embarkation of persons;

(e) Places for the examination of goods, including baggage;

(f)

Roads or routes in a Partner State over which goods in transit, or goods transferred between the Partner States, shall be conveyed;

(g) Entrances and exits, whether general or special, to and from any Customs area or Customs airport within a Partner State;

(h) Transit sheds;

(i) Internal container depots.

(2) An appointment made under Subsection (1) may be subject to such conditions, including the provisions of suitable accommodation for officers, as the Commissioner may deem fit; and the Commissioner may, in any particular case and subject to such conditions as he or she may deem fit, permit any boarding station, area, wharf, place, road, route, entrance, or exit, to be used as if it had been so appointed and in any such case this Act shall apply thereto as if it had been so appointed.

(3) The Commissioner may by notice in the Gazette revoke appointment of any Customs area if he or she is satisfied that the conditions imposed under Subsection (2) have not been complied with.”

(my emphasis)

12)The procedure to be adopted by the Commissioner in

revoking a licence are not detailed by statute. But Section 14(2) requires he/she to give reasons therefor. The Commissioner is by law obliged to observe the rules of natural justice and has a Constitutional obligation under Article 47 of the Constitution 2010 to adopt a procedure that is expeditious, efficient, lawful, reasonable and fair.

13)To see whether an occasion has arisen to warrant the

revocation of a licence, one must necessarily look at the conditions imposed upon the grant of a particular licence. From the reading of Section 12 & 14 of EACCMA and Regulation 57 of The East African Community Customs Management Regulations, the licence issued is premises specific. Regulation 57 provides as follows-

“An application for the licensing of premises as an Internal Container Depot shall be made to the Commissioner in Form 22.” (my emphasis)

Indeed the licence issued to CPC specified the place appointed as a transit shed. It was-

“The area on Plot No. 2448 Makupa Causeway, Mombasa, within the area bounded by, perimeter wall marked ‘A’ of the Architectural drawing deposited in the office of the Commissioner.”

14) It is not in dispute that Applicant took back possession

of Plot No. 2448 and is no longer available for use by CPC. It seems that an occasion may have arisen requiring the licence issued to CPC to be revoked. I am unable to accede to the suggestion by the Commissioner of Customs Services contained in her letter of 16th August 2012 that the licence to CPC could only be degazetted upon CPC itself applying for degazettment. Having said that the decision as to whether or not to revoke the licence rests in the discretion of the Commissioner and this Court cannot direct him/her on the manner to exercise it. It is nevertheless the view of this Court that where, like here, the Commissioner is alerted that there may be a breach of condition imposed on a licence then the Commissioner has a public duty to consider and follow up on the alert. This duty is even greater where the alert does not appear to be frivolous. In this case the alert was from the landlord of the licensee informing the Commissioner that the lease over the appointed premises had been terminated. Although I am unable to issue an order of mandamus to compel the Commissioner to degazette the licence issued to CPC Freight Services Ltd, this Court shall in its final orders and discretion be directing the Commissioner to consider whether an occasion has arisen requiring the revocation of that licence.

15) The second request of the motion is even more difficult

to grant. The Court is asked to compel the Commissioner to licence Unifreight. This request is untenable for two reasons. First it has not been shown that Unifreight has indeed applied for the licence as required by the law. Regulation 57(1) of EACCM Regulation requires that an application for the licensing of premises or an internal container depot is made in a specific form. The Applicant has not proved that Unifreight has complied with this procedure. Second, even if there was a proper application before the Commissioner the Court cannot interpose to direct the Commissioner on how it should process the application. The discretion as whether or not to grant or refuse the licence is given to the Commissioner under Section 14

of EACCMA. This Court cannot usurp that discretion. This Court will only intervene when it is demonstrated that the Commissioner has acted in excess or without jurisdiction or in an unreasonable manner. The Applicant has not shown that the Commissioner is guilty of any of these.

16) These now are my orders. I decline to grant prayers 1

& 2 of the motion dated 1st August 2012 and fled on 7th August 2012. I however direct the Commissioner of Customs Services to consider whether an occasion has arisen requiring the revocation of the licence issued to CPC Freight Service Ltd in respect to Plot No. 2448 Makupa Causeway Mombasa. The Commissioner to do so within 6 months of today.

17) Each party to bear its own costs.

Dated and delivered at Mombasa this 27th day of February, 2013.

**F. TUIYOTT
JUDGE**

Dated and delivered in open court in the presence of:-

Lumatete for Exparte Applicant

Miss Kariuki for Miss Mwaniki for Respondent

Court clerk - Moriasi

**F. TUIYOTT
JUDGE**