



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Petition 447 of 2012

BETWEEN

RICARDO EPZ INTERNATIONAL COMPANY LTD ..... PETITIONER

AND

KENYA REVENUE AUTHORITY..... 1<sup>ST</sup> RESPONDENT

THE HON ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT

JUDGMENT

Introduction

1. The petitioner (“Ricardo”) is a limited liability incorporated under the provisions of the *Companies Act (Chapter 486 of the Laws of Kenya)*. It undertakes its business within the Import Processing Zone within the provisions of the *Export Processing Act (Chapter 521 of the Laws of Kenya)*.
2. Kenya Revenue Authority (“KRA”) is incorporated under the provisions of **section 3** of the *Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)* and is responsible for the collection of taxes in the country. It administers the *East African Community Customs Management Act (“EACCMA”)* which governs the administration and collection of customs duty.
3. One of the benefits conferred on companies carrying on business within the Export Processing Zone (EPZ) is that licenced companies are entitled to import raw material duty free to manufacture goods for export. In order to ensure that the goods are not directed for home use, the company is required to execute a bond in favour of the Kenya Revenue Authority (KRA) when goods are being moved from one place to another. For this purpose, the control of movement of goods is secured by requiring the company to fill a statutory form C17 which shows the records of goods imported and exported. The company is subjected to inspections and audits to ensure compliance with the statutes and to ensure that revenue is protected. Upon being licenced, the company is issued with a personal identification number (PIN) which enables it transact business.

Petitioner’s Case

4. Ricardo’s case is that in March 2012, persons unknown utilized its security bond without its consent through misrepresentation and outright fraud illegally imported a consignment and goods under the pretext that the goods were being imported by the Ricardo.

5. Ricardo states that it reported the matter to the police station at the EPZ and at the same time lodged a complaint with KRA. In a turn of events and without legal justification Ricardo contends that KRA illegally withdrew the petitioner's PIN without affording the petitioner the right to be heard and without notice or any written reasons contrary to **Article 47(1)** of the Constitution which guarantees the right of fair administrative action.

### **Repondent's Case**

6. KRA denies that it violated the petitioner's fundamental rights and freedoms. According to the affidavit of Joyce Munene sworn on 19<sup>th</sup> November 2012, KRA conducted an audit in August 2012 following irregular cancellation of bonds without evidence that goods had arrived at the EPZ. The wide ranging audit confirmed, *inter alia*, that out of the 32 consignments imported, Ricardo could not account for 7 of them and that 25 of these consignments had not been accounted for either as exports made or stock in trade even after contacting Ricardo's account.

### **The correspondence**

7. By a letter dated 10<sup>th</sup> September 2012, KRA wrote to Ricardo to account for the various consignments imported by it under the duty free status. Ricardo responded to the letter by its letter dated 12<sup>th</sup> September 2012 stating that it was able to account for 16 out of 26 entries. The explanation was not satisfactory to the KRA and it sent a further letter dated 17<sup>th</sup> September 2012. The letter stated as follows;

**The Managing Director,**

**17<sup>th</sup> September 2012**

**Ricardo EPZ International Co. Ltd  
Athi River EPZ**

Dear Sir,

### **RE: DEMAND FOR TAXES KSHS.41,566,166/00**

Reference is made to the above subject and our letter dated 10<sup>th</sup> September 2012 in which we required you to account for the various consignments imported by you under your duty free status. We note that you have only produced documents showing receipt of some of the subject consignments but have produced no evidence at all of any export of finished goods or indeed accounted for the raw materials imported by yourselves. This constitutes a gross breach of the customs laws and regulations and further the conditions of your security bond. Having not accounted for the goods you are deemed to have diverted the same to the local market and this constitutes an offence under section 168(4) of the East African Community Customs Management Act. Further your obligations under the Security Bond are due and the bond amount is payable to the commissioner of customs.

You are hereby required to pay the commissioner of customs Kshs.41,566,166/00 as tabulated on the attached schedule within 14 days hereof failure to which further enforcement measures shall be taken against and without further reference to you.

**J Kaguru**

**FOR: Senior Assistant Commissioner, Investigation & Enforcement**

8. There is no indication, that there was a response to the letter dated 17<sup>th</sup> September 2012 to answer the specific queries but what followed was a demand letter dated 26<sup>th</sup> September 2012 by *Messrs Khaminwa and Khaminwa Advocates* after KRA had set in motion enforcement measures set out in the letter dated 17<sup>th</sup> September 2012. The letter stated as follows;

**Investigations and Enforcement  
Kenya Revenue Authority  
NAIROBI, KENYA**

Dear Sir,

**RE: RICARDO (EPZ) INTERNATIONAL COMPANY LIMITED**

We act for the above named EPZ Company. This company was incorporated about two years ago and it has employed up to 800 Kenyans. This said company has been messed up by fraudulent acts of unknown individuals but whom we believe that yourselves using its investigation machinery should be able to trace and identify.

Our client's efforts to give meaningful responses to your enquiries have proved difficult because the work force of 800 employees through the union is currently on strike. Our client believes that its inability to operate effectively has been hampered by the withdrawal of the PIN number which has led to all operations being paralyzed.

Perhaps, we should add that our client was not given a hearing before the PIN was withdrawn. Our client also submits that there was absolutely no reasonable ground for KRA to withdraw the PIN number. The characters responsible for the fraudulent acts should be traced by KRA. The claim of Kshs. 41,566,166/= which has absolutely no basis and no justification in law. However, without prejudice to the aforesaid our client is prepared to co-operate in investigations so that those responsible for loss of revenue are caught and brought to justice.

This can only be possible if our client's PIN number is re-instated so that normal operations of the Company are resumed and the labour is re-instated. We hesitate to state that the closure of the Company by KRA is illegal and contrary to the law. We are willing to meet you as legal advisers of our client so that an amicable practical solution is found and our client is able to remain in business in order that litigation is avoided. Our Dr Khaminwa will see you this afternoon in view of the urgency of this matter.

Many thanks

Yours faithfully,

**(Signed)**

**Dr. John M Khaminwa**

**The issue for determination and arguments**

9. From the bare facts outlined above, the issue for consideration is whether the Ricardo's right to fair administrative action guaranteed under **Article 47(1)** have been violated. Such an inquiry is not for merits but of determination of the legality or fairness of the process Ricardo does not dispute the right of KRA to conduct the audit but contends it was not given a fair hearing in the process.

10. Dr Khaminwa, learned counsel for the petitioner, submitted that the Ricardo's main complaint is that the denial of a fair hearing under **Article 50**. He contended that it was not given a fair hearing in public as such its conduct violated the Constitution. Counsel further submitted that KRA must exercise its powers in accordance with the Constitution and its values and in the circumstances of the case, it acted arbitrarily particularly given that the enforcement of measures contained in the letter dated 17<sup>th</sup> September 2012 were drastic and punitive.

11. The respondent on its part contends that it acted in accordance with the law and statute. Mr Nyaga, learned counsel for the KRA, submitted that the evidence is clear that Ricardo had violated the

terms of its licence and the act of withdrawing the PIN was neither irrational nor arbitrary.

### **The Determination**

12. Although Dr Khaminwa made oral submission on the application of **Article 50** of the Constitution to this case, I do not think that this provision is applicable. In **Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011**, I stated as follows, “[62] *Article 47 and 50(1) protect separate and distinct rights which should not be conflated. Although the two rights embody and give effect to the general rules of natural justice they apply to different circumstances. Article 50(1) applies to a court, impartial tribunal or a body established to resolve a dispute while Article 47 applies administrative action generally. Article 50(1) deals with matters of a civil nature while the rest of the Article deals with criminal trials. Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by the Constitution.*[63] *What is clear to me though, is that Article 50 is not applicable to the circumstances of this case. The petitioner did not contend that it was entitled to a public hearing as required by Article 50(1) nor did I hear it state that it was an accused facing a criminal trial for Article 50(2) to apply....”*

13. In the same case and in reference to the provision of **Article 47(1)**, I observed that, “[I]t is important to note that there is an implicit flexibility in Article 47. The primary consideration is whether the procedure adopted is fair. In this regard I adopt the sentiments of Lord Pearson in the case of **Pearlberg v Varty (Inspector of Taxes) [1972] 1 WLR 534** at page 547 where he stated, “Fairness, however does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too easily sacrificed.” This is the reason why Article 47 not only has the element of procedural fairness but also provides that administrative action must be “expeditious, efficient, lawful and reasonable ....” All these elements are relevant and ought to be considered to give effect to the provisions of the Article.” 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 of Appeal stated that whether there is a fair hearing it is to be looked into in light of circumstances of the case.

14. It is not denied that the KRA was entitled to conduct an audit. Such an audit was expected to ensure that revenue was protected and the benefits conferred by EPZ are not abused. It is also not disputed that Ricardo was notified of deficiencies in its documentation at least twice. The letter dated 17<sup>th</sup> September 2012, I find and hold is in the nature of a notice to show cause. It was an opportunity for the petitioner to present its case before enforcement action could be taken.

15. There is no evidence that Ricardo took advantage of this opportunity. As I stated in **Dry Associates v Capital Markets (Supra)**, “Coming to this conclusion, I must emphasise that fairness in light of Article 47 must be taken in the context of the case which include a determination of the nature of the proceedings and the statutory regime or architecture. I reject any suggestion that the petitioner would be entitled to a full oral hearing with all the accoutrements that go with it; witnesses, statements, evidence in chief, cross examination of witnesses and oral submissions.” Likewise, there was no requirement for an oral hearing, in public, and none can be implied from a reading of the statute or the circumstances of the case.

16. For example, in **Richard Momanyi Osoro v Permanent Secretary, Ministry of Co-operative Development and another, CA Nairobi Civil Appeal No. 11 of 2006 (Unreported)**, the Court of Appeal in reference to the Public Service Commission observed as follows; “There is no provision in the Public Service Commission Regulations for oral hearing of appeals. From the nature of the complaints against the appellant, it was sufficient if he was informed of the grounds on which he was dismissed and given an opportunity to file an appeal. This was done and the appellant indeed filed an appeal. The Public Service Commission is a master of its own procedure as a statutory body. It need not hold a hearing and it can do everything in writing. The Public Service Commission ultimately communicated its decision to the

*appellant, that there was no convincing grounds for allowing the appeal although it erroneously referred to the appeal as the second appeal.” Likewise in **Karina v Transport Licensing Board [2004] 2 KLR** the Court stated as follows, “It is not in every case that a person is entitled to an oral hearing. What the requirement of fairness demands depends on the character of the decision making body, the kind of decision it has to make and the statutory or other framework in which it operates.”*

17. The course adopted by KRA comports with the scheme and architecture of provisions of the **Export Processing Act** and **EACCMA** in so far as the collection of customs duty is concerned. These statutes provide a system where movement of goods is strictly controlled to prevent revenue loss through diversion of goods to the domestic market. This system is predicated upon the taxpayer maintaining documentation to track the goods imported and exported and it is not unreasonable for KRA to demand that taxpayer explain any discrepancies in its documentation (See **Crywan Enterprises Limited v Kenya Revenue Authority Nairobi Petition No. 322 of 2011 (Unreported)**).

### **Conclusion and disposition**

18. I am satisfied that before the commencement of enforcement action, the petitioner was given an opportunity to show cause why enforcement action should not proceed in the letter dated 17<sup>th</sup> September 2012. It did not take advantage of this opportunity accorded to it and KRA was entitled to act in accordance with the statute.

19. I would also draw the petitioner’s attention to the provisions of **section 127E (1)** of the **Customs and Excise Act** which establishes an Appeals Tribunal for the purposes of hearing appeals on disputes arising from the decisions of the Commissioner or a person authorised by him, or the proper officer. Had the petitioner responded to the letter of 17<sup>th</sup> September 2012, the Commissioner would have made a decision which the petitioner, if aggrieved, would have moved the Tribunal for relief.

20. The inescapable result of my findings is that the petition lacks merits, it must be dismissed and it is hereby dismissed with costs to the respondent.

**DATED and DELIVERED at NAIROBI** this 31<sup>st</sup> day of May 2013

**D.S. MAJANJA**  
**JUDGE**

Dr Khaminwa instructed by Khaminwa and Khaminwa Advocates for the petitioner.

Mr Nyaga, Advocate, instructed by the Kenya Revenue Authority.