



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 36 OF 2013

EDWARD KIPYEKO.....PETITIONER

VERSUS

1. KENYA REVENUE AUTHORITY

2. THE COMMISSIONER CUSTOMS DEPARTMENT
MOMBASA.....RESPONDENTS

RULING

Before court is the chamber summons dated 12th June, 2013 brought under certificate of urgency. He petitioner seeks *inter alia* the following orders.

“1. **THAT** the respondents be restrained as

against continuing to hold the petitioner’s motor vehicle registration number KBJ 698H-ZC 1556.

3. **THAT** the respondents be ordered to

release forthwith to the petitioner the above stated motor vehicle.

4. **THAT** costs be provided for.”

The application is supported by the affidavit of the petitioner **EDWARD KIPYEKO** sworn on 12th June, 2013. The background to this petition is as follows. The petitioner runs a transport business and for this business he uses a truck registration number **KBR 698H-ZC 1556** (hereinafter referred to as ‘*the subject truck*’). The petitioner told the court that sometime in May, 2013 one ‘Hamisi’ hired him to transport cargo made up of two containers from Mombasa port to Kampala, Uganda. The petitioner and the said ‘Hamisi’ negotiated the fee for the job at Kshs. 350,000/= for which a down payment of Ksh. 245,000/= was to be made by 27th June, 2013. In pursuance of this arrangement the petitioner collected the two containers from Mombasa in preparation for onward transit to Uganda. However, as the subject truck was still parked at the municipal yard awaiting payment of the agreed deposit the respondents being Kenya Revenue Authority impounded the truck. The respondents alleged that part of the consignment being Refined Thailand sugar which was strictly destined for Uganda had been released and diverted into the Kenyan market without any tax being paid as was required by law. The respondents therefore detained the subject truck pending investigations. This prompted the filing of this constitutional petition by the petitioner. **MS. ATHMAN** Advocate appeared for the petitioner whilst **MR. NYAGA** acted for

the Respondents. The petition was disposed of by way of written submissions.

I have carefully perused the submissions filed by both parties. At this point the court is only required to rule on the application seeking mandatory orders for release of the subject truck. The merits or otherwise of the main petition are not up for determination at this stage. From my perusal of the submissions filed it would appear that parties have made submissions on the main petition. Be that as it may I shall only rule on the prayers sought in the chamber summons.

As stated earlier the prayers sought in this petition are mandatory in nature. The petitioner being aggrieved by the respondents' detention of his truck seeks orders for the release of the same to himself. The conditions for the grant of a mandatory interlocutory injunction were well enunciated in the case of **LOCA BAIL INTERNATINAL FINANCE LIMITED – VS – AGROEXPORT & OTHERS [1986] 1 AII ER 901** where it was held that:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for prohibitory injunction.”

The order being sought here is release of the subject truck. The obvious question that would arise is whether the respondents had any legal cause and/or authority to detain that truck. The Kenya Revenue Authority does have legal basis to detain a vessel which they find to have been used in committing a customs violation. This authority is provided under sections 211(1) and section 213 of the East African Community Customs Management Act. Section 213(1) provides:

“213(1) An officer or a police officer or an authorized public officer may seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture; and that aircraft, vessel, vehicle, goods, animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been or is about to be instituted.”

The definition of a vessel liable to forfeiture is provided by section 211(1) of the same Act which provides:

“211(1) A vessel of less than two hundred and fifty tons register and any vehicle, animal, or other thing, made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise of any goods liable to forfeiture under this Act shall itself be liable to forfeiture.”

This it is clear that the respondents had sound legal grounds to detain the subject truck based on the suspicion that it had been used in the transportation and/or carriage of uncustomed goods. Since investigations into the question of how part of the consignment was released are still ongoing, to direct the respondents to release the subject truck, would be prejudicial to those investigations. The question of whether the goods were indeed uncustomed and the question of what role (if any) the petitioner may have played in the diversion of sugar to the local market are issues which are to be determined in the main hearing and **not** at this interlocutory stage. The only question at this stage is whether there exists *prima facie* basis for detention of the petitioner's truck. Based on the facts submitted to this court, I find that such *prima facie* basis does exist. The procedures and steps to be taken following such a forfeiture are all very well laid out in the EACCMA more specifically sections 214 and 215. At this point I am not persuaded that the prayer for a mandatory interlocutory order is merited. As such I dismiss this application and order that each party meet its own costs. Dates for the hearing of the main petition to be

taken in the Registry on priority basis.

Dated and delivered in Mombasa this 12th day of July, 2013.

M. ODERO

JUDGE

In the presence of:

Ms. Athman for Petitioner

Mr. Nyaga for Respondents

Court Clerk Mutisya