



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 117 OF 2013

KIVUWATT LIMITED 1ST PLAINTIFF

SMART CARGO LIMITED 2ND PLAINTIFF

V E R S U S

THE COMMISSIONER,

KENYA REVENUE AUTHORITY,

CUSTOMS SERVICES DEPARTMENT DEFENDANT

RULING

1. The Plaintiffs by their plaint seek for mandatory injunction to issue compelling the Kenya Revenue Authority (KRA) to release and ensure loading and guarantee exit from Kenya Borders equipment known as Seperator.
2. An application dated 15th November, 2013 is filed by Civicon Limited (**Civicon**) seeking for an order that they be joined in this suit as second Defendant. That application is based on various grounds which essentially relate to Civicon claim that they are in possession of the Seperator and that they have a lien over the same. It should be noted that the 1st Plaintiff and Civicon have had and still having a pending Court case and an arbitration in Zurich.
3. Civicon submitted that it is in possession of the Seperator which is the subject of this suit. It was submitted that the Seperator is in the premises of Civicon along Makupa Causeway, Kibarani, Mombasa. Civicon is asserting a lien over that Seperator arising from an alleged debt owed to it by the first Plaintiff amounting to approximately US \$ 20 million. The Plaintiffs in response to this ground relied on the provisions of East African Community Customs Management Act (**the Act**). It was submitted before Court that the Act would determine whether Civicon had possession or not of the Seperator. Learned Counsel for the Plaintiff submitted that possession was essential for a claim of lien. In this regard the Plaintiffs referred to the Notice of Goods Deposited in Custom Warehouse on 10th September 2013. The Plaintiffs also referred to the rental payment made by them through the National Bank for the amount of Kshs. 130,788/-. That payment by the first Plaintiff was deposited in the bank to the credit of KRA account. It was submitted that the rent was for the Custom Warehouse where the Seperator has been kept. In sum the Plaintiffs were arguing that they paid KRA Kshs. 130,788/- being rent for use of the Custom Warehouse for the storage of the Seperator. According to the Plaintiffs learned Counsel the Plaintiffs are paying rent

to KRA and not to Civicon. On that basis it was argued that KRA are in possession of the Seperator.

4. The issue of who has the possession of the Seperator is essential when determining whether a general lien can be asserted by Civicon. Halsbury's Laws of England 4th Edition Vol. 28 at page 227 has this to say on lien-

“A general lien entitles a person in possession of chattels to retain them until all claims or accounts of the person in possession against the owner of the chattel are satisfied.”

(underlining mine)

5. It was conceded by the Plaintiffs that as at 25th July 2013 the Seperator was in possession of Civicon. It was on that date that this Court vacated the injunction order that had been issued in favour of Civicon against the 1st Plaintiff in **Mbsa HCC No. 36 of 2013**. The learned Counsel for the Plaintiff submitted that after the injunction was vacated the Seperator was put in the hands of KRA. In support of that submission the Plaintiffs relied on the rental payment made to KRA. Civicon did not respond to that specific submission other than relying on the Rulings delivered on **Mbsa HCC No. 36 of 2013**. It argued that those Rulings supported its claim that it had a right to assert a lien over the Seperator. What is clear from those rulings is that the court found that the Seperator belonged to the 1st Plaintiff. In my considered view those rulings made no further finding in regard to the Seperator.
6. Bearing in mind that the Seperator is in a Warehouse where the Plaintiffs have paid the rental to KRA it follows that Civicon does not have possession of it. Section 2 of the Act defines Warehouse as-

“Means deposited in a government or bonded warehouse with the authority of the person in charge of that warehouse.”

Further Section 42(8) of the Act makes it clear who controls the property in a Customs Warehouse. That Section provides-

“Any officer having the custody of any goods in a Customs warehouse, or place of deposit deemed to be a Customs warehouse, may refuse delivery therefrom until he or she is satisfied that all duties, expenses, rent, freight and other charges due in respect of such goods have been paid.”

7. Having considered the provisions of the Act and the evidence produced by the Plaintiffs I make a finding that Civicon does not have possession of the Seperator and therefore it fails the test of asserting a lien over it. In addition by virtue of Section 16(1)(h) of the Act the Seperator which is destined to be transported to Rwanda is under Customs control and cannot therefore be the subject of a lien by a party in this country without an offence being committed.
8. The issue of KRA being in possession of the Seperator is made more poignant by the fact that KRA has recorded a consent with the Plaintiff by their letter dated 18th November 2013 in this matter. It is important to reproduce that letter in this ruling as follows-

“Deputy Registrar,

18th November, 2013

High Court of Kenya

Mombasa Law Courts

MOMBASA

Dear Sir,

RE: MSA HCCC NO. 117 OF 2013

KIVUWATT LIMITED & ANOTHER –VS- KENYA REVENUE AUTHORITY

We refer to the above matter and would be grateful if the following consent would be recorded in the Court file;-

- i. The Defendant undertakes to forthwith release to the Plaintiffs the “Seperator” from the Customs warehouse in accordance with Section 42(8) of the East African Customs Management Act, 2004.***
- ii. The Plaintiffs, jointly and severally undertake to pay the Defendant’s costs agreed at Kshs. 200,000/- (Kenya Shillings Two Hundred Thousand Shillings Only), immediately upon the release of the “Seperator” the subject matter of this suit.***
- iii. The application dated 10th October 2013 and the entire suit be and is hereby marked as settled.***

Yours faithfully,

Wamalwa, Abdi & Co. Advocates

Advocates for the Plaintiff/Applicant

Ado Moses

Advocate for the Defendant/Respondent”

- 9. It follows therefore as provided under Section 43(1) of the Act that although the land upon which the Warehouse is situated belonged to Civicon as alleged it is however deemed under that Section as a Custom Warehouse.**
- 10. Because Civicon claim for asserting a lien over the Seperator is defeated by the lack of possession and because as rightly submitted by the Plaintiffs that Custom goods cannot be diverted to the local market, the application dated 15th November 2013 must and does fail.**
- 11. In the end the Notice of Motion dated 15th November 2013 is dismissed with costs to the Plaintiffs.**

Dated and delivered at Mombasa this 18th day of December, 2013.

MARY KASANGO

JUDGE