



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI MILIMANI LAW COURT

MISCELLANEOUS 54 OF 2010

**IN THE MATTER OF AN APPLICATION BY AFRICAN BOOT COMPANY LIMITED TO
APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION**

AND

**IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT CHAPTER 469, LAWS OF
KENYA**

AND

**IN THE MATTER OF THE EAST AFRICAN COMMUNITY CUSTOMS, MANAGEMENT ACT
2004, LAWS OF KENYA**

AND

IN THE MATTER OF CIVIL PROCEDURE ACT CAP 21 OF THE LAW OF KENYA

AND

**IN THE MATTER OF THE CIVIL PROCEDURE RULES
BETWEEN**

REPUBLICAPPLICANT

AND

KENYA REVENUE AUTHORITYRESPONDENT

EX-PARTE

AFRICAN BOOT COMPANY LIMITED

JUDGMENT

African Boot Company Ltd (the applicant) through a notice of motion dated 8th March, 2010 prays for an order of certiorari to issue directed at Kenya Revenue Authority (the respondent) quashing the respondent's decision dated 16th February, 2010 requiring the applicant's bankers to pay to the respondent the sum of Kshs.6,902,658/= being revenue due to the respondent from the applicant. The applicant denies owing the respondent any taxes. The application is supported by an affidavit sworn by Jaybharat Jethwa on 5th March, 2010 and the grounds contained in the statutory statement dated 22nd

February, 2010 plus annexures thereto.

The facts that emerges from the documents availed to court by the parties are that the applicant is a company trading in Kenya. For purposes of importing goods to Kenya it contracted Hellmann Worldwide Logistics Limited (hereinafter simply referred to as Hellmann) to handle all the sourcing, clearing and forwarding. The applicant would therefore pay Hellmann for the services and custom duties due to the respondent. In order to clear goods through customs, Hellmann would use Cargo Rollers Limited as clearing agents. In 2009 the applicant learned that Hellmann had not been remitting to the respondent the sum due to it. On 16th February, 2010 the respondent issued an Agency Notice vide letter dated the same date directing the applicant's bankers Messrs Investments & Mortgages Bank Limited to pay to the respondent the sum of kshs.6,902,658/=. In reaction to the Agency Notice the applicant's bankers closed the applicant's account.

It is the applicant's case that it had already paid the sum of kshs.6,902,658/= being demanded by the respondent through Hellmann who are the respondent's agents and it is not under any legal obligation to pay a single cent of the amount claimed. The applicant also argues that if the said money did not reach the respondent then it failed to do so because of fraudulent collusion between the respondent's employees and Hellmann and the respondent cannot be allowed to benefit from the dirty dealings of its employees. The applicant further argues that the Agency Notice was issued before it was given a hearing and this was in clear breach of the rules of natural justice. The applicant also argues that the respondent failed to consider all the relevant documents submitted to it.

The application was opposed through a replying affidavit sworn on 27th May, 2010 by Joseph Kaguru an Assistant Commissioner with the respondent. In brief the respondent's case is that in early 2009 it was discovered that goods belonging to the applicant had been cleared through the respondent's customs clearing system without payment of duties. The applicant insisted that it had paid duties but the receipts it produced were found not to be genuine. After the applicant was informed that the receipts were fake it then laid the blame on its clearing agent, Hellmann. The respondent argues that Hellmann and Cargo Rollers Limited were the applicant's agents and the applicant is therefore responsible for their fraudulent activities.

Looking at the evidence placed before the court it becomes clear that the respondent is indeed owed kshs.6,902,658/= being unpaid dues for goods imported by the applicant in 2008. It is also not disputed that the applicant could have indeed given this money to Hellmann for onward transmission to the respondent. It is also clear that the respondent engaged the applicant when it was investigating the unpaid duties. In fact the applicant filed Nairobi **H.C. Milimani Commercial Courts Civil suit No. 823 of 2009 against Hellman Worldwide Logistics Limited** and among the prayers it seeks is **"a declaration that the plaintiff duly paid taxes due from it to Kenya Revenue Authority with respect to goods imported by it through the Defendant in the years 2007 and 2008."** It is also clear that Hellmann is being investigated for its fraudulent activities.

Having outlined the background of this case, I now move to analyse the evidence and apply the law to it. In my view the question is: Whose agent was Hellamnn? Once this question is answered, everything else will fall into place.

It was submitted by counsel for the respondent that Hellmann was an agent of the respondent having been appointed in accordance with Section 145 of the East African Community Customs Management Act. The applicant argued that since the respondent is the body which licensed Hellmann as a clearing agent, then the said clearing agent is an agent of the respondent.

For purposes of record, the applicant relied on the following authorities:-

1. COMMISSIONER OF LANDS VS. KUNSTE LTD, COURT OF APPEAL CIVIL APPEAL NO. 234 OF 1995.

2. REPUBLIC VS. JUDICIAL SERVICE COMMISSION & ANOTHER (2006) eKLR.

3. REPUBLIC VS PROVINCIAL LAND DISPUTES APPEALS COMMITTEE EMBU EX-PARTE GLEMBOCKI (2204) eKLR.

4. REPUBLIC VS. CHAIRMAN, MEDICAL LABORATORIES TECHNICIANS & TECHNOLOGISTS BOARD & 2 OTHERS (2005) eKLR, AND

5. CHARLES MWANGI KAGOMIA VS. DHRAJ D. POPAT & 2 OTHERS (2006) eKLR

The respondent relied on the following authorities:-

1. REPUBLIC VS. KENYA NATIONAL EXAMINATIONS COUNCIL EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS, COURT OF APPEAL CIVIL APPEAL NO. 266 OF 1996.

2. REPUBLIC VS. JUDICIAL SERVICE COMMISSION EX-PARTE PARENO (2004) 1KLR 203,

3. JACK N RANGUMA VS. KENYA REVENUE AUTHORITY & OTHERS, MERU H.C. MISC. CIVIL CASE NO. 1 OF 2006;

4. UXBRIDGE PERMANENT BENEFIT BUILDING SOCIETY VS. PICKARD (1939) 2KB 248;

5. HALSBURY'S LAWS OF ENGLAND, 4TH EDITION VOL 1(1) PARAGRAPH 59;

6. REYNOLDS, F.M.B (BOWSTEAD ON AGENCY) 14TH EDITION (SWEET & MAXWELL) CHAPTER 7 PAGE 230 et seq;

7. JOHN MURPHY (STREET ON TORTS), 11TH EDITION, CHAPTER 29, PAGE 642 et seq;

8. REPUBLIC VS. COMMISSIONER OF LANDS EX-PARTE SOMKEN PETROLEUM COMPANY LIMITED (2005) eKLR; and

9. REPUBLIC VS. NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY (2011) eKLR.

For the purpose of this judgement I find it necessary to reproduce the entire Part XI of the East African Community Customs Management Act, 2005 which deals with customs agents. It states as follows:-

“ 145. (1) The Commissioner may license persons to act as agents for transacting business relating to the declaration or clearance of any goods or baggage other than accompanied non-manifested personal baggage of a person travelling by air, land or sea.

(2) The Commissioner shall not license any person to act as agent under this Act unless the Commissioner is satisfied that, that person has the capability, office equipment, a registered office and documents to effectively transact business in accordance with the provisions of this Act and any other conditions as may be prescribed by regulations.

(3) The Commissioner may refuse to issue a license or may be order, suspend, revoke or refuse to renew, any such license on the ground that the applicant or holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reason that the Commissioner may deem fit.

146. (1) Where under the provisions of the Customs laws the owner of any goods is required or authorized to perform any act then such act, unless the contrary appears, may be performed on his or her behalf by an authorized agent.

(2) A person shall not be the duly authorized agent of any owner unless-

(a) such person is exclusively in the employment of the owner; or

(b) such person is a Customs agent duly licensed as such in accordance with this Act, and, in either case, such person is authorized in writing by the owner, either generally or in relation to any particular act, to perform the act on behalf of the owner.

(3) The proper officer may require from any person purporting to be the duly authorized agent of any owner the production of his or her written authority and in default of the production of such authority the proper officer may refuse to recognize such person as a duly authorized agent.

147. A duly authorized agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.

148. An owner of any goods who authorizes an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorized agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:

Provided that –

(i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorised agent unless the owner actually consented to the commission of the offence;

(ii) nothing herein contained shall relieve the duly authorized agent from any liability to prosecution in respect of any such offence.”

A look at the above quoted Part XI of the Act clearly shows that the Commissioner of Customs only licenses customs agents. The agents however act on behalf of the importers of goods. The person who appoints the agent to carry out a particular transaction is the importer. That means the customs agent becomes the agent of the importer and not the Commissioner of Customs. The respondent therefore does not foist a particular customs agent on a taxpayer. The taxpayer is the one who goes out to look for a particular agent to clear goods on his behalf.

Counsel for the respondent provided a good analogy when he told the court that just like the Law Society of Kenya licenses advocates to practice law, the Kenya Revenue Authority through the Commissioner of Customs licenses customs agents to clear goods and baggage which have been imported into the country. If a lawyer becomes rogue and misappropriate the client's money, the client cannot turn to LSK for compensation. The same case applies here so that when a customs agent engages in fraudulent activities, the importer cannot ask the respondent for compensation. The importer has to bear the loss with fortitude and find a way of recovering the money misappropriated from the customs agent. A prudent taxpayer will always monitor the activities of its agent so as to ensure compliance with the law. The only civil duty a taxpayer can do is to report the agent so that the license can be revoked by the respondent.

The applicant argued that Hellmann acted in concert with the respondent's employees so as to defraud it of the money that was meant to pay custom duties. That may as well be true but just as the applicant did not authorize its agent (Hellmann) to steal so did the respondent not authorize its employees to engage in fraudulent activities. Maybe the applicant could have had a stronger case had it established that Hellmann was the respondent's agent. It is however clear that the applicant was defrauded by its agent.

It is unfortunate that the applicant suffered such a big loss. The only answer to its application, however, is that the same must be dismissed and it is so dismissed. Considering the loss suffered by the applicant I

find it in the interest of justice that there should not be orders as to costs and I so order.

Dated and signed at Nairobi this 23rd day of February ,2012.

W. K. KORIR

JUDGE