



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 240 OF 2011

BETWEEN

TITO ALAI OKUMU.....PETITIONER

AND

COMMISSIONER OF CUSTOMS.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. The issue in this petition has been obscured by rather prolix pleadings that, with respect to the petitioner's counsel, have not set out with clarity the specific provisions of the bill of rights that have been breached. The facts are rather straight forward and are contained in ten out of the twenty-six paragraphs of the petition.

2. The supporting affidavit sworn by the petitioner on 21st October 2011 contains forty four paragraphs of a few facts and extensive legal arguments and statements made on advice of counsel. The inclusion of arguments and legal proposition is not only a breach of the procedural rules governing affidavits but also tends to muddy the real issues in the controversy. **Order 19 rule 3(1)** of the **Civil Procedure Act** provides, "*Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.*" Legal arguments and propositions are better left for submissions (See **Meme v Republic [2004] 1 KLR 645** at para 30.).

3. The purpose of **Article 22** of the Constitution is to enforce the specific fundamental rights and freedoms guaranteed under the Constitution. The Court in **Samura Engineering Ltd & Others v Kenya Revenue Authority Nairobi Petition No. 54 of 2011(Unreported)** emphasised that; "[46] *The proceedings before the court are essentially for the enforcement of fundamental rights and freedoms protected by the Constitution provided under Article 22 and 23 of the Constitution. The purpose of the procedure enacted in Article 22 of the Constitution is to enforce specific fundamental rights and freedoms of the individual guaranteed under the Bill of Rights set out in Part 2 of Chapter 4 of the Constitution. [47] Since enforcement of the Bill of Rights is a special jurisdiction, it is therefore an incident of this jurisdiction that a party who invokes this special Article 22 jurisdiction has a duty to set out clearly the sections or provisions it is claimed have been infringed or violated and show how these sections are infringed in relation to him or her. This principle has been established in a long line of cases since Anarita K Njeru v Republic (Supra). (See also Meme v R (Supra) and more recently in respect of the Constitution, Kerosi Ondieki v The Public Service Commission & Others Nairobi Petition No. 45 of 2011 (Unreported)).*"

4. In an attempt to comply with the principle set out in the case of **Anarita K Njeru v Republic, (No.1)[1979] KLR 154**, paragraph 26 of the petition is titled, “*How the rights and fundamental freedoms have been denied, violated, infringed and or threatened*” and it states as follows;

(i) *The 1st respondent’s actions in doing a partial waiver of duty/fees payable by the petitioner is unconstitutional as it cannot take away a basic constitutional right already protected and purport to create a discrimination that has been outlawed by Article 27. This decision offends the spirit, purport and object of the Constitution of Kenya.*

(ii) *The 1st respondent’s actions in levying fees and waiving some, payable by the petitioner offends the basic principles of the Constitution since it fails to provide for the principle of natural justice and condemns the petitioner contrary to Article 25(c), 50(1)(2) of the Constitution of Kenya.*

(iii) *The 1st respondent’s actions in making demands for payments by the petitioner contravenes Article 25, 26, 27, 28, 73 of the Constitution by going against the provisions of established law and the prescribed procedure, it was done in bad faith.*

(iv) *Petitioner avers that the methodology of arriving at the demands after waiver is unreasonable, is discriminatory and contravenes article 27(1), (2), (3), (4), (5) of the Constitution which outlaws discrimination on any grounds.*

(v) *The process the 1st respondent has invoked is selective and discriminatory in view of the provisions of Article 22(1) (b) Constitution of Kenya. The petitioner avers that Article 159 (1) (2) reflects the spirit, purport and objects of the Constitution of Kenya. Justice shall be administered to all irrespective of status. Article 259 enjoins the courts to promote the purpose, values and principles of the rule of law, human rights and fundamental freedoms, good governance. Article 258 (1) enjoins all Kenyans to enjoy the right to institute proceedings claiming that the Constitution of Kenya has been contravened or is threatened with contravention.*

(vi) *It is therefore contrary to these basic values and principles for the respondents to arrogate themselves powers to exclude certain citizens from owning and utilizing their properties in a democratic process of social, economic and culture development yet their actions inhibit the values and principles of our constitutionalism.*

(vii) *Article 3 donates the right and obligation to every person to uphold and defend the Constitution of Kenya.*

5. In the petition dated 21st October 2011, the petitioner seeks the following reliefs;

(a) *A declaration that the rights and fundamental freedoms of the petitioner including his fair expectation and aspiration as to the usage of his motor vehicle have been infringed violated and denied with a holding that the tax waiver is invalid and breaches the petitioner’s constitutional rights.*

(b) *An order of Judicial Review of certiorari do issue calling the decision of the 1st respondent in levying a partial waiver of the tax payable by the petitioner to the High Court and quash it and in its place order for the immediate release of the petitioner’s motor vehicle Engine No. IHD0298499 and Chassis No. JTEHC05JX 04036102 to him without condition on his part.*

(c) *A declaration that the respondent’s acts of making demands upon waiver of amounts is unprocedural, arbitrary, unilateral and against the spirit and intention of the governing act which said amount is arrived at on unknown considerations and therefore of no consequence.*

(d) *Any other relief that the honourable court may deem just and fit to grant is safeguarding the petitioner’s right to property.*

(e) *Costs of this petition.*

6. A substantial part of the petition is concerned with reciting provisions of the preamble, **Article 10** and the provisions of **Part 1** of the **Bill of Rights**. In respect of these provisions, the Court in **Samura Engineering Ltd & Others v Kenya Revenue Authority (Supra)** that, “[60] **The purpose of Article 22 is**

to enforce the fundamental rights set out in part 2 of Chapter Four of the Bill of Rights, that is, the rights enumerated at Articles 26 to 51. Article 10 sets out the national values and principles of governance. These values and principles do not give rise to justiciable rights separate from the bill of rights but apply to all State organs, State officers, public officers and all persons whenever any of them applies or interprets this constitution, enacts, applies or interprets any law, or makes or implements policy decisions. These values are the interstitial fluid by which the bill of rights is nourished. [61] Similarly, Article 19 is a general provision which sets out the place and purpose of the Bill of Rights and the principles set out therein together with all the general provisions contained in Part 1 of the Bill of Rights are employed by the court in the task of interpreting and enforcing the Bill of Rights.”

7. In preparing a petition to enforce fundamental rights and freedoms what is important to set out are the facts that constitute the cause of action under **Article 22**. A petition is a pleading and it should set out clearly the material facts in relation to the cause of action which is the specific violation of the fundamental rights and freedoms. It should not be a recital of Constitutional provisions and arguments of law.

8. In this case, the petitioner pleaded violation of **Articles 9, 19, 20, 21, 22, 23, 24, 27, 28, 29, 47** and **50** of the Constitution. As the hearing proceeded it became apparent that the facts of the case and the alleged violations did not fall within the various provisions of the Bill of Rights cited. Counsel for the petitioner conceded that the only provision that was applicable to the petitioner’s case was **Article 47**. It was on this basis that arguments were confined. I was satisfied that the parties were not prejudiced by confining the arguments to breach of **Article 47** of the Constitution.

The Facts

9. The facts are set out in the petition dated 21st October 2011 which is supported by the affidavit of the petitioner sworn on 21st October 2011. There are two replying affidavits sworn on behalf of the 1st respondent. The first one is sworn by Dulu Igwo on 14th December 2011 and a further one sworn by Seraphine Anamanjia on 14th march 2012.

10. The facts as are gathered from these depositions and submissions are not disputed. In summary, the petition relates to the petitioners application to the 1st respondent to be exempted from paying duties and charges under the ***East Africa Community Customs Management Act, 2004*** (“**the EACCMA**”).

11. The petitioner is a Kenyan citizen who has been working abroad. On 13th November 2009 he imported a motor vehicle for utilization in Kenya. As a result he applied to be exempted from duty as he fell in the category of persons exempted from making such payments under the provisions of the ***Fifth Schedule Part B Item 5(3)(c) of the East Africa Community Customs Management Act, 2004*** and ***Eight Schedule Part B, Item 4(3)(c) of the Value Added Tax Act***.

12. In order to secure release of the motor vehicle, the petitioner contends that he issued a bank guarantee for the sum of Kshs.2,051,920/00 to secure release of the vehicle. A bank guarantee dated 25th January 2010 was issued by KCB in favour of the Kenya Revenue Authority valid for the period 25th January 2010 to 26th April 2010.

13. The 1st respondent sought to confirm the petitioner’s residency in order to process the exemption which requires that in order to benefit from the exemption as a returning resident. Unfortunately this could not be done as the petitioner had lost his passport. The 1st respondent had to obtain confirmation from the petitioner’s itinerary records at the Ministry of State for Immigration. This process took some time before the records could be furnished.

14. By a letter dated 5th January 2011, the appeal for tax exemption was rejected by the 1st respondent on the basis that the information received from the Immigration Office would not assist in determining the ownership and usage of the vehicle by the petitioner for at least one year before return. The request for duty free importation as a returning resident was therefore declined.

15. By a letter dated 25th January 2011, the petitioner lodged an appeal against the refusal. The appeal set out further grounds for review of the decision. Once again the appeal was declined by a letter dated 25th March 2011.

16. The petitioner then applied for a review of that decision contained in the letter of 25th March 2011 by his letter dated 1st April 2011. The appeal was considered and by a letter dated 21st April 2011, the exemption for the petitioner to import a personal vehicle duty free was duly finally granted. The exemption was granted subject to all other conditions governing importation being duly fulfilled.

17. After waiver of duty, the petitioner could only get the motor vehicle released on payment of customs warehouse rent. Customs warehouse rent is charged pursuant to **section 42(3)** of the *East African Community Customs Management Act, 2004*. These charges had accrued to Kshs. 661,572/00 as at 3rd June 2011. The petitioner by a letter dated 3rd June 2011 applied for a waiver of customs warehouse rent. This was in addition to an earlier letter dated 13th May 2011.

18. By a letter dated 26th August 2011, the 1st respondent informed the petitioner that he had been granted a waiver of customs warehouse rent in accordance with **regulation 85** of the *East African Community Customs Management Regulations, 2006* to the extent of 20% on condition that the sum of Kshs.499,817.60 which was to be paid within 14 days.

19. Once again the petitioner appealed for a total waiver of the warehousing rent by the letter dated 29th August 2011 citing the fact that he had given a guarantee for the full duty when the vehicle was imported to secure its release and the delay in dealing with the matter.

20. While the appeal was pending, the petitioner filed this petition. After this matter was adjourned on 19th December 2011 and 3rd March 2012 to enable the parties pursue amicable settlement, the 1st respondent made a decision on the petitioners appeal. He was given a 100% waiver of the customs warehouse rent. This decision was contained in the letter dated 9th March 2010.

Issues for determination

21. As I stated earlier, the main issue in this petition was obscured by the pleadings and petitioner's deposition. During the hearing it became apparent that it was common ground that the petitioner had been exempted from paying customs duty and customs warehouse rent had been waived which are the only statutory duties and charges required to be paid under the *EACCMA*.

22. The complaint by the petitioner, as I understood, is whether it should pay storage or demurrage charges levied by Portside CFS where the subject motor vehicle is stored and if so whether refusal to waive this amount is a breach of **Article 47** of the Constitution.

23. The main objection of the petitioner is that he has no privity of contract with CFS Portside and therefore he ought not to pay charges imposed for release of the motor vehicle. The petitioner also contends that the vehicle ought to have been released once the bank guarantee was issued when the vehicle was imported as this was intended to secure its release.

24. The 1st respondent contends that under the *EACCMA*, it has discharged its statutory obligation by exempting the petitioner from paying duty and waiving of customs warehouse rent. It contends that it has no further statutory obligation to discharge to the petitioner.

25. I think the petitioner's arguments lack merit for the following reasons. The claim in respect of storage charges is an afterthought. In the appeal for waiver for warehouse rent dated 29th August 2011, the petitioner after setting out the reasons for his seeking a waiver stated, "*with all the above facts I therefore request for your good office to consider 100% waiver as I battle to get container demurrage waiver from CGM shipping the amounting to Kshs.0.9m and portside CFS of Ksh.3.2m.*"

26. In my view the petitioner was well aware of his obligations to these third party entities. It is now estopped from claiming that the 1st respondent has anything to do with storage charges. This is also confirmed by the fact that the petitioner did not allude these storage charges being due to the 1st respondent otherwise he would have lodged an appeal in respect of these charges.

27. As regards the guarantee, it expired on 26th April 2010, it was not renewed. I note that the petitioner was diligent in lodging appeals which were all considered by the 1st respondent. It is surprising therefore that he did not lodge an appeal or review against the failure, neglect or refusal to release the vehicle upon the furnishing of such guarantee.

28. On the whole therefore, I do not find any merit in the petitioner's arguments. Joinder of CFS Portside to these proceedings as requested by the petitioner would have further obscured the issues for determination. In any case, any relief against CFS Portside lies outside the purview of **Article 22** of the Constitution.

29. I also agree with counsel for the 2nd respondent that these proceedings do not raise any constitutional issue and must be dismissed as an abuse of the court process.

Right to Fair Administrative Action

30. **Article 47(1)** of the Constitution provides as follows;

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

This provision is intended to subject administrative processes to constitutional discipline (see *Dry Associates Ltd v. Capital Markets & another Nairobi Petition No. 328 of 2011 (Unreported)* at paras 62, 63 and 64.)

31. What is fair administration is dependent on the facts and circumstances of the case. On my part, I have examined the correspondence between the parties, the subject matter and I find that the petitioner was given an opportunity to present his grievances in accordance with the law and in each case his appeals were successful. The 1st respondent has complied with its legal and statutory obligations under the *EACCMA* and there is no further statutory obligation to discharge to the petitioner.

Disposition

32. I must therefore conclude that this petition lacks merit. It must be dismissed and it is hereby dismissed. Having regard to the facts and circumstances of the case I am not inclined to award costs to the respondent.

33. I therefore make no order as to costs.

DATED and DELIVERED at NAIROBI this 29th day of March 2012.

D.S. MAJANJA
JUDGE

Mr Nyaberi instructed by Ombeta and Associates Advocates for the petitioner.

Mr H. Ng'ang'a instructed by the 1st respondent.

Mr Kiage, Litigation Counsel, instructed by the State Law Office for the 2nd respondent.