



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL SUIT NO 299 OF 2010

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER SECTION 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA AND ORDER LIII OF THE CIVIL PROCEDURE ACT, CHAPTER 21 OF THE LAWS OF KENYA

AND

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

AND

IN THE MATTER OF KENYA REVENUE AUTHORITY

BETWEEN

KRONES LCS CENTRE EAST AFRICA LIMITEDAPPLICANT

VERSUS

KENYA REVENUE AUTHORITY1ST RESPONDENT

COMMISSIONER OF INVESTIGATION &

ENFORCEMENT (KENYA REVENUE AUTHORITY).....2ND RESPONDENT

JUDGEMENT

This decision is an answer to the notice of motion dated 11th October, 2010 filed by Krones LCS Center East Africa Limited (the Ex-parte Applicant) under Order LIII rules 3(1) & (2) of the Civil Procedure Rules in which the Applicant prays for orders as follows:-

1. THAT AN ORDER OF CERTIORARI do issue to remove into the High Court for the purpose of its being quashed, and quash, the decision of the Respondents whether acting directly or through their officers and/or agents (made on a date unknown to the Applicant but embodied in a letter dated 20th July, 2010) demanding the payment of Kshs.41, 413, 329.50 alleged to be due on account of unpaid duty and VAT on imports made for, on behalf of and/or by the Applicant.

2. THAT AN ORDER OF PROHIBITION do issue directed at the Respondents, prohibiting the Respondents whether directly or indirectly, by/or through their officers and/or agents, prohibiting and restraining them from implementing the said decision or any further decisions or notices demanding the payment of the said sum of Kshs.41,413,329.50 or at all in relation to the alleged unpaid duty and VAT on imports made for, on behalf of and/or by the Applicant and or in any manner whatsoever taking the threatened “enforcement action” against the Applicant.

3. THAT costs of this suit be provided for.

In the application Kenya Revenue Authority and Commissioner of Investigation & Enforcement (Kenya Revenue Authority) are named as the 1st and 2nd respondents respectively. The 1st Respondent is a public body created by an Act of Parliament to assess and collect revenue and to administer and enforce the laws relating to revenue. The 2nd Respondent is an officer of the 1st Respondent charged with the responsibility of investigating activities that may hinder collection of revenue and is mandated to enforce the laws governing the operations of the 1st Respondent.

The application is supported by a statutory statement dated 22nd September, 2010, a verifying affidavit sworn on 20th September, 2010 by Sedlmeier Wulf Jurgen who is the General Manager of the Applicant, a further affidavit sworn by the said Sedlmeier Wulf Jurgen on 28th September, 2010 and a supplementary affidavit sworn by the same person on 24th January, 2011. The application is opposed through the replying affidavit sworn by Abdi Noor Adan a Revenue Officer of the 1st Respondent on 10th January, 2011.

An applicant is by Order 53 Rule 4(1) of the Civil Procedure Rules, 2010 expected to rely on the grounds on the statutory statement in support of his application. So as not to lose sight of the quarry, I will therefore reproduce the grounds in support of the relief sought as follows:-

(a) The decision by the Respondents made and/or arrived at to the effect that the applicant is in arrears of Kshs.41, 413, 329.50 in purported account of duty and VAT was made by the Respondents unilaterally and against the rules of natural justice in that, besides other things, the Respondents did not afford the Applicant a chance to be heard before arriving at the stated sums.

(b) The decision of the Respondents was not founded upon basis of fact, as it is required by law, in that the Applicant has to-date paid all the statutory duties payable to the Respondents.

(c) The Respondents in making the decision have taken into account, matters they ought not to have, and omitted to take into account matters they should have.

(d) It is the legal duty of the Respondents to satisfy themselves that duty and other requisite taxes on imports have been fully paid before effecting clearance of the same at all entry points of this country.

(e) The Respondents upon being satisfied that all the taxes had been paid, cleared the Applicant's imports and cannot be heard to purport that the said tax was never paid.

(f) The imports in question were cleared for a period spreading out for at least nine (9) months and the imports to be cleared consistently for such a long period of time, it must be that all the requisite duty and taxes were paid.

(g) The decision of the Respondents is therefore malicious, unreasonable and oppressive and is thereby void and a nullity.

(h) The decision and the process by which it was arrived at, are in breach of the principle that justice must not only be done, but must manifestly be seen to have been done.

In judicial review parlance, I get it that the Applicant is saying that the respondents' decision is bad for being:-

(i) made in breach of the rules of natural justice i.e. the Applicant was not given a hearing;

(ii) unreasonable and failing to take into account relevant considerations and taking into account irrelevant considerations;

(iii) made in bad faith and for an improper purpose i.e. the decision is oppressive; and

(iv) contrary to the legitimate expectation of the Applicant in that once the imported goods were released then the respondents were satisfied that the necessary taxes had been paid.

Even though the Applicant made extensive submissions on other grounds, I am only supposed to consider the grounds contained in the statutory statement. The said grounds form the issues for determination in this case.

The respondents' answer to the application is very simple: the taxes were not paid and the respondents are statutorily bound to collect the said taxes.

The Applicant's case is that the respondents through a letter dated 20th July, 2010 demanded payment of Kshs.41, 413, 329.50 being alleged unpaid duty for imports made by the Applicant for the period October, 2008 to June, 2009. The Applicant's case is that it had paid Kshs.29, 972, 602.00 as duty and VAT to the respondents through its clearing agent Ports Conveyors Limited (POCOL). The Applicant produced documents showing that POCOL had indeed paid the taxes and the Applicant had in turn paid POCOL all the monies paid as taxes to the respondents. It is the Applicant's case therefore that the respondents' demand is based on an error of facts and was arrived at unilaterally without the Applicant being given an opportunity to explain its side of the story. It is further the Applicant's case that by releasing the goods the respondents are presumed to have satisfied themselves that all the taxes due had been paid and it is unreasonable and oppressive for the respondents to demand double payment of taxes. The Applicant is therefore saying that it has a legitimate expectation that once the imported goods had been cleared then the respondents would not demand taxes afresh.

The respondents' case is that although the goods were indeed cleared by them, the clearance was fraudulent. The respondents says that the documents produced by the Applicant as evidence of payment of taxes are forgeries. The respondents argue that their decision to demand taxes from the Applicant is just, fair and reasonable and was arrived at after lengthy engagement with the Applicant.

A scrutiny of all the papers filed in this cause clearly points to the fact that the taxes that are being demanded by the respondents were never paid. Although the Applicant insists that the taxes were paid, there is clear evidence both from National Bank through the letter dated 14th November, 2010 and the Applicant through the letter dated 1st March, 2010 that POCOL may have misappropriated the money given to it by the Applicant for purposes of paying taxes.

I find it necessary to reproduce the letter dated 1st March, 2010 written by VSC Consultants Limited on behalf of the Applicant. The letter which was addressed to the 2nd Respondent read as follows:-

“We refer to your letter dated 23 February, 2010 and our client's letter dated 24 February, 2010 in reference to the above matter for our above named client. We further refer to our meeting of today morning with representatives from your department, Mr. Rishi shah, Financial Controller of Kronos LCS Centre East Africa Ltd, Mr. Samuel Mwaura of VSC Consultants Ltd and the undersigned.

Further to our meeting please note that the Financial Controller has discussed the matter in detail with the General Manager and their holding company, Kronos AG in Germany who are totally surprised and annoyed with the whole matter. As discussed in the morning, they have paid the monies for the duties and VAT to the clearing agent, Ports Conveyors Ltd to be forwarded to Kenya Revenue Authority which unfortunately has not been remitted to the KRA. Our client is now caught in this dilemma whereby the clearing agent has not been remitting the payments to KRA on behalf of them and being a new establishment in Kenya, this will definitely deter them from doing further business in Kenya.

In our meeting you had also mentioned to us that the Ports Conveyors Ltd had written a letter to you stating that any amounts which are demanded from their clients, they will take ownership of the same and pay any dues owing to the KRA. You further mentioned that Ports Conveyors Ltd are still carrying on their operations and normally and hence it seems that no action is being taken against them whereas the default is purely on their part.

In view of the above we kindly request if you could pursue the matter with Ports Conveyors Ltd independently while in the meantime our client has also been instructed by their holding company in Germany to legally pursue the matter for which the lawyers shall communicate further.

We therefore request if you could kindly give our client some more time to deal with Ports Conveyors Ltd and if you could kindly suspend the agency notice. We hope you understand that our client's intention to set up the business in Kenya was to promote the business in Kenya and not defraud on any tax payments as they have been regularly paying all the taxes and tried not also default on submission of any statutory taxes or returns.

Yours positive consideration and guidance shall be highly appreciated.

The letter is signed by Parag Shah who identifies himself as Taxation Director of VSC Consultants Ltd.

Reading through the said letter, it becomes clear that the Applicant's claim that the respondents never gave it a hearing before making the decision contained in the letter dated 20th July, 2010 cannot be believed. The above quoted letter clearly shows that there were talks over the disputed taxes. The Applicant was therefore given a hearing before the demand was made.

The only issue that remains is whether the decision to demand taxes from the Applicant is fair, just and reasonable considering that the Applicant had paid POCOL money for taxes allegedly paid to the respondents. The issue of legitimate expectation will also be addressed under this issue.

The Applicant has asked me to rely on the case of **REPUBLIC V KENYA REVENUE AUTHORITY & ANOTHER, EX-PARTE UNILEVER TEA KENYA LIMITED [2011] eKLR** in reaching my decision. In the **EX-PARTE UNILEVER TEA KENYA LIMITED** case (supra) the respondents had demanded payment of taxes by the Ex-parte Applicant. The Ex-parte Applicant proved that it had paid the taxes to the respondents through the interested party (**Nephets Interlink Services Limited**) a clearing agent. Musinga, J found that the Ex-parte Applicant had indeed paid money to the interested party for onward transmission to the respondents. He also found that the respondents had already demanded the money from the interested party. Musinga, J went ahead and quashed the respondents' demand for the taxes from the Ex-parte Applicant.

This is what the learned Judge had to say in reaching his decision:-

“It cannot be denied that in law the interested party was an agent of the applicant. The fact that the interested party had earlier been vetted by KRA does not make him an agent of KRA. However, all the goods that were imported by the applicant and cleared by the interested party were under the control of KRA as per Section 12 of the Customs and Excise Act and Section 14 of the Value Added Tax Act. This control included the rigorous checking of all the documents accompanying the said goods. The procedure of clearing goods is closely controlled by KRA. Although it was alleged by KRA that the interested party presented various false documents which were vital for clearing of the applicant's goods, all of those documents were inspected and passed by officials of KRA. The applicant had no hand in such scrutiny. KRA cannot therefore simply allege that there was fraud in clearing the goods and lay all the blame upon the applicant. One of the requirements of KRA before a person is registered as a clearing agent is provision of a bond under Regulation 259 of the Customs and Excise Regulations. The agent undertakes that he “shall faithfully and uncorruptly perform his/their duties as agent to the satisfaction of the Commissioner.” I agree with the applicant that this clearly requires KRA to have a watchful eye over all clearing agents to ensure that they perform their duties faithfully. In the event that corrupt officials of KRA collude with corrupt clearing agents to pocket money that is paid as duty by a principal through a clearing agent, it would be unjust to require the principal to shoulder the burden of making another payment in respect of the same duty.”

On the issue of legitimate expectation the learned Judge stated that:-

“In conclusion, I wish to state that the applicant had a legitimate expectation that it would not be required to pay the taxes again, there being no dispute that it had already made appropriate payments and/or reimbursements for the same through the interested party.”

I agree with the views of Musinga, J considering the circumstances under which those views were made. The respondents herein have asked me to distinguish the facts of this case from the facts of the **EX-PARTE UNILEVER TEA KENYA LIMITED** case.

Clearing agents also known as customs agents are dealt with in Part XI (Sections 145-148) of the East African Community Customs Management Act, 2004. The clearing agent is an agent of the importer. Section 47 provides that:-

“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 the Act:

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

The said Section therefore places the onus of payment of duty on both the agent and the owner of the goods. It is therefore upon the Commissioner of Customs to decide who to go after. In a case where a customs agent has been involved in fraudulent activities, it would be more beneficial to the taxing authority if it went after the agent. The importer does not normally deal directly with the taxing authority's employees and the only people who can collude to defraud the taxman of his dues are the employees of the clearing agent and the employees of the taxman. The only way the taxman can fight corrupt activities is to demand taxes from the clearing agent. The taxing authority also has powers to cancel the licence of a rogue clearing agent. Going after the importer would seem unfair in a situation where there is clear evidence that the clearing agent has misappropriated the money meant for clearing the goods and corruptly cleared the goods.

In the case before me the Applicant in its application implied that the respondents had indeed been paid taxes by POCOL. The Applicant insisted that the respondents had received taxes despite the fact that it was aware (see letter dated 1st March, 2010 already reproduced in this judgment) that POCOL had not remitted the taxes to the respondents. The Applicant therefore concealed some material facts and approached the temple of justice with unclean hands.

The Applicant having known that POCOL had not paid the taxes ought to have made POCOL an interested party to these proceedings. That way the court could have easily directed the respondents to go after POCOL. Since POCOL has not been heard there is no way that orders can be made against it.

As matters stand, taxes for goods imported into the country by the Applicant for the period October, 2008 to June, 2009 have not been paid. The respondents are under statutory obligation to collect the unpaid taxes. The owner of the said goods is the Applicant and the Applicant is by law required to pay the taxes.

The Applicant has argued that the fact that the goods were released meant that the Applicant was entitled to conclude that the respondents were satisfied that taxes had been paid for the goods. It has now emerged that taxes were not paid. Legitimate expectation can only operate inside and not outside the law. One can only rely on legitimate expectation when the law has been complied with. Where taxes have not been paid then the Applicant cannot rely on the principle of legitimate expectation to avoid payment of taxes.

Considering the evidence placed before the court, I conclude that the decision by the respondents to demand taxes from the Applicant was reasonable and legal. The Applicant's application to have the respondents' decision altered by way of judicial review cannot therefore succeed. The Applicant's application is therefore dismissed with costs to the respondents.

Dated and signed at Nairobi this 8th day of May , 2012

W.K. KORIR

JUDGE