



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**JR NO. 449 OF 2001**

**REPUBLIC**

**VERSUS**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

***EX-PARTE***

**TOTAL KENYA LIMITED .....APPLICANT**

**JUDGMENT**

**The Application**

1. The *ex-parte* applicant (hereinafter “Total”) filed a Notice of Motion dated 30<sup>th</sup> January 2002 seeking the following orders for judicial review;

(1) *That an order of certiorari to issue to move into the High Court and quash a decision made by and*

communicated to the applicant by the Commissioner of Customs and Excise vide a letter dated 24<sup>th</sup> April 2001 purportedly made under **Section 163 and 225A (1) Customs and Excise Act (Cap 472)** seeking to recover from the Applicant a total of Kshs.23,407,724/=

(2) That an Order of Prohibition to issue prohibiting the said Commissioner of Customs and Excise whether by himself, his servants or agents or appointees from attaching intervening or confiscating disposing or in any other manner interfering in the management, control and or conduct of the affairs and or business of the Applicant particularly by attachment of property fund or bank accounts of the said **TOTAL KENYA LIMITED** or dealing in the said property funds or banks accounts in any manner likely to interfere with the Applicant's interest.

(3) That an order that the respondent be condemned to pay the costs of the application.

(4) That further and/or other consequential directions be made as part of the orders for certiorari and/or prohibition.

2. The notice of motion is supported by the statutory statement and the verifying affidavit sworn on 10<sup>th</sup> May 2001 by Francis Nyalala, the accounts assistant in charge of tax matters at the material time.

### **The Applicant's Case**

3. In the course of its business the Total contracted Veritas Agencies Limited ("Veritas") as its clearing and forwarding agent for the year 1995. The company was duly registered as such with the Commissioner of Customs and Excise ("the Commissioner").

4. On 8<sup>th</sup> February 2001, the Commissioner wrote to Total seeking payment of duty in respect of a consignment of 21 cases of Prime Burners amounting to Kshs.3,352,181/= in duty and compound interest at 30% amounting to Kshs.18,436,990/=. These sums were to be paid within fourteen days of the letter. Total received the letter on 9<sup>th</sup> February 2001.

5. In response to the demand, Total, by a letter dated 13<sup>th</sup> February 2001 forwarded to the Commissioner a copy of the Import Entry No. 0130 relating to the consignment together with the invoice issued by Veritas as evidence of payment of duty.

6. The Commissioner wrote two further letters to Total dated 23<sup>rd</sup> February and 21<sup>st</sup> March 2001 insisting that Total had failed to submit proof payment of duty. It was required to make payment of the outstanding duty and interest within a period of seven days.
  
7. By a letter dated 5<sup>th</sup> April 2001 Total forwarded a copy of the Import Entry No. 0130, Veritas invoice dated 13<sup>th</sup> July 1995 and Receipt Number D 199720 dated 4<sup>th</sup> July 1995 issued by the Commissioner. According to Total, it was the duty of Veritas to settle the duty payable with the Customs Department and thereafter forward its invoice to it for settlement. Accordingly, the documents submitted to it by Veritas demonstrated payment of Kshs 3,045,026/= by way of bankers cheque No. NBK 038584 on account of duty due from Total.
  
8. The Commissioner wrote the letter 24<sup>th</sup> April 2001 to Total alleging that the documents submitted to it were forgeries. It demanded payment of outstanding duty and interest within seven days. Upon this notice Total wrote to the Commissioner on 25<sup>th</sup> April 2001 requesting for a period of twenty one days to establish the Commissioner's allegations and to obtain further information on the document submitted to it by Veritas.
  
9. The Commissioner responded to Total's request for time by his letter dated 4<sup>th</sup> May 2001 and specifically stated that the duty and interest must be paid within seven days. Total complains that the Commissioner has not provided it with any documents confirming the alleged fraud.
  
10. In support of its case, the applicant relied on the written submissions dated 21<sup>st</sup> March 2012. Mr Thangei, submitted that the Commissioner's claim amounts to abuse of statutory power as **section 158 of Custom and Excise Act (Chapter 472 of the Laws of Kenya)** ("the Act") does not allow respondent to claim outstanding duty after five years unless fraud committed by the person who should have paid amount levied is established. The allegations of fraud made by the Commissioner are against Veritas. According to counsel, the Act recognises agents and the intention of the Act was to save the principal from fraud of its agent therefore Total was not liable.
  
11. Counsel further submitted that duty was due in July 1995 and payment was made in 1995 and therefore the demand letters 8<sup>th</sup> February 2001 and 24<sup>th</sup> April 2001 were outside the five year period set out in **section 158** of the Act. The demand was *ultra vires* the mandate conferred by law.
  
12. According to Total, it was not given a chance to explain or verify the documents alleged to have been forged. The request to seek clarification was inadequate and unreasonable in the circumstances given that it took over five years to detect the fraud of the agent. Furthermore, counsel contended that the period of notice for payment between 24<sup>th</sup> April 2001 and 4<sup>th</sup> May 2001 was in the circumstances

insufficient. In the circumstances counsel submitted that there was a breach of natural justice.

13. Mr Thangei urged the court to allow the application on the ground that although the Commissioner is disputing fraud, it has not denied receiving payment and the fraud alleged by the Commissioner is against the Veritas. Counsel also urged the court not to follow the case of ***Republic v Kenya Revenue Authority ex parte African Boot Company Limited Nairobi HC Misc. Appl. No. 5 of 2010 (Unreported)*** where the court held that principle was liable under the provisions of the Act irrespective of the fraudulent acts of the agent.

### **The Respondent's Case**

14. The respondent opposed the application by an affidavit sworn on 24<sup>th</sup> March 2004 by Peter Mogoi, a Senior Revenue Officer. The correspondence exchanged between the parties is not in dispute.

15. According to Mr Mogoi, the imported goods were required to be stored in a bonded warehouse pending payment of duty. However, during an inspection audit, it was established that the goods were neither delivered nor received at the bonded warehouse at Nairobi and that is why it was necessary to make demand for duty and interest thereon.

16. Mr Mogoi states that Total's response was not satisfactory as it was supposed to produce an Ex-warehouse Home Use Entry to show that the goods were actually warehoused instead of the Import Entry that is used to pay duty on the goods upfront upon arrival at the Port of Mombasa. Failure by Total to submit the ex-Warehouse Home Use entry created a suspicion that it may have directed the goods to Home Use without payment of duty. He therefore initiated internal investigations including seeking verification of documents.

17. On 5<sup>th</sup> April 2001, Total submitted a copy of Customs receipt Number D199729 dated 4<sup>th</sup> July 1995 purporting it to be evidence of payment of duty and taxes for goods entered vide Import Entry Number 0130. The receipt was issued in Mombasa on 4<sup>th</sup> July 1995 and acknowledged payment by Bankers Cheque NBK 038584 for Kshs.3,045,026/00 from Veritas.

18. Upon scrutiny of the KRA's records it was confirmed the Customs Import Entry No. 0130 related to goods imported by another company Datini Mercantile Limited and not Total. The payment was for grain milling and dairy machines and cultivators and not 21 cases of burners. The duty paid was Kshs. 107,152/00 and not Kshs. 3,045,026/00

19. Based on this information, it was concluded that the documents submitted by Total were fraudulent and it is on this basis that the letter dated 24<sup>th</sup> April 2011 was written calling for duty amounting to Kshs.23,407,724/00 and interest.

20. In opposition to the application, Ms Odundo, counsel for the respondent, submitted that **section 168(1)** of the Act allows for the demand of tax from Total beyond five years in the event of fraud. She further noted that Veritas was an agent of and employed by Total to clear the goods and by virtue of **section 166** of Act, Total is accountable for taxes. Counsel urged the court to follow ***R v Kenya Revenue Authority ex parte African Boot Company Limited (Supra)***.

21. Ms Odundo denied that there had been a breach of natural justice. In her view, the correspondence between the parties was clear that Total had been given the opportunity to make its case and contest the evidence against it. She relied on the case of ***R v Kenya Revenue Authority ex-parte Kapa Oil Refineries Limited Nairobi JR HC Misc. Appl. 283 of 2009 (Unreported)*** where the court held that protracted correspondence between the parties afforded the party the right to be heard.

22. Ms Odundo urged the court to dismiss the application with costs.

### **Determination**

23. Two issues fall to be decided in this case;

**(1) Whether the respondent's action of calling for payment of duty and interest thereon by the letter dated 24<sup>th</sup> April 2001 was *ultra vires* the *Customs and Excise Act*.**

**(2) Whether there was a breach of the rules of natural justice in the circumstances of this case.**

### **Whether actions of the respondent were *ultra vires***

24. This issue calls for the interpretation of the ***Customs and Excise Act*** and principally whether the Commissioner is entitled to collect customs duty from Total after five years and if so whether the fraudulent acts of the agent are attributed to Total as the principal in this case.

25. The relevant parts of the Act are **sections 158, 164, 165 and 166** which I set out as follows;

*158(1) where duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper office, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was so short levied or erroneously refunded, as the case may be, were liable;*

*Provided that the property officer shall not make any such demand after five years from the date of the short levy or erroneous refund unless the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made.*

*(2) Where, on demand, a person who should have paid amount short levied or to whom the refund has been erroneously made fails to pay the amount short levied or to repay the amount erroneously refunded, then the Commissioner may order that any other entries or other documents by that person or his agent shall not be accepted by the customs, or may revoke or suspend that person's licence until the duty short levied or erroneously refunded has been paid or repaid.*

*164(1) where under the provision of this Act the owner of the goods is required or authorised to perform any act, then that act unless the contrary appears, may be performed on his behalf by an authorised agent.*

*(2) A person shall not be the duly authorised agent of an owner unless-*

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

*(b) The person is a customs or excise agent duly licensed as such in accordance with any regulations*

*And in either case the person is authorised by the owner, either generally or in relation to a particular act to perform the act on behalf of the owner.*

*(3) The property officer may require from a person purporting to be the duly authorised agent of an*

***owner the production of that authority the proper officer may refuse to recognise the person as a duly authorised agent.***

***165 A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purpose of this Act, be deemed to be the owner of any 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 all acts in respect of the goods which the owner is required to perform under the Act, but nothing herein contained shall relieve the owner of such goods from such liability.***

***166 An owner of any goods who authorises an agent to act for him in relation to those goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to the goods as if the owner had himself 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 relive the duly authorised agent from any liability to prosecution in respect of any offence.***

26. **Section 158(1)** of the Act entitles the Commissioner to demand taxes short levied from Total even after five years have elapsed provided it shows that the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid.

27. Total contends that by issuing the receipt to Veritas, the Commissioner has not denied payment of duty by bankers cheque. In my view, the documents forwarded including the receipt for payment by Total have been impugned as fraudulent. Though the affidavit of Peter Mogoi was filed way back in 2004, there has been no response to it contesting its contents. No affidavit has been sworn by Total's agent to show that payment was indeed made to the Commissioner as it alleged or evidence to show that the banker's cheque drawn on National Bank was paid over as tax. What is annexed to the verifying affidavit is evidence of payment by Total to Veritas on account of an invoice no. 00200 dated 13<sup>th</sup> July 1995 issued by Veritas.

28. On the basis of the material before the Court, I am satisfied that there was a reasonable basis for the finding of fraud on the Total's part in failing to pay duty or at any rate in presenting fraudulent payment.

The person referred to under **section 158(1)** is the person liable to pay the tax and not the agent as contended by Total.

29. Though a clearing agent is licensed by the Commissioner under **section 164**, the agent remains the agent for the taxpayer and the taxpayer cannot evade his liability on the basis of fraudulent acts of the clearing agent. **Section 166** of the Act underpins this liability. Even though **section 165** of the Act imposes liability to the agent *qua* agent, the principal or the tax payer is not relieved of liability to pay taxes.

30. In coming to these conclusions, I adopt the reasoning of the Court (Korir J) in the case of ***Republic v Kenya Revenue Authority ex parte African Boot Company Limited Nairobi HC Misc. Appl. No. 5 of 2010 (Unreported)*** where the Court stated, “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. .... The same case applies here so that when a customs agent engages in fraudulent activities, the importer cannot ask Kenya Revenue Authority for compensation. The importer has to bear the loss with fortitude and find a way of recovering 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 tax payer can do is to report the agent so that the license can be revoked by the respondent.”

31. In the circumstances, I find that the demand dated 24<sup>th</sup> April 2004 issued by the respondent was *intra vires* the ***Customs and Excise Act***.

### **Whether there was a breach of rules of natural justice**

32. Total claims that it was denied the right to be heard on the alleged fraud and in proceeding to demand the disputed duty; the respondent breached the rules of natural justice.

33. The right to be heard is a fundamental right and basic right and cannot be taken away however hopeless one's case. It cannot be cured by holding that the decision would be right or proper. (See ***Dickson Ngigi Ngugi v Commissioner of Lands Nairobi Civil Appeal No. 297 of 1997 (Unreported)*** and ***David Oloo Onyango v Attorney General Nairobi Civil Appeal No. 152 of 1986 (Unreported)***)

34. The question whether there has been a breach of natural justice must be determined in light of the facts of the case. As was stated by Lord Denning in the case of *Reg. v Gaming Board ex parte Benaim* (1970) QB 417,430 (quoted in *David Oloo Onyango's case*), “*It is not possible to lay down rigid rules as to when the principles of natural justice are to apply not as to their scope and extent. Everything depends on the subject matter ..*”

35. The issue of duty was first raised in the letter dated 8<sup>th</sup> February 2001. There was subsequent correspondence between the parties on the issue leading to the demand on 24<sup>th</sup> February 2001. Total responded by the letter dated 25<sup>th</sup> April 2001 and on 4<sup>th</sup> May 2001, Total was granted an extension of seven days to respond to the queries before the respondent began to enforce the collection of duty. This is what precipitated these proceedings.

36. I agree with counsel for the respondent that the exchange of correspondence in this instance provided the applicant an opportunity to be heard and to present its case. That opportunity was afforded from the time the first demand was issued on 8<sup>th</sup> February 2001 and this opportunity was available until at least 4<sup>th</sup> May 2001.

37. I therefore hold that in the circumstances of this case there was no denial of natural justice.

### **Conclusion**

38. On the basis of the material before me, I find and hold that the acts of the respondents were within the provisions for the law and were not unreasonable excessive, arbitrary or oppressive.

39. The Notice of Motion dated 10<sup>th</sup> May 2001 is therefore dismissed with costs to the respondent.

**DATED and DELIVERED at NAIROBI this 8<sup>th</sup> day of May 2012.**

**D. S. MAJANJA**

**JUDGE**

Mr A. Thangei instructed by Waruhiu K'Owade and Ng'ang'a Advocates for the ex-parte applicant.

Ms B. Odundo instructed by the respondent, Kenya Revenue Authority.