



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Judicial Review 631 of 2009

REPUBLIC

-VERSUS-

KENYA REVENUE AUTHORITY 1ST RESPONDENT

COMMISSIONER OF CUSTOMS & EXCISE

KENYA REVENUE AUTHORITY 2ND RESPONDENT

COMMISSIONER GENERAL

KENYA REVENUE AUTHORITY 3RD RESPONDENT

EX PARTE

MODERN COAST BUILDERS

AND CONSTRUCTORS LTD APPLICANT

JUDGMENT

The Application

1. The *ex-parte* applicant, Mombasa Coast Builders and Contractors Ltd (“the applicant”) has filed a Notice of Motion dated 30th October 2009 under **Order 53 rule 3 and 4** of the ***Civil Procedure Rules*** seeking the following orders of Judicial Review;

(a) An order of certiorari to remove to this Honourable Court to be quashed the decision of the respondents to impound and detain the applicant's motor vehicles/trailers Registration Numbers KAR 911J/ZB 5198, KBH 640N/ZB 8172 and or other vehicles and trailers of the Applicant for alleged want of authority to transport goods within the country.

(b) An order of prohibition prohibiting the respondents from impounding and or detaining the applicant's motor vehicles/trailers registration numbers KAR 911J/ZB 5198, KBH 640N/ZB8172 or any other vehicles/trailers of the applicant for alleged want of authority to transport goods within the country.

2. The application is supported by the statement dated 30th October 2009 and the verifying affidavit sworn on 30th October 2009 by Mr Robinson Munyasya who was at the time material to these proceedings the transport manager of the applicant.

Applicant's Case

3. The applicant is a long haul transporter and is the owner of motor vehicles and trailers registration KAR911J/ZB 5198, KBH 640N/ZB8172 ("the vehicles"). It contends that the vehicles are duly registered in Kenya and by virtue of that registration they derive automatic licence to carry goods locally.

4. Mr Munyasya depones that on 20th October 2009 at the Port of Mombasa, the applicants vehicles were loaded with fertilizer belonging to a third party for delivery in Nairobi, under the supervision of the respondent's personnel. On that date, the respondents acting through their agents impounded and detained the applicant's vehicles and the goods at Mariakani Transport Monitoring Unit ("TMU") on the ground that vehicles which were licenced to carry transit goods could not be used to transport goods locally.

5. After impounding the vehicles, Mr Munyasya avers that the respondents' officers proceeded to compound several offences as follows:

(i) Carrying local goods using transit goods licenced trucks;

(ii) Failure to produce original transit goods licence;

(iii) Erasing inscription "Transit Goods" and

(iv) Pending production of the original Transit Goods Licence cancellation letter or authority allowing them to use transit goods licence truck to carry local goods.

6. The applicant argues that in compounding the respondent failed to specify the law or the specific provisions of the law violated despite several demands. The applicant further argues that the offences which are it was requested to compound do not exist in law.

7. According to Mr Munyasya, the applicant had previously filed two judicial review applications; *Nairobi HC MISC. 217 of 2006* and *Nairobi HC MISC. No. 748 of 2007* in respect of the impounding and detention of its motor vehicles and the matter were settled by consent and the vehicles released.

8. Mr Makolwal adopted the written submissions filed on behalf of the applicant dated 19th March 2010. The applicant contends that **section 85** of the *East Africa Community Customs Management Act, 2004 ("EACCMA, 2004")* makes provisions for treatment of goods under transit and transshipment but does not prescribe the offence charged herein. Thus there is no law prohibiting the transportation of goods

locally by vehicles also licensed to carry goods on transit, provided that vehicles display “TRANSIT GOODS” inscription when carrying goods on transit for necessary identification to avoid dumping and provided the “TRANSIT GOODS” inscription is erased/removed when the vehicles are carrying goods locally to avoid confusion.

9. The applicant asserts that the alleged compounded offences are unreasonable for requiring the applicant’s motor vehicles to display the “TRANSIT GOODS” inscription while carrying local goods.

10. The applicant asserts that the respondents’ actions have no basis, are unlawful, unjustified, *ultra vires* the law and the abuse of the criminal justice process and that the decision to impound, detain and charge was made in bad faith to harass the applicant in its business.

The Respondents’ Case

11. The respondents oppose the application by the affidavit of Felix Ndunga Kasiva sworn on 30th November 2009. At the material time he was the officer in charge of the Mariakani TMU.

12. Mr Kasiva depones that he was aware that the vehicles were intercepted by the respondents officers at Mariakani on 20th October 2009 for the following reasons;

(a) The vehicles were licensed to carry transit goods but were actually carrying local goods contrary to **Regulation 104 of EACCM Regulations** and Condition No. 2 of the Transit Goods Licence.

(b) The inscription, “TRANSIT GOODS” had been erased from the vehicles contrary to **Regulation 104 of EACCM Regulations** and Condition No. 4 of the Transit Goods Licence.

(c) The applicant refused to produce customs documents Transit Goods Licence as requested by customs officers contrary to **Section 204 of EACCMA**.

13. Once these offences were detected, Mr Kasiva proceeded to prepare the relevant documentation which he forwarded to the head of Enforcement at Kilindini, who directed that offence files be opened. The case files were forwarded to the office of Senior Assistant Commissioner at Regional Headquarters, Southern Region for compounding.

14. Mr Kasiva states the applicant’s representative appeared before the Senior Assistant Commissioner for compounding the offences and the fine of Kshs. 60,000.00 was ordered together with an order that the local goods be transferred to local trucks but the offer to compound was rejected with the result that the trucks remained at the Mariakani TMU parking area.

15. Mr Kasiva deponed that in respect of *Nairobi HC Misc. Civil No. 217 of 2006*, the applicant was issued with the transit licenses after the trucks had been detained after a request made in writing to the Commissioner of Customs who allowed it to transport local goods with conditions.

16. Mr Ontweka, counsel for the respondents, adopted the written submissions dated 28th May 2012. The respondents’ contention is they acted according to the provisions of *EACCMA, 2004* and the regulations made thereunder.

17. Furthermore the applicant, as a licenced transporter entitled to carry transit goods, was required to conform to the conditions of its licence and where there was a violation; the respondents were entitled to enforce the law. As the applicant was in breach of the law, Mr Ontweka submitted that the application lacked merit and ought to be dismissed.

Determination of issues

18. The applicant in the application for leave and the statement relied on a broad notion of *ultra vires*. The grounds for seeking relief were rather vague and did not set out with due particularity the law or

regulations impugned and how such rules are *ultra vires*. I think it is proper that where a party relies on the doctrine of *ultra vires*, the pleadings must set out the legal provisions alleged to be *ultra vires* and the provisions they infringe.

19. The applicant's case was brought out in submissions. It's case is that the respondents actions violate **section 77(2)(b)** of the former Constitution which entitles every person charged with a criminal offence to be informed as soon as possible, in the language he understands and in detail, of the nature of the offence with which the person is charged. This provision is given statutory effect by **sections 134 and 137(a)** of ***Criminal Procedure Code*** which the applicant also alleges has been infringed. According to the applicant the alleged offences for which its vehicles were impounded were not specified and did not exist.

20. The answer to the applicant's case call an examination of the relevant provisions of ***EACCMA, 2004*** in relation to what has been alleged by the parties. The starting point for the inquiry is **section 85** of ***EACCMA, 2004*** which gives the Commissioner broad powers to impose conditions on the transit or transshipment of imported goods. **Section 85(3)** refers to certain regulations which govern transit goods.

21. The regulations governing transit of goods are to be found in the ***East African Community Customs Management Regulation, 2006 ("EACCM Regulations")***. **Regulation 104** which set out how transit goods are to be treated for the protection of the revenue. These regulations provide inter alia, for the licensing of vehicles carrying transit goods by the Commissioners, the mode of identification of trucks licensed to carry transit goods and the manner in which transit goods are conveyed.

22. These regulations are made pursuant to **section 251** of ***EACCMA, 2004*** which empowers the Council of Ministers to make generally for giving effect to the provisions of the Act. Under **section 251(2)** any regulations made under **subsection (1)** may provide that any person contravening any of the provisions thereof commits an offence and may provide a penalty for the infraction. Such a penalty is enacted under **Regulation 215** which provides that a person who commits an offence under the regulations is liable to a fine not exceeding five thousand dollars.

23. It is not denied that the applicant's vehicles were issued with licences to carry transit goods in accordance with **regulation 104**. The conditions imposed on the licences were as follows;

(1) The licence shall be permanently affixed to the licensed vehicle in a prominent position where it is visible at all times.

(2) The licensed vehicle shall be used exclusively for the carriage of goods in transit and for no other purpose, unless otherwise authorised by the Commissioner.

(3) The licensed vehicle shall travel through the Republic of Kenya only upon those routes appointed in accordance with the provisions of the Customs and Excise Laws.

(4) The licensed vehicles shall be distinguished by the following inscription in yellow painted letters, not less than 31cm high on both sides of vehicles.

(5) The licensed vehicle carrying goods in transit shall be sealed by the property officer except in the case of "exceptional loads" as defined in regulation 96, or in any particular case otherwise authorised by the Commissioner.

24. It is now abundantly clear that the applicant misapprehended the Commissioner's powers under ***EACCMA, 2004***. Contrary to the assertions by the applicant, the Commissioner's powers and offences for which it was accused have a firm legal foundation and there is no basis for impugning them. Specific violations of the Act and the regulations were disclosed to the applicant and the respondents were entitled to impound the vehicles. The vehicles could not be permitted to contravene the conditions of licence nor breach the regulations for the carriage of transit goods for the specific offences which I have set out at paragraph 12 above.

25. The Commissioner was thereafter entitled to compound the offences in accordance with **section 219, EACCMA, 2004**. **Section 219** empowers the Commissioner, where he is satisfied that any person has committed an offence under the Act in respect of which a fine is provided or a thing is liable to be forfeited, compound the offence and may order that such a person pay a sum not exceeding the amount of the fine which the person would have been liable if he or she has been convicted of the offence. The Commissioner can only compound the offences where the person liable admits the offence in writing.

26. I have examined the documents attached to the deposition of Mr Kasive and I find that there was evidence to suggest that the applicant had breached the conditions of its transit licences and the **EACCM Regulations**. The Commissioner was entitled to take steps to charge the applicant or in any case compound the offence.

27. The applicant admits that the Commissioner took steps to compound the offences but contests that the action on basis that the alleged offences do not exist. As I have demonstrated, the applicant's position is based on a misunderstanding of **EACCMA, 2004** and **EACCM Regulations**. In the circumstances, the applicant, but for these proceedings, would have been charged in a court of law for the disclosed offences.

28. As the applicant had not been charged with any criminal offence before a court of law, the provisions of **section 77(2)(b)** of the former Constitution and the provisions of **section 134** and **137** the **Criminal Procedure Code** cited by applicant in the submissions are not applicable.

29. On 10th December 2009, a consent order was recorded by the parties where the applicant was permitted to transfer the local cargo to non-transit licenced trucks and the impounded vehicles released.

Conclusion

30. In the circumstances orders of certiorari or prohibition sought by the applicant cannot lie in the absence of any breach of the law or procedure by the respondents.

31. I also find that the respondents' actions as set out in the depositions were in accordance with the provisions of the law, were not *ultra vires*, baseless or made in bad faith to harass the applicant as alleged or at all.

32. The Notice of Motion dated 30th October 2009 therefore lacks merit and is dismissed with costs to the respondents.

DATED and **DELIVERED** in **NAIROBI** this 19th day of June 2012.

D.S. MAJANJA

JUDGE

Mr Makolwal instructed by Lumumba, Mumma and Kaluma Advocates for the *ex-parte* applicant.

Mr Ontweka, Advocate instructed by the respondents.