REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MOMBASA

Judicial Review 130 of 2011

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL

REVIEW ORDERS UNDER SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF: KENYA MARITIME AUTHORITY ACT, KENYA REVENUE AUTHORITY ACT, CUSTOMS AND EXCISE ACT AND THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: CERTIFICATE OF DESTINATION AND FERI CERTIFICATE

REPUBLIC ……..…… APPLICANT

V E R S U S

1. KENYA PORTS AUTHORITY

2. KENYA REVENUE AUTHORITY

3. KENYA MARITIME AUTHORITY …….....…….....…… RESPONDENTS

AND
OFFICE DE GESTION DU FRET MULTIMODAL (OGEFREM) ……. INTERESTED PARTY

EX-PARTE

1. **ROSMIK TRADING CO. LIMITED**
2. **ATHANASE KIRO M. MUHAVIRWA**
3. **KAMBALE VALEVEKA KDEPHONSE**
4. **ABDULLATIF IBRAHIM**
5. **KATALIKO KANIKI**
6. **KASEREKA MBAYAHI**

7. **PALUKU JEAN-BOSCO**

8. **A. BAGHA**

9. **KAMBALE KAZINGUFU**

10. **CLAUDE MAHENGERA**

11. **KAHINDI NZOKA**

12. **KAMBALE MAHAMA**

13. **PALUKU MALIYABWANA**

14. **KATEMBO MAHEMBE**

15. **KAMATE MARANZI**

16. **LWANZO MUTUMISHI**

17. **KAKULE VIKWIRAHANGI**

18. **KALUME KABUNGA FRANCOIS**

19. **MUHINDO KYAVERE ROGER**

20. **KASEREKA VAHWERE IZRON**

21. **PALUKU LUSENGE**

22. **KAMBALE CHARLES**

23. **KAMBALE KATSONGO**

JUDGEMENT

1. The vast Democratic Republic of Congo (DRC) has a short 37 kilometres of Coastline. Many of the imports into DRC pass through the Port of Mombasa. The Applicants are involved in the Clearing and Forwarding some of those transit goods at that Port.

2. Pursuant to leave granted to them on 21st November 2011 the Applicants filed a Notice of Motion dated 8th December 2011 in which they seek the following Judicial Review Orders-

"(a) PROHIBITION restraining the Respondents from demanding from the ex-parte applicants or any other persons FERI Certificate or Certificate of Destination issued by the Interested Party prior to release of any goods imported through the port of Mombasa or through any other Kenyan Port.

(b) MANDAMUS compelling the Respondents to release all goods that have complied with all lawful customs procedures other than the requirement for the aforesaid FERI Certificate and Certificate of Destination."

3. The Respondents are Statutory Corporations established pursuant to provisions of various Statutes. A function of the 1st Respondent is to maintain, operate, improve and regulate the Port of Mombasa. The 2nd Respondent is charged with, amongst other roles, the management, enforcement and

administration of customs, while The Kenya Maritime Authority Act, 2006 gives the 3rd Respondent the mandate to regulate, co-ordinate and oversee Maritime affairs.

4. The Interested Party, Office De Gestion Du Freit Multimodal En Sigle (OGEFREM) is said to be an agent of the Government of DRC in respect to Maritime Freight Management and is represented in Mombasa.

The Evidence

5. A synopsis of the dispute. In an agreement made between the Government of Kenya (GoK) and that of The Government of DRC in Nairobi on 30th May 2000 GoK ("***the Bilateral Agreement***") GOK agreed to assist in the Management of Congolese Cargo in transit at the Port of Mombasa. This would include calculation and collection of some charges on behalf of DRC. The Kenya Government was to act through The Merchant Shipping Superintendents Office, an office established under The Merchant Shipping Act (repealed). The Kenyan public was notified of this agreement vide Gazette Notice No. 5625 published on 30th August 2002. In this arrangement the Interested Party was to represent DRC.

6. The Court was told that on 22nd April 2008 DRC through the Interested Party introduced Fiche Electronique de Renseignment a I'Importation (FERI) Certificate for purposes of tracking cargo bound for DRC. Also required was a Certificate of Destination (C.O.D).

7. The Applicants showed Court various Notices issued by the Interested Party in respect to the requirement for FERI and Certificate of Destination. These include an undated notice reproduced below-

"**TO ALL ESTIMATE CLEARING AND FORWARDING AGENTS**

WE WISH TO INFORM YOU THAT, FROM 1ST NOVEMBER ANY CARGO DESTINATED TO DR CONGO THAT LEFT PORT OF LOADING AFTER 1ST OF OCTOBER MUST HAVE A FERI CERTIFICATE OF DESTINATION. FOR ALL ENQUIRIES:

v**Mail : ogefrem@frabemar.it**
v**Tel : +390105533011**
v**Fax : +39010541458**
v**Site www.ogefrem.net**

MANAGEMENT"

A procedure Notice was also issued on the manner of obtaining a FERI Certificate. This required, inter alia, that payments be made by Western Union to an individual's account in Italy.

8. It was the evidence of the Interested Party that the procedure has the force of law. Vide Decree No. 011/18 of 11th April 2011, DRC issued instructions on procedures applicable to the Importation and Exportation of goods. The requirements of this procedure included applying and obtaining Electronic Cargo Tracking Note on Imports (FERI) and Certificate of Destination. It was explained by Berthe Morisho Mwamvua a representative of the Interested Party that the Certificate of Destination verifies that cargo has been checked before it is cleared for transportation to DRC while the FERI Certificate was issued by the Interested Party to confirm the nature and volume of the import. The Respondents have enforced the twin requirements of Certificate of Destination and FERI Certificate. This has displeased the Applicants.

The Applicants Contention

9. In the Statutory Statement in support of the application for leave the Applicants raised the various grounds, some appear to overlap and I reproduce the following-

- **The Interested Party has no valid or lawful role to play in the process of importation of goods through Kenya.**

- **The Respondents' insistence on the Certificate of Destination and FERI Certificate is therefore unlawful and discriminatory. The Respondents' actions aforesaid are unfair, irregular, unprocedural, unlawful and unjust.**

- **The Ex-parte Applicants have not been given any valid legal basis or grounds entitling the Respondents to carry out the aforesaid acts.**

- **The Ex-parte Applicants have neither been heard nor given an opportunity to be heard prior to the said acts.**

- **The Respondents' said acts are ultra vires the powers and statutory functions of the Respondents.**

- **The Respondents' acts complained are an abuse of power, unfair and perverse within the Wednesbury principle.**

- **The Respondents' acts complained of are unreasonable, irrational and a breach of the rules of natural justice.**

10. Confronted by affidavit evidence filed by the Respondents and the Interested Party the Applicants took the position that the requirements of these two Certificates was not contemplated in the Bilateral Agreement. Citing Article 3 thereof Counsel for the Applicants argued that the 3rd Respondents mandate was limited to asking for-

(a) A copy of the Freight Bill of Lading.

(b) A copy of Import Cargo Manifest

(c) A copy of a Certificate of Hold Reservation "ARC"

That to insist on the two Certificates would be to overstep that mandate.

11. That in any event the Bilateral Agreement lapsed as it was not properly renewed after the first expiry date of 30th May 2003. The renewal made on 18th December 2003 was thereof invalid and ineffectual. All renewals premised on this were equally invalid.

12. That being statutory bodies the Respondents were acting ultra vires as their conduct was conducted was not sanctioned by law, the agreement or Gazette Notice.

<u>The Response</u>

13. It is convenient, I think, to consider all the Respondents and Interested Party's position together as they are not dissimilar and compliment each other. Their arguments, abridged, are-

- **The requirement of the two Certificates was well founded as it was based on a valid agreement entered between two Sovereign States. In that agreement GOK through its agencies was to assist DRC in controlling and managing Congo bound freight leaving the Port of Mombasa. That the agencies themselves were empowered by Statute to carry out those duties.**

- **The notices renewing the agreement was done on time and even if not extended in the exact manner provided by the agreement, its validity can be construed from the conduct of the parties as they both recognize it as binding between them.**

- **Although the two Certificates were not expressly provided in the agreements, the Certificates were sanctioned by the agreement in as far as they promoted the object and purpose of the treaty. In this regard one needed to bear in mind the mischief that the agreement intended to address which was to keep track of the nature of imports into the Congo and revenue collection**

- **The decision to require the two Certificates had already been made and an order of prohibition could not prevent what had already happened.**

- **By attacking the validity and scope of the agreement, the Applicants had strayed away from their application. The Applicants were introducing new matters and ran foul of Order 53 Rule 4. This Court was asked not to take account of those arguments in reaching a decision.**

Issues and Determination

14. It is necessary, before framing the issues for determination, to consider as a prefatory issue whether the matters which now form the backbone of the Applicant's case fall outside the grounds revealed in the application for leave. Order 53 Rule 4 of The Civil Procedure Rules is also effect-

"(1) Copies of the statement accompanying the

application for leave shall be served with the Notice of Motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement."

That rule is undergrided by Section 9(1) of The Law Reform Act. This is not an idle provision. The rule ensures fair play as all parties to Judicial Review proceedings need to know the Applicants specific grievance so as to adequately prepare their answers if any.

15. The Court has in paragraph 9 of this decision given a summary of the grounds taken up by the Applicants in their statutory statement in support of leave. It is the Applicants submission that the issues of the validity and scope of the Bilateral Agreement and Gazette Notice are evidential matters falling within the Grounds in the Statement. Quite frankly the Applicants were either ignorant of the existence of the agreement and Gazette Notice or simply chose not to mention them at the leave stage. But as it turned out these provided the ammunition for attack.

16. I am nevertheless inclined to consider those issues to be live issues for discussion and determination. There would be two reasons. One, those issues can be considered to fall under ground (P) of the statutory statement which is expressed in the following broad terms-

'The Exparte Applicants have not been given any valid legal basis or grounds entitling the Respondents to carry out the aforesaid acts.'

As it is the argument of the Respondents that the Bilateral Agreement is the legal foundation of the freight management then its validity and scope falls squarely for discussion. Second, the Agreement and Notice were introduced into the matter by affidavit evidence presented by the Respondents and Interested Party. The 1st and 2nd Respondent and the Interested Party thought they were central to this dispute and expressly identified issues surrounding their validity and scope as issues for determination. The 3rd Respondent, though, not of the same mind made comprehensive arguments on it. I do not see prejudice that will be suffered by any of the parties.

17. The Court isolates the following as the issues it must determine-

- **Is the Bilateral Agreement entered between GOK and DRC valid and in force.**

- **If the answer to the above is in the affirmative, is the imposition of COD and/or FERI within the terms of the Agreement.**

- **Do the Respondents have the mandate to impose COD and/or FERI.**

18. At International Law a treaty means "**an agreement concluded between states in written form and governed by International Law, whether embodied on a single instrument or in two or more related instruments and whatever its particular designations**" (Halsbury's Laws of England 4th Edition (paragraph 1769).

What is critical is that not only must the agreement be between two sovereign states but the contracting parties must intend the document to be binding at International Law. The Bilateral Agreement entered between GOK and DRC was in respect to Maritime Freight Management. It imposed obligations on the contracting states and had provisions in respect to renewal, amendments and termination (Section V) of The Agreement. In addition GOK thought it important enough to publish a Gazette Notice notifying the General Public of the existence and coming into effect of the agreement. Then there was routine renewal through exchange of letters. Importantly the contracting states had rights and obligations under the Agreement. GOK was to calculate and collect commission at a remuneration. The two parties, in my view, intended to be bound by the terms.

19. The term (period) of that agreement was provided in Article 10 as follows-

"The present Agreement shall remain in force for a period of THREE (3) YEARS following the day of coming into force of the Agreement and shall be renewable for a further period of THREE (3) YEARS, provided both parties exchange notices of their intention to renew at least THREE (3) MONTHS before the expiry of every three-year period." (my emphasis)

The representative of the Interested Party said this of the Clause-

"The Agreement was to remain in force for 3 years. However it could remain in force for a further 3 years and beyond provided the Democratic Republic of Congo and the Republic of Kenya Exchange notices of intention to renew the said agreement at least three months before the expiry of the 3 year period" (paragraph 4 of the Affidavit of Berthe Murisho Mwamvua sworn on 4th April 2012).

This is not the construction the Court would give to those provisions. Granted the language used is somewhat confusing. A plain reading is that the term of the agreement would be for a maximum period of six (6) years. "**A further period of three (3) years**" means one more period of three years. But the use of the words "***before the expiry of every three-year period***" at the end of the Clause may have caused the parties to believe that the agreement could be renewed every three (3) years ***ad infinitum.*** But nothing turns on the construction given.

20. The two Governments assumed that the agreement could be renewed every three years and exchanged four communications for renewal. The last was a request by DRC to renew for a fresh term after May 2012. The signatories were quite happy to keep the agreement between them alive. They chose to do so by exchanging letters of renewal. It must be said that the first renewal was done outside the timelines imposed by the Clause on renewals and the subsequent renewals may not have been contemplated at all in the strict reading of the Clause. Nevertheless, the mutual exchange of letters kept the Agreement alive and the parties related in conformity with the terms thereof. Both GOK and DRC recognize the Agreement as existing and valid. It is my view therefore that at the time when the requirements of the two Certificates were imposed a valid Inter-Government agreement on freight management existed.

21. So were the requirements of COD & FERI contemplated by the agreement? The answer will be found partly in the interpretation of the agreement. As the agreement is a treaty under International Law the rules of Interpretation of treaties are relevant. It was submitted by Counsel for the 3rd Respondent, and this Court accepts, that much assistance would be found in Article 31 of The Vienna Convention of Treaties, 1969. The provisions of Article 31 are summarized as follows in **Halsbury's (supra)** at

paragraph 1792-

"A treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context includes, in addition to the text with its preamble and annexes, (1) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; and (2) any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. There may also be taken into account (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; and (c) any relevant rules of international law applicable in the relations between the parties. A special meaning different from the general or usual meaning is to be given to a term if it is established that the parties to the treaty so intended." (my emphasis)

In interpreting the Bilateral Agreement the Court will exam the object and purpose of the treaty and the subsequent practice of the parties regarding its implementation. This is what Lord McNair in "**The Law of Treaties**" (Oxford Press 1961 page 22) said of the use subsequent Practice as a tool of Interpretation-

"Here we are on solid ground and are dealing with a judicial practice worthy to be called a rule, namely that, when there is a doubt as to the meaning of a provision or an expression contained in a treaty, the relevant conduct of the contracting parties after the conclusion of the treaty (sometimes called 'practical construction') has a high probative value as to the intention of the parties at the time of its conclusion. This is both good sense and good law."

22. The stated objectives of the Bilateral Agreement are in Article 2-

"OGEFREM gives mandate to Merchant Shipping Office and Merchant Shipping Office accepts to-

(a) Record all Congolese cargo in transit in the Port of Mombasa.

(b) Provide OGEFREM with the monthly statistics of all exports and imports of the Democratic Republic of Congo on transit in the Port of Mombasa.

(c) Provide OGEFREM with the cargo manifest of all Congolese exports indicating clearly among others-

- **The description of the cargo**
- **The weight, measurements, and metric tonnes**

(d) Calculate and collect on behalf of OGEFREM a commission of one point eight percent (1.8%) of the gross freight charges on the imports for the Democratic Republic of Congo on transit at the Port of Mombasa, which are not covered by an A.R.C. The said commission is payable in US DOLLARS.

(e) Issue, on the 25th day of every month, a monthly statement per Shipping Line, on the OGEFREM commission collected during that month. Any other cargo arriving after this date will be registered in the statement of the following month.

One discerns at least two objectives of this inter-government arrangement. One is the monitoring or tracking of the nature of cargo in transit (Article 2(a), 2(b) and 2(c)). The other was to impose a levy (Article 2(d) and 2(e)).

23. Article 3(a), (b) & (c) of the agreement gives the documents to be produced by shipping lines as –

"(a) A copy of the Freighted B/L

(b) A copy of the import cargo manifest indicating clearly among others-

- ***The description of the cargo***
- ***The weight measurements, and metric tonnes***

(c) A copy of a Certificate of Hold Reservation "A.R.C"

from OGEFREM agent at the Port of Loading as proof that OGEFREM commission was collected. For those not covered by an A R C, a 1.8% levy on the Gross Freight charges should be collected."

So it is true, as argued by the Applicants, that FERI & COD were not amongst the documents expressly mentioned in the agreement.

24. But it must be remembered that when the 3rd Respondent issued the notice giving effect to the imposition of FERI & COD it did so on behalf of the DRC. This is what one such notice said-

"NOTICE TO IMPORTERS, CLEARING AND FORWARDING AGENTS AND SHIPPING LINES/AGENTS HANDLING TRANSIT CARGO TO DEMOCRATIC REPUBLIC OF CONGO (DRC)

OGEFREM on behalf of the government of the Democratic Republic of Congo notifies all importers, clearing and forwarding agents and shipping lines/agents that fees for all Democratic Republic of Congo (DRC) bound cargo transiting through the Port of Mombasa will with effect from 1st June 2010 be as follows-

- ***DRC Certificate of Destination: Twenty Five US Dollars (US$25)***
- ***Registration fee for importers: Fifty US Dollars (US$50)***

For any further clarification, please contact OGEFREM Representative.

Kenya Maritime Authority,

P.O. Box 95076,

MOMBASA-80104
Tel: 2318398/7 Ext. 127/143
Email Address: Ogefrem.atd.rmsa@gmail.com." (my emphasis)

25. The rationale for imposing FERI & COD are given in the affidavits of Mr. Bertha Morisho Mwamvua the Representative of the Interested Party. It is explained that FERI is issued by the Interested Party to confirm the nature and the volume of cargo that is being imported to DRC. That through issuance of the COD & FERI, DRC is able to track the nature of goods imported into DRC. This was to check, inter alia, the proliferation of arms into Congo. It is further explained that the two Certificates were introduced to strengthen the existing system. This explanation was reinforced by Mr. Omingo, the Head of Commercial Shipping of the 3rd Respondent. This is what he says in his affidavit of 19th March 2012-

"12. That when comparing data from, on the one hand,

FERI Certificate which captured data from the actual port of loading and the Certificate of Destination with data, on the other hand, derived from the manifests submitted to the 3rd Respondent,

certain discrepancies were identified which discrepancies included the fact that it was noted that not all transit cargo had their final destination identified as the Democratic Republic of Congo. (Shown to me JOO III of a Certificate of Destination and a Bill of Lading for the United Nations relating to the same consignment yet showing different destinations).

13. That the state of affairs described in paragraph 12 of

this affidavit resulted in loss with regard to the collection of the amounts referred to in Exhibit JOO1, because of the wrong identification of the final destination in the manifests thus making it impossible to collect the commission with regard to the said consignments.

14. That for the purpose of applying the commission to

all cargo bound to the Democratic Republic of FERI Certificate became instrumental in identifying what the cargo manifests may have missed out."

What I hear the 3rd Respondent and Interested Party to be saying is that the older procedure was fraught with weaknesses and loopholes. The introduction of FERI and COD was to strengthen the procedure and to seal the loopholes. This explanation has not been contested and the Court believes it. I take the view that COD and FERI were to give effect to the objectives in Article 2. The two Certificates were consistent with the provisions of the Bilateral Agreement.

26. I think I need to add that I would reach the same conclusion even if I was to hold that the Bilateral agreement was not a treaty. This is because both GOK and DRC recognize it as binding and providing a framework for freight management. This is not an informal or private arrangement. GOK notified the public of its existence by way of Gazette Notice Number 5625 of 30th August 2002 and the requirement for COD and FERI are underpinned in Decree NO. 118/18 of 11th April 2011 issued by the Government of DRC.

27. The procedure implemented by the Respondents are procedures of DRC. The Respondents are merely implementing them as agents of GOK who in turn were acting on the instructions of DRC and in accordance with the Bilateral arrangement. If the Applicants are unhappy about the rules then they should take that up against the DRC. This Court would not have jurisdiction to entertain that grievance. This same can be said about the complaint that the FERI charged is being paid into an account in Italy. The FERI Certificate is issued by the Interested Party. The Respondents neither collect the charges nor issue the Certificate so any grievance about the integrity of the process needs to be directed against the Interested Party and its principal (DRC).

28. The above analysis leads this Court to reach the conclusion that the imposition of FERI and COD is with a legal basis. The Statutory Bodies implementing it are doing so in the discharge of their statutory duties. This Court is not persuaded that they have acted ultra vires their powers or in breach of statutory duty. It has not been demonstrated how the implementation of that procedure is unfair, unreasonable or discriminatory. The procedure is prescribed by the Government of DRC. That procedure cannot be impeached by a Kenyan Court unless it can be shown to be manifestly unlawful.

29. There would be one other reason why this Court is reluctant to interpose on the side of the Applicant. There was evidence that the Applicants were aware of the requirements of these two Certificates by June 2010. Even if it were to be accepted that an order of prohibition would be available to stop a continuing wrong, the Applicants did not explain why it took them about 17 months to seek this Court's intervention. Granted, there is no time limit imposed for applying for mandamus and prohibition, but good Public Administration requires that proceedings questioning the validity of an Administrative action be brought promptly and without unreasonable delay. What amounts to delay will depend on the circumstances of each case. The dispute here revolves around Freight Management of Transit goods. The Government of DRC, the importers of the goods, the Respondents and, not in the least, the Applicants all have a stake. This Court is told that the question of Freight Management has an implication on the National Security of DRC and Revenue Collection. Delay in resolving a dispute of this nature may lead to

serious repercussions. It is my humble view that the Applicants in waiting for 17 months never acted promptly. I would refuse to exercise my discretion in their favour.

30. For all reasons given, I dismiss the Notice of Motion dated 8th December, 2011 with costs.

Dated and delivered at Mombasa this 27th day of September, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Omondi for the Applicant

Ikegu holding brief for Sangoro for the 1st Respondent

Tarus holding brief for Lavuna for the 2nd Respondent

Okello for the 3rd Respondent

Tarus for the Interested Party

Court clerk - Moriasi

F. TUIYOTT
JUDGE