REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 359 of 2012

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

EX-PARTE

SHAKE DISTRIBUTORS LTD

JUDGEMENT

This decision is an answer to the Notice of Motion application dated 3rd October, 2012 brought by the ex-parte Applicant, Shake Distributors Limited (hereinafter simply referred to as the Applicant) under **Order 53 Rule 3 of the Civil Procedure Rules, 2010; sections 8 and 9 of the Law Reform Act, Cap. 26** and the Inherent Jurisdiction of the Court. The Respondent is the Kenya Revenue Authority, a statutory body created, under the **Kenya Revenue Authority Act, Cap. 469**, as a collector and receiver of revenue on behalf of the Government of Kenya. Through the said application the Applicant seeks orders as follows:-

1) *An Order of Certiorari do issue to quash the decision of the Deputy Commissioner-Programmes and Policy, Kenya Revenue Authority to subject sugar imports from Uganda to conditions specifically being that* ***Samples shall be drawn at random basis and retained at the release stations for further analysis and comparison with samples drawn during the verification exercise*** *and further that a* ***Cash bond equivalent to the taxes payable shall be executed on all consignments to be discharged or liquidated depending on the findings of the verification mission*** *as communicated vide the circular dated 7th August 2012.*

2) An Order of Mandamus do issue to command and to compel the Deputy Commissioner-Programmes and Policy, Kenya Revenue Authority to unconditionally release to the Applicant consignment of 2000 bags of sugar being held at Malaba entry point and to fully indemnify the Applicant for the expenses incurred as at the date of the release, for the period the goods remain detained at the entry point, which accumulates by the day.

3) An Order of Prohibition do issue to restrain the Deputy Commissioner-Programmes and Policy, Kenya Revenue Authority from demanding illegal payments on the Applicant's remaining 3500 bags of sugar being part of the total 5500 bags of sugar in the absence of any valid justification upon the payment of Value Added Tax and the Sugar Levy as by law provided.

4) Costs of the application.

The application is supported by grounds on its face. It is also supported by the Chamber Summons application for leave, the verifying affidavit of Peter Wangombe who is the Managing Director of the Applicant and annexures thereto together with the statutory statement all filed on 27th September, 2012.

It is important at this stage to give a background of the case. The Applicant is an importer of sugar. In the course of this year (2012) the Applicant ordered for 5500 bags of sugar from Kakira Sugar Company in Uganda. Uganda and Kenya being member states of the East African Community Customs Union, the Applicant expected to pay Value Added Tax (VAT) at 16% and sugar levy at 4%. The Applicant transported 2000 bags of the commodity to Malaba entry point having paid the VAT and sugar levy. At the entry point the Applicant was confronted with new conditions namely that samples of the sugar consignment had to be drawn for verification and a requirement to execute cash bond equivalent to the taxes payable. On further enquiry the Applicant was shown the Respondent's circular dated 7th August, 2012. The circular signed by one J. W. Githinji for Respondent's Deputy Commissioner-Programmes and Policy and titled **"INFLUX OF SUGAR FROM UGANDA"** states as follows:-

"WE have noted a drastic increase in the sugar imports or re-imports from Uganda and some of the companies dealing in these imports are suspect.

Available statistics indicate that Uganda is a net importer of sugar; hence our need to query the origin of the surplus quantities for "export" to Kenya. In order to protect the sugar industry at this critical time when the COMESA safeguard is about to expire, there is need to ensure that any sugar imports do meet all Customs requirements.

In view of these developments and as Kenya prepares for a verification mission to Uganda, all sugar imports from Uganda shall be subjected to the following conditions:

1. Samples shall be drawn on random basis and retained at the release stations for further analysis and comparison with samples drawn during the verification mission;

2. Cash Bond equivalent to the taxes payable shall be executed on all consignments. This shall be discharged or liquidated depending on the findings of the verification mission.

Officers at the border stations shall ensure compliance with these requirements."

The Applicant faults the Respondent's circular on several grounds and I will now proceed to summarize the grounds upon which the Applicant seeks relief. In my understanding, the Applicant bases its application on the ground that the decision by Respondent to impose the conditions in question is ultra vires and unreasonable because the duty of drawing and analysing samples does not belong to it but to the Kenya Bureau of Standards. Moreover, matters relating to sugar are governed by the Kenya Sugar Board and the Respondent is therefore not empowered to make any decisions regarding sugar. The Applicant argues that the Respondent is attempting to introduce an illegality since there is no duty that is payable on import and export of products within the East African Community. The Respondent is therefore introducing an illegal levy. The Applicant further argues that the Respondent imposed conditions based on speculation and unjustified suspicions because there is no evidence to show that the sugar was not processed in Uganda.

Further, the Applicant submits that the decision of the Respondent is not justified because the Protocol on the Establishment of the East African Customs Union provides that the competent authority authenticating the certificate of origin is the one mandated to call for further verification if there are exceptional circumstances to warrant the same. It is the Applicant's case therefore that the verification of the source of origin ought to have been done and was done by the Ugandan Export Promotion Board. Therefore, the Applicant contends, the Respondent has no statutory role to play in the verification of the origin of goods. No reason has been adduced to warrant additional verification and the fact that Uganda is a net importer of sugar is not an exceptional circumstance to call for fresh verification. The Applicant also argues that the rules state that there shall be a request for verification by the competent authority and there has been no such request in respect of the Applicant's consignment of goods. The

Applicant therefore submits that the Respondent is not the competent authority and even if it was found that it was the competent authority, it did not make any request for verification as required by the rules. The Applicant argues that the Kenya Sugar Board has conducted investigations in the past and confirmed that the sugar originated from Uganda and continues to issue import permits based on this fact. Finally, the Applicant attacked the requirement for cash bonds at the rate of duty applicable to goods imported from outside the East African Community as being unreasonable since it will tie up the funds of the Applicant thereby affecting its cash flow. The Applicant argues that the respondent's demand for cash bond is without any justification at all.

The Respondent's response to the application is clearly captured by the replying affidavit sworn on 16th November, 2012 by its Revenue Officer, Mr. Aquilano Mwithali. The Respondent started by giving a background as to why the circular in question was issued. The Respondent told the Court that in August, 2011 through **Legal Notice No. EAC/37/2011** the East African Council of Ministers granted Uganda an exemption on sugar imports and allowed it to apply import duty rate at 0% on the commodity on the basis that Uganda needed to import sugar in order to meet its domestic requirements. A few months into the exemption the Respondent noticed an upward spiral of sugar imports from Uganda to Kenya. From the statistics it had, it noted that in January-September 2011 the sugar imported to Kenya from Uganda was 73,000 kilograms but for the same period in 2012 the sugar imports had stiffly risen to 26,900,812 kilograms. It was further noted that Kakira Sugar Company which had not exported any sugar to Kenya in 2011 had now exported 22,630,812 kilograms and out of this amount the Applicant had imported 750,000 kilograms. This is what raised the Respondent's eye brows. The Respondent decided to send a verification mission to Uganda but in the interim decided to impose conditions on sugar from Uganda as per the circular in question. The Respondent argued that the issuance of the circular was in accordance with the law and in particular the provisions of the **EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT (EACCMA)** as follows:

Section 106:

"The Commissioner may require any person to give security for the due compliance by that person with this Act and generally for the protection of customs revenue; and pending the giving of such security in relation to any goods subject to customs control, the Commissioner may refuse to permit delivery or exportation of such goods or to pass any entry in relation thereto."

Section 107:

"107(1) Where any security is required to be given under this Act, then that security may be given to the satisfaction of the Commissioner either-

(a) by bond, in such sum and subject to such conditions and with such sureties as the Commissioner may reasonably require; or

(b) by cash deposit; or

(c) partly by bond and partly by cash deposit;

(d) any other form of security which the Commissioner may allow."

Section241:

"The Proper Officer may take samples of any goods subject to customs control for such purposes as the Commissioner may deem necessary; and any such samples shall be disposed of and accounted for in such manner as the commissioner may direct."

It is the Respondent's case that it detained the Applicant's consignment after it failed to comply with the terms of the circular. The Respondent informed the Court that due to complaints from the business community in the two countries a joint meeting was held between Uganda and Kenya and the terms of the

circular in question were revised so that instead of depositing a cash bond an importer was now allowed to provide a bank guaranteed bond for the goods. This information was conveyed to the Applicant but the Applicant has failed to provide a bank guaranteed bond so as to have its goods released.

As for the argument that the Respondent has no business in relation to sugar imports, the Respondent pointed to **Section 5 (1) (i)** of the **Kenya Revenue Authority Act** and submitted that the said Section authorized it to assess, collect and account for all the revenues as provided under certain Acts of Parliament including the **Sugar Act, Act No. 1 of 2001.**

In reply to the Applicant's submission that the Respondent is not a Competent Authority under the **EAST AFRICAN COMMUNITY CUSTOMS UNION (RULES OF ORIGIN) RULES**, the Respondent argued that it was a Competent Authority and was allowed by **Rule 12 (3)** to require further verification of the statement contained in a certificate of origin. It submitted that the exceptional circumstances which justified further verification in respect of sugar originating from Uganda was the fact that there was a sharp rise in sugar imports from Uganda despite the fact that Uganda is a net importer of sugar.

The parties herein made detailed submissions in respect of their positions in this matter. I will address those submissions in the course of determining this matter. Looking at the issues as framed by the parties, I find that the issues for the determination of this Court in this matter are:

1. Under what circumstances can this Court interfere with the Respondent's exercise of its statutory powers and/or duties?

2. Is the Respondent's decision to draw and retain samples for further analysis in breach of the law?

3. Is the Applicant's decision to levy a cash bond equivalent to the taxes payable on all consignments unlawful?

4. Whether the Respondent's actions have frustrated the Applicant's legitimate expectation?

5. Whether the Applicant is entitled to the reliefs sought? And

6. Who should meet the costs of the application?

It must be noted from the beginning that the Respondent is a public body created by statue. It is therefore expected to perform its functions within the mandate donated to it by the law. It must act within the cocoon designed for it by Parliament. If it assumes a role not given to it by the lawmakers, then this Court will step in to correct it by issuing relevant orders. It must also comply with the rules of natural justice. Failure to do so will see its decisions quashed for procedural impropriety. The decisions of the Respondent must also be reasonable and rational otherwise the Court may find them to be unreasonable in the Wednesbury sense as enunciated in **Associated Provincial Picture Houses v Wednesbury Corporation [1947] 2 All ER 680.** That is to say the decision is so unreasonable to the extent that a reasonable man applying his mind to the same facts would not have arrived at such a decision. For the Applicant to succeed, it must prove that the decision of the Respondent offended these requirements.

Let me start by considering whether the decision offended the principles of natural justice as submitted by the Applicant. The Applicant told the Court that there was no prior notice about the intention to impose the requirements contained in the circular and that the said circular did not contain the reasons for the imposition of the new conditions. The reason for the imposition of the new requirements is contained in the circular. There is no evidence that the reason given was not based on reasonable information. The Respondent has given figures to demonstrate why it thought the sugar did not originate from Uganda. The Applicant is therefore not correct when it claims that the Respondent did not give reasons for its decision.

The other reason the Applicant gives to support its claim of breach of the rules of natural justice is alleged failure by the Respondent to give notice of the new requirements. In response to this accusation, the Respondent submitted that it communicated the new conditions to all agents through the tradex module of

the simba system through which all customs transactions are undertaken. The fact that the decision was communicated does not mean that the intention to make the decision was made public. It may have been necessary for the Respondent to give adequate notice so that potential importers could have decided whether to import or not considering the new requirements. On the other hand it must be noted that the policy decisions of the Respondents are dictated by the business environment and in certain instances there may be no time to give notice. In the case at hand giving notice would have meant that the suspected leakage of revenue would have continued as the notice period was being awaited to expire. Failure by the Respondent to give notice of its intention was therefore reasonable in the circumstances. In my view therefore, the Respondent did not breach the rules of natural justice.

As for the argument that the Respondent acted illegally, the Applicant submitted that the Kenya Sugar Board had conducted investigations and concluded that the Applicant's sugar originated from Kakira Sugar Company. The Applicant therefore contended that it was not the business of the Respondent to conduct another verification exercise especially after the Uganda Export Promotion Board had issued a certificate of origin. On this argument, the Court's take is that as per **Rule 12(3) of the East African Customs Union (Rules of Origin) Rules,** the issuance of a certificate of origin does not bar the Respondent from requiring further information as regards verification.

It was also argued that the mandate for inspecting imported goods belonged to the Kenya Bureau of Standards (KEBS) and not the Respondent. This argument is fallacious. KEBS inspects goods for quality and fitness for use and the Respondent inspects imported goods for assessment of revenue and collection of the same. The fact that KEBS has inspected goods cannot be used as a ground to shut out the Respondent from inspecting the same goods. KEBS and the Respondent carry out their duties as per the Acts of Parliament which created them.

Did the contents of the Respondent's circular breach any law? The answer is in the negative. **Section 241 of EAMCCA** clearly gives the Respondent power to draw samples of any goods subject to custom control. **Sections 106 and 107** of the same Act allow the Respondent to require the giving of security for the purpose of protecting customs revenue. The security may be given through cash deposit if the respondent so requires. The Applicant argued that giving cash deposit would affect its cash flow. This argument became moot on 17th September, 2012 when it was decided that an importer could execute a bank guaranteed bond. The requirement for cash deposit was therefore abandoned at this stage.

On the issue of legitimate expectation the Applicant submitted that it met all the pre-requisite conditions and obtained all the documents necessary for the importation of sugar. The Applicant argued that it had received an assurance that after meeting the necessary conditions its legitimate expectation would be protected and not breached. In reply the Respondent submitted that it did not make any representation to the Applicant that it would clear its imports without imposing conditions permitted in law or release them on terms which contravene customs law or practice.

What is legitimate expectation? According to Harry Woolf, Jeffrey Jowell and Andrew Le Sueur at page 609 of the 6th Edition of **DE SMITH'S JUDICIAL REVIEW**, **"Such an expectation arises where a decision-maker has led someone affected by the decision to believe that he will receive or retain a benefit or advantage (including that a hearing will be held before a decision is taken)."** It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law. In the case before me there is no evidence of a written or verbal promise made to the Applicant that its goods would be allowed into Kenya once he obtained the necessary licenses. One may argue that the legitimate expectation was based on the understanding that goods from Uganda would be admitted into Kenya at a duty rate of 0%. However, that argument cannot hold when one considers the fact that the Respondent has a statutory duty to ensure that all the necessary taxes for goods entering Kenya have been paid. The Applicant's argument that its legitimate expectation was breached therefore fails.

The Applicant submitted at length on the "procedural impropriety by the Respondent under the COMESA safeguards". It is my view that the Respondent started its argument on the wrong footing by stating at

page 6 of its written submissions dated 5th November, 2012 and filed in Court on 19th November, 2012 that:

"COMESA Safeguard regulations establish rules for the conduct of investigations and the application of safeguard measures. The safeguard measures are applied in conjunction with the existing national legislation for conducting safeguard investigations and reviews in individual COMESA member states.

The COMESA safeguard provides that: If an investigation is initiated by a COMESA member state, such as Kenya in this case, finds that the industry under investigation includes imported products only from non-COMESA WTO member countries, such as Uganda, the provisions to be applied is the WTO Agreement on Safeguards."

I say the submissions are premised on the wrong footing because the Applicant presumes that Uganda is not a COMESA member state. A look at the COMESA Website (www.comesa.int) clearly shows that Uganda is indeed a COMESA member state. I can therefore at this stage find that the Applicant's submissions on this issue are fallacious and refuse to consider the same.

I will nevertheless forge ahead and consider the Applicant's submissions as anchored on the World Trade Organization (WTO) regulations. It is submitted that the WTO rules provide special flexibility to countries to take safeguard measures to restrict imports, for temporary periods, in order to promote the development of new or infant industries. Such measures can only be introduced with the approval of WTO. The WTO rules provide the **Requirements and Procedures for the Application of Safeguard Measures.** The Applicant went into the rules in detail and I need not reproduce them here. Once again, I note that the Applicant proceeded on the wrong premise. The circular issued by the Respondent did not impose any duty on sugar imports from Uganda. What the circular did was to impose conditions meant to protect revenue in case the investigation that was to be undertaken established that the sugar that was coming into Kenya did not originate from Uganda.

One of the core functions of the Respondent is to collect revenue. Protection of revenue is ancillary to collection of revenue. The Respondent has clearly explained why it issued the circular in question. It had good reason, i.e. Uganda was a net importer of sugar, to suspect that the sugar entering Kenya from Uganda did not originate from Uganda. It must be appreciated that there is need to protect local industries, albeit within the law, from unfair competition. The rights of the Applicant cannot supersede the interests of sugar cane farmers of this country. They toil day and night in their farms and this Court will be failing them were it to allow the Applicant to import sugar in a situation where the revenue collector has plausible reasons to suspect that the sugar has not originated from the COMESA trade block. On the other hand, Kenya as a member state of COMESA must play within the rules of that organization. This Court will not hesitate to quash decisions by the government and its agencies which are meant to undermine the objectives and aspirations of COMESA. The decision of the Respondent is however not such a decision.

Having considered the material placed before this Court, I find that the Applicant has not established grounds for the grant of any of the orders sought in its application. The application is therefore dismissed with costs to the Respondent.

Dated, signed and delivered at Nairobi this 18th day of December, 2012

W. K. KORIR,

JUDGE OF THE HIGH COURT