



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 447 of 2012

**RICARDO EPZ INTERNATIONAL COMPANY
LTD.....PETITIONER**

AND

**KENYA REVENUE AUTHORITY.....1ST
RESPONDENT**

**THE HON ATTORNEY GENERAL.....2ND
RESPONDENT**

RULING

1. The petitioner is manufacturer of garments for export. It moved the Court by way of petition seeking to enforce certain fundamental rights and freedoms more particularly the right to fair administrative action guaranteed under **Article 47**. It claimed that its Personal Identification Number (PIN) had been disabled by the Kenya Revenue Authority (KRA) making it impossible to carry on business. Together with the petition, it also filed an application seeking conservatory orders.

2. On 15th October 2012, the petitioner and the 1st respondent recorded a consent on the following terms;

1. *In view of the request made by the petitioner the parties be given 30 days to do a further reconciliation on the documents and*

2. *The first respondent to release the containers currently detained at the port upon payment by the claimants of the requisite taxes and other statutory charges; and*

3. *The first respondent to temporarily reinstate the petitioners PIN pending the conclusion of the reconciliation exercise; and*

4. *That the matter be mentioned further on 20th November 2012 for further directions.*

3. The parties to the consent were clear that certain containers belonging to the petitioners could be released pending payment of taxes and other statutory charges.

4. The proposed interested party, Hussein Ibrahim Nuni (“the applicant”), has now moved the Court by a Chamber Summons dated 16th November 2012 where it seeks the following orders:

(1) *That the application filed herewith be certified as urgent and it be heard exparte in the first*

instance.

(2) That leave be granted *ex parte* to the Applicant to be joined in this suit as an interested party.

(3) That the 1st respondent be compelled by an order of this court to allow the substitution/amendment of the name of the consignee in favour of the applicant the containers MKSU0384787, PCIU8593108, PCIU9930224, PONU7519890, PCIU99886157 and CMAU4065452 respectively.

(4) That this Honourable Court be pleased to order release of the Containers MKSU0384787, PCIU8593108, PCIU9930224, PONU7519890, PCIU99886157 and CMAU4065452 to the interested party/Applicant upon payment of the requisite taxes and other statutory charges specific to them.

(5) That the 1st respondent be compelled by an order of this court to waive all the demurrages and port charges levied on the containers.

(6) That the cost of this application be provided for.

5. In his deposition sworn on 16th November 2012, Hussein Ibrahim Nuni avers that he owns the subject containers which are currently detained by the KRA. He avers that he purchased assorted textiles from India and China and he engaged a third party clearing agent and who either on his own or in collusion with the petitioner, caused the containers to be registered in the petitioner's name as the consignee.

6. The applicant states that the consent recorded on 15th October 2012 was agreed upon and was actually his favour and that he has always cooperated with the KRA to resolve this issue of the container. Furthermore, he is ready and willing to pay taxes and storage charges to secure release of the containers.

7. KRA's position is that for all intents and purpose, the Bill of Lading is a document of ownership and since it is the petitioner's name, then it is the petitioner who is entitled to the property. Furthermore, that KRA is owned appropriately Kshs. 41 million in taxes by the petitioner hence it is entitled to exercise the lien on the subject containers which are in the name of the petitioner.

8. KRA also relies on the provisions of **section 130(2) of East Africa Community Customs Management Act (EACCMA)** to enforce the lien and **section 34(2) of the EACCMA** which require the owner of goods entered for home use to furnish documentary evidence and since the evidence show that the petitioner is the owner, it cannot release the goods to the interested party. KRA also contends that the interested party must take the liability of the agent as it cannot be implicated in the acts of a dilatory agent by virtue of the provisions of **section 148 of EACCMA**.

9. It is against the brief background that I must decide whether the consent orders should remain in force as they affect a third party or indeed whether I should allow the applicant's application seeking to join the suit as an interested party and the further relief sought.

10. First and foremost, Dr Khaminwa clearly stated that his client had no interest in the containers and that there was criminality involved in bringing the containers into the country. In the circumstances, he urged the court to order that the containers be sold and the proceeds be used to offset the revenue due to his client.

11. In this respect, I would agree with Dr Khaminwa that if indeed there is criminality then the Court should not be used as a laundering process to make good what was illegal. It is for this reason that the consent order recorded on 15th October 2012 must be set aside as the petitioner has clearly disclaimed any interest in the subject containers. Whether there is criminality or not is not a matter for this court to determine at this stage. Furthermore, I would also discharge the orders as it appears that the consent order was intended to affect a third party, a matter which was not disclosed to the court.

12. Once the consent is set aside, then the interested party is free to pursue its claim against either KRA or the petitioner as the substratum of the order affecting its interest no longer exists. The consequential orders the applicant seeks concern resolution of the issue of ownership of the containers. I cannot grant the orders in the application as they do not fall within the purview of an application under **Article 22** of the Constitution. This process is not intended for the determination of other disputes other those that concern or are incidental to the enforcement of fundamental rights and freedoms under the Bill of Rights.

13. In view of the fact that I have now discharged the order that was inimical to Mr Hussein Ibrahim Nuni's interest, I am left with only one option and that is to dismiss the application dated 16th November 2012.

14. My final orders, then, are as follows;

(a) The consent order dated 15th October 2012 is set aside and all consequential orders thereon discharge forthwith.

(b) The proposed interested party's Chamber Summons dated 16th November 2012 is dismissed with no order as to costs.

DATED and DELIVERED at NAIROBI this 11th day of December 2012

D.S. MAJANJA
JUDGE

Dr Khaminwa instructed by Khaminwa and Khaminwa Advocates for the petitioner.

Mr Nyaga, Advocate instructed by the Kenya Revenue Authority.

Mr Sagana instructed by Sagana, Biriq and Company Advocates for the interested party.