



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 1109 OF 2005

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER OF JUDICIAL REVIEW BY
WAY OF PROHIBITION,**

**MANDAMUS AND CERTIORARI DIRECTED AT THE KENYA REVENUE AUTHORITY
AND**

THE COMMISSIONER GENERAL

AND

IN THE MATTER OF: THE VALUE ADDED TAX ACT

AND

IN THE MATTER OF: THE CUSTOMS AND EXCISE ACT

REPUBLIC

VERSUS

**KENYA REVENUE AUTHORITY1ST
RESPONDENT**

**THE COMMISSIONER GENERAL.....2ND
RESPONDENT**

EX PARTE

**UNILEVER TEA KENYA
LIMITED.....APPLICANT**

AND

NEPHETS INTERLINK SERVICES LIMITED.....INTERESTED
PARTY

RULING

Unilever Tea Kenya Limited, the ex parte applicant, hereinafter referred to as “**the applicant**”, filed an application dated 8th August, 2005 and sought the following orders:

- “1. An order of judicial review by way of certiorari to remove to this court and quash the decision by the Kenya Revenue Authority (Commissioner of Customs & Excise) to demand the disputed Import Duties and Value Added Tax from the applicant.**
- 2. An order of judicial review by way of prohibition to prohibit the Kenya Revenue Authority (Commissioner of Customs & Excise) and the Commissioner General from issuing any agency notice and serving the same upon the applicant’s bankers as agents of the applicant on account of the disputed payment of Import Duties.**
- 3. An order of judicial review by way of prohibition to prohibit the Kenya Revenue Authority (Commissioner of Customs & Excise) and the Commissioner General from commencing, instituting or proceeding with any other enforcement actions against the applicant in relation to and/or on account of the disputed payment of Import Duties.**
- 4. An order of judicial review by way of mandamus to compel the Kenya Revenue Authority (Commissioner of Customs & Excise) and the Commissioner General to investigate the conduct of the interested party as a licenced clearing agent of the Kenya Revenue Authority.**
- 5. An order of judicial review by way of mandamus to compel the Kenya Revenue Authority (Commissioner of Customs & Excise) and the Commissioner General to collect the outstanding Import Duties, the penalties and interests from the interested party to whom reimbursement was made after the payment of the duties and taxes impugned by the Kenya Revenue Authority.**
- 6. An order of judicial review by way of mandamus to compel the first respondent to carry out a thorough and proper investigation into the issue and submit a report of its findings to the Criminal Investigations Department and the Kenya Anti-Corruption Commission for further action.**
- 7. An order for costs of this application”.**

The said orders were sought on grounds, *inter alia*, that:

- “1. The Kenya Revenue Authority has demanded payment of a sum in excess of Kshs.85,000,000/= on account of duty alleged to be unpaid and penalties thereon from the applicant.**
- 2. The applicant paid the duty in question to the interested party, a licenced clearing agent of the Kenya Revenue Authority who provided the applicant with the Kenya Revenue Authority’s receipts as proof that payment had been remitted to the Kenya Revenue Authority.**

3. The Kenya Revenue Authority (Commissioner of Customs and Excise) and the Commissioner General however alleged that there was no payment and the interested party, on behalf of the applicant made fraudulent declarations and/or mis-declarations to evade payment of tax.

4. The applicant did not in any way collude, connive or offer any assistance to the interested party to perpetrate the alleged crimes.

5. It is evident from the procedures and controls laid down by the Kenya Revenue Authority (Commissioner of Customs and Excise) department that there was complicity on the part of the Kenya Revenue Authority's (Commissioner of Customs and Excise) employees.

6. The effect of the Kenya Revenue Authority's ((Commissioner of Customs and Excise) demand or any other enforcement action against the applicant is that the Kenya Revenue Authority (Commissioner of Customs and Excise) seeks to benefit from its own default and in so doing requires the applicant to pay twice over the amounts of the duty and interest and penalties thereon, which is unconscionable and an abuse of its powers".

The application was supported by a statutory statement which sets out in great details the facts of the case, the grounds on which the application is made and the reliefs sought. The application was further supported by an affidavit sworn by **Antoinette Absaloms**, the applicant's Company Secretary. The applicant was until 20th July, 2004 known as Brooke Bond Kenya Tea Limited but after the said date changed its name to the present one. The applicant has been trading in Kenya since 1925 and employs over 19,000 employees.

The applicant is a major player in the Tea industry and it imports a live enzyme known as **Kikkoman Tannase** as one of the materials required in its trade. The said enzyme is imported by air.

Between the years 2000 and 2004 the applicant had retained the services of the interested party as a clearing and forwarding agent. The agent was at all material times licenced by the Kenya Revenue Authority, hereinafter referred to as "**KRA**". The deponent stated that before a clearing agent is licenced by KRA a vetting exercise is carried out. The said agent was charged with the duty of clearing the applicant's goods at the port of entry and to make payment of all duty and VAT assessed by KRA. The agent would receive all import documents from the applicant which were necessary for purposes of clearing the goods. The agent would then make payments on the applicant's behalf that is duty and taxes payable on the importation of the applicant's goods. The agent would thereafter seek reimbursement from the applicant. The reimbursement would be made against production of KRA receipts as proof of payment of duty in question.

The applicant further stated upon production of the requisite receipts and release of the imported goods the applicant verily believed that KRA had acted in strict compliance with the provisions of Customs and Excise Act and its subsidiary legislation as well as its departmental instructions and procedures.

By a letter dated 19th July, 2004, KRA demanded from the applicant the payment of duty totaling to **Kshs.1,198,471/=** together with late payment penalties amounting to **Kshs.3,523,383/=**. In the said letter KRA alleged that the applicant had committed fraud by failing to disclose the real nature of goods imported thereby avoiding the duty payable. By a further letter dated 11th August, 2004 KRA revised the amount up to **Kshs.3,935,600/=**.

At the request of KRA officers, the applicant produced KRA receipts and other importation documents as

evidence that it had made proper declarations and paid the requisite duty. KRA asserted that whilst the receipts were genuine KRA stationery they had not been issued by KRA employees. KRA claimed that the receipts were forgeries and alleged that the stamp and signatures on the said receipts did not tally with theirs. Following those developments, the applicant indicated to KRA that it would cooperate fully with investigations that were to be undertaken by KRA. The applicant also decided to report the matter to the Criminal Investigations Department on 26th August, 2004 and requested for further investigations. The applicant also commissioned Deloitte Consulting Limited to carry out independent investigations to establish all the facts relating to the alleged forgeries. A **Mr. Martin Kisuu**, a Director of Deloitte Consulting Limited was in charge of this exercise. From his investigations, it was concluded that at all material times the applicant had all the proper customs and import documents that an importer is required to have in relation to imported goods.

By a letter dated 21st April, 2004 but received in May 2005, KRA made a further demand of **Kshs.41,334,019/=** being duty allegedly unpaid and a further sum of **Kshs.46,998,585/=** being penalties attaching thereto.

Various meetings were held between the applicant's officers and those of KRA with a view to establishing the basis of the aforesaid claim. KRA took the position that the applicant's agent had presented fraudulent documents and had not made any payment in respect of duty for the applicant's goods. That position was disputed by the applicant who insisted that all her documents were genuine and appropriate payments had been made to KRA through the interested party. The applicant further asserted that given the stringent and elaborate procedure, controls and checks at KRA the interested party would not have managed to defraud KRA of such huge amounts of money for a period of over 4 years without complicity and connivance by KRA officials.

The applicant's averments regarding the investigations that were carried out by Deloitte Consulting Limited were verified by an affidavit sworn by the said Mr. Martin Kisuu.

The respondents filed an affidavit sworn by **Dishon Mungai Njuguna**, a Principal Revenue Officer employed by KRA. He stated that the interested party was never an agent of KRA but was only licenced by KRA as a clearing and forwarding agent. He said that the act of vetting of clearing agents and licencing them is purely an administrative exercise and does not attach any liability on the part of KRA for any misdeed of a clearing agent.

Mr. Njuguna further contended that the applicant, who was the consignee of the imported goods, handed over all import documents to the interested party as their agent and not as the agent of KRA. He added that the consignee of goods is obliged in law to pay all assessed duty and VAT and the arrangement between the applicant and the interested party for reimbursement is a matter between the two. He said that KRA was justified in making all the aforesaid demands for payment from the applicant notwithstanding the fact that the clearing agent had seemingly engaged in criminal activities.

Mr. Mungai swore a further affidavit and stated that all alleged receipts that had been issued to the interested party by KRA had been examined by a Forensic Document Examiner and found to have been defaced or altered. As a result the Director of Criminal Investigations had preferred criminal charges against one **Mr. Stephen Ndungu King'ara**, the Managing Director of the interested party. The said person is facing three criminal counts. In Count I, he was charged with making a false document contrary to **Section 347(b)** of the **Penal Code**, the particulars of the offence being that on diverse dates between 1st January, 2000 and 31st December, 2000 at an unknown place within the Republic of Kenya jointly with others not before court made a KRA Miscellaneous Receipt Serial Number 273925 for Kshs.3,296,108/= with intent to defraud Kenya Revenue Authority, a fact which he knew to be true.

In Count II, Mr. King'ara was charged with stealing by agent contrary to **Section 283(b)** of the **Penal Code**. The particulars of the offence are that on diverse dated between 1st January, 2000 and December 2003 at an unknown place within the Republic of Kenya jointly with others not before court stole Kshs.41,334,019/= which had been received by him as a licenced Customs Agent to apply for the purposes of paying import duties and taxes to the Kenya Revenue Authority on behalf of Unilever Tea Kenya Limited.

In Count III, Mr. King'ara was charged with dealing with uncustomed goods contrary to **Section 200 (d) (iii)** of the **East African Community, Customs Management Act, 2004**. The particulars of the offence were that on diverse dates between 1st January, 2000 and 31st December, 2003 at Jomo Kenyatta International Airport, Nairobi jointly with others not before court procured the release of uncustomed goods, namely enzyme Kikkoman Tannase, knowing the same not to be customed. In all the said counts KRA is named as the complainant.

Subsequently, the interested party offered to pay to KRA the total amount of **Kshs.41,334,019/=** as stated in Count II and asked for a waiver of interest and penalties. The interested party made a down payment of **Kshs.1,000,000/=** on 17th June, 2008. The interested party further forwarded postdated cheques to the advocates for KRA but all the cheques were dishonored upon presentation for payment. The interested party also instructed its advocates to forward a sum of Kshs.2 Million which it claimed they were holding but the said amount was not remitted.

The interested party did not file any replying affidavit or written submissions but filed grounds of opposition through its advocates, **S. Musalia Mwenesi**. In a nutshell, the grounds are an attack on the propriety of the applicant's case.

The applicant and the respondents filed written submissions. **Mr. Kiragu Kimani** for the applicant and **Mr. Wambugu** for the respondents highlighted their respective submissions. **Mr. Mwenesi** for the interested party also made his submissions.

I have taken into consideration all the affidavits and submissions and need not re-state in any details the contents of those submissions.

It is not disputed that between the years 2000 and 2004 the interested party was engaged as a clearing and forwarding agent by the applicant. It is also not in dispute that over the said period of time the interested party cleared for and on behalf of the applicant several consignments. The process of clearance of the applicant's imported goods involved rigorous verification, checking and counter-checking procedure and the goods could not be released to an importer if any anomalies were detected. The applicant used to reimburse the interested party for all payments made on account of duty and/or other dues payable to the respondents.

However, it appears that the interested party conspired with some KRA officials to perpetrate the fraud that has been highlighted hereinabove. It was not alleged that the applicant was at any time a party to or aware of the fraud during the period of its perpetration. Appropriate investigations were conducted by KRA, the police as well as Deloitte Consulting Limited on behalf of the applicant. As a result, the interested party's Managing Director was charged with various offences relating to the aforesaid fraud. The court was not told what became of the said criminal case. However, the interested party offered to pay to KRA a sum of Kshs.41,334,019/= and it appears that KRA agreed with that arrangement. The interested party has actually made part payment of the said sum.

The applicant's contention is that in view of the aforesaid facts, the decision by KRA to demand from it a sum of Kshs.87 million is in all the circumstances unfair, unreasonable and an abuse of power.

On the other hand, the respondents contend that the interested party was at all material times an agent of the applicant and to the extent that it was proved that the appropriate duty was not paid on the various goods that were cleared by the agent for and on behalf of the applicant, the sum claimed is due and payable by the applicant.

Sections 147 and 148 of the **East African Community Customs Management Act, 2004** places the responsibility of paying duty to both a clearing agent and the owner of goods in certain instances. **Section 147** states that:

“A duly authorized agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of 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 the goods which the owner is required to perform under this Act.”

On the other hand **Section 148** states:

“An owner of any goods who authorizes an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorized agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence”.

Section 166 of the **Customs and Excise Act** has similar provisions as **Section 148** cited hereinabove.

It cannot be denied that in law, the interested party was an agent of the applicant. The fact that the interested party had earlier been vetted by KRA does not make him an agent of KRA. However, all the goods that were imported by the applicant and cleared by the interested party were under the control of KRA as per **Section 12** of the **Customs and Excise Act** and **Section 14** of the **Value Added Tax Act**. This control included the rigorous checking of all the documents accompanying the said goods. The procedure of clearing goods is closely controlled by KRA. Although it was alleged by KRA that the interested party presented various false documents which were vital for clearing of the applicant's goods, all of those documents were inspected and passed by officials of KRA. The applicant had no hand in such scrutiny. KRA cannot therefore simply allege that there was fraud in clearing the goods and lay all the blame upon the applicant.

One of the requirements of KRA before a person is registered as a clearing agent is provision of a bond under **Regulation 259** of the **Customs and Excise Regulations**. The agent undertakes that he “shall faithfully and uncorruptly perform his/their duties as agent to the satisfaction of the Commissioner”. I agree with the applicant that this clearly requires KRA to have a watchful eye over all clearing agents to ensure that they perform their duties faithfully. In the event that corrupt officials of KRA collude with corrupt clearing agents to pocket money that is paid as duty by a principal through a clearing agent, it would be unjust to require the principal to shoulder the burden of making another payment in respect of the same duty.

KRA alleged that false declarations were made on Airway Bills. That may have been so. However, the applicant's contention is that an Airway Bill on its own cannot facilitate the clearance of goods and any clearance done under such circumstances would be purely due to negligence of KRA employees. I am in agreement with that submission. It is evident that there was complicity on the part of KRA officials and the interested party.

The question that must be determined is whether the negligence, complacency and/or acquiescence on the part of KRA officials ought to entitle the applicant to pay the amount of money demanded by KRA.

KRA contends that in view of the relationship between the applicant and the interested party, the agent owes the principle duties of a fiduciary nature.

It is an accepted principle of commercial law that where an agent acts without or in excess of authority or in fundamental breach of a contract between him and a principal the agent will be personally liable for such acts.

This is more so in a situation where the applicant, the respondents as well as the police carried out thorough investigations and as a result the Managing Director of the interested party was arraigned in court. The complainant in that case is KRA. The interested party has admitted liability and has made part payment to the respondents. In the circumstances, KRA ought to pursue the interested party to make good its promise and should not make unnecessary demands upon the applicant. After all, KRA is already dealing directly with the interested party as far as recovery of the sum of Kshs.41,334,019/= is concerned. KRA has entered into those negotiations with the interested party directly. In my view therefore, the decision by KRA to pursue the applicant for payment of the sum of Kshs.87 million is not fair and reasonable in the circumstances of this case. It amounts to abuse of power. In **RE-PRESTON [1985] 1 AC 825**, Lord Scarman held:

“I must clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case it is a ground upon which a court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law”.

In the same case at page 64 Lord Templeman held:

“The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory power if the court is satisfied that the “unfairness” of which the applicant complains renders the insistence by the commissioners of performing their duties or exercising their powers an abuse by the commissioners”.

It appears to the court that the respondents have made an unfair decision, given the evidence in this case of the circumstances under which the fraud was perpetrated.

In addition, KRA's intention to serve an agency notice on the applicant's bankers when it is already pursuing the interested party for payment is, in my view, an unreasonable and oppressive decision.

In conclusion, I wish to state that the applicant had a legitimate expectation that it would not be required to pay the taxes again, there being no dispute that it had already made appropriate payments and/or

reimbursements for the same through the interested party. I am thus satisfied that the decisions of the respondents are amenable to judicial review proceedings and hereby grant the orders sought by the applicant. The interested party shall bear the costs of this application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JUNE, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – Court Clerk

Mr. Kimani Kiragu for the Applicant

Mr. Orina for Mr. Wambugu for the Respondents

Mr. Onindo for Mr. Mwenesi for the Interested Party