



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA**

Miscellaneous Civil Case JR 5 of 2010

**IN THE MATTER OF: AN APPLICATION BY SAFA ENTERPRISES
COMPANY LIMITED FOR LEAVE TO APPLY FOR
ORDERS OF CERTIORARI, PROHIBITION AND
MANDAMUS
AND
IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT
CHAPTER 469 LAWS OF KENYA**

**IN THE MATTER OF: THE CUSTOM AND EXCISE ACT CHAPTER 472
LAWS OF KENYA**

**IN THE MATTER OF: THE EAST AFRICAN COMMUNITY CUSTOMS
MANAGEMENT (ACT 2004)**

IN THE MATTER OF:

REPUBLICAPPLICANT

VERSUS

THE COMMISSIONER OF CUSTOMS1ST RESPONDENT

KENYA REVENUE AUTHORITY2ND RESPONDENT

EX PARTE:

SAFA ENTERPRISES COMPANY LIMITED

J U D G M E N T

This is a Notice of Motion dated 27-01-2010 by the Applicant Safa Enterprises Company Limited under the provisions of Order 53, Civil Procedure Rules and Part VI of the Law & Reform Act (Ss.8 and 9) for the following judicial review orders:-

- 1. An Order of Certiorari to remove to the High Court and quash the decision of the Commission of Customs, Kilindini Mombasa made on the 30th day of December 2009 contained in the Inspection Report dated 30th December 2009 ordering the Applicant's goods not to be released in respect of Entry Number 2009 Mombasa.2048398 and Entry Number 2009 MSA 2062048 respectively owned by the Applicant SAFA ENTERPRISES COMPANY LIMITED.*
- 2. An Order for Mandamus to compelling the Respondent to release to the applicant the goods in the entry number 2009 MSA 2048398 and Entry Number 2009 MSA 2062048 IN WHICH Customs duty has been paid for by the applicant.*
- 3. An order for Mandamus to compel the Respondents to release the goods in Entry Number 2009 MSA 2048398 and Entry Number 2009 MSA 2062048 respectively free of any warehousing*

Charge that would have accrued pending the disposal of this judicial review.

4. *An Order of prohibition to prohibit the Respondent its officers, agents or employees or otherwise howsoever from seizing the applicant's goods in Entry Number 2009 MSA 2048398 and Entry Number 2009 MSA 2062048 respectively.*

5. *An Order that the costs of this application be paid by the Respondents.*

The application is supported by a verifying affidavit sworn by one

Bashir Mohammed Nur a director of the applicant company on 18th January 2010 filed with the application for leave. The grounds for the application are stated to be as follows:-

1. **The actions of the Respondent are unlawful, wrongful and are oppressive in nature for the following reasons:-**
 - a) **The Respondent had earlier on 22nd December 2009 inspected and verified the goods and order to be released to the Ex parte Applicant.**
 - b) **That the Respondents had received custom duty of Kenya shillings 1,998,890/-**
 - c) **The Respondents have refused and/or ignored to respond to the Applicant's Advocates' letters.**
 - d) **The Respondent continue to withhold the subsequent imported goods of the applicant without any legal basis.**
2. **The action of the Respondents to continue to refuse to release the imported goods of the applicant was and is contrary to law and breach of the Rule of Natural Justice.**
3. **The Order/decision contained in the Inspection Report of 30th December 2009 is not based upon any basis of facts or law.**
4. **The decision contained in the inspection report of 30th December 2009 is unreasonable, oppressive, arbitrary, capricious and is thereby void and a nullity.**
5. **The Respondent have acted ultra vires the Kenya Revenue Authority Act, the Customs and Excise Act and the East African Customs Community Management Act 2004 in refusing to release the Applicants goods after receiving the full customs duty.**
6. **The Respondent did not take any or every reasonable precaution to ensure fairness in the exercise of its decision.**
7. **The applicant was denied the right to natural justice and in particular the right to be heard on its goods which the custom has been paid.**
8. **There has been serious breach of the rules of natural justice.**
9. **The applicants legitimate expectation that due process of the law would be followed has been shattered by the refusal to release the goods by the respondents when the customs duty of Kshs.1,198,890 has been paid.**
10. **That it is now unfair and unreasonable for the Respondents through its servants and/or employees have threatened to seize the Applicant's goods.**
11. **That the Respondent will not suffer any prejudice in the event that orders sought herein is granted.**

The Respondents on 2nd March 2010 filed a Replying Affidavit sworn by Mr. Dishon Njuguna the Ag. Senior Assistant Commissioner, Investigations and Enforcement Department, Southern Region of the Kenya Revenue Authority sworn on 1st March 2010. He depones inter alia, that:-

- His duties inter alia involves investigations touching on all the Departments of the 2nd respondent in respect of imported goods or the clearance of goods through customs.
- The 1st Respondent's mandate is established under the Kenya Revenue Authority Act (Cap 469, Laws of Kenya and under Section 5 it acts as an agent of the Government for the assessment, collection and receipt of revenue.
- In the execution of this mandate, the 1st Respondent administers the East African Community Customs Management Act, 2004.
- Investigations conducted by their offices indicate that three (3) containers number MSKKU8152 941, PC IU 9964857 and MSKU8336093 belonging to the applicant herein were irregularly cleared from the Compact Customs Foresight Station without payment of the requisite customs duties, Investigation reveal that the Applicants clearing agent was involving in this action that resulted in the loss of the Government revenue.
- Under Section 148 of the Act an owner of any goods who authorizes an Agent to act for him or her in relation to such goods for any purpose of the Act shall be held 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.
- That the Applicant is being held liable for the actions of its Agents who have been implicated in the loss and irregular clearance of three containers from the Compact Freight Station in Mombasa.
- That Section 203 of the Act states that it is an offence for any person who in any matter relating to the customs when required in accordance to the Act to answer any question put to him or her by an officer makes any false or incorrect statement in reply thereto.
- That when the Applicant was required to provide information on the loss of the three containers aforesaid, the Applicant stated that the delivery notes in respect of the three containers had been lost and that they had obtained an

abstract from the Mombasa Urban Police Station. The Applicant further stated that they had informed the shipping line of the said loss of delivery notes.

- That the Police Abstract Report Form provided by the applicant was found to be a false copy as shown in the letter from the Mombasa Division Police Headquarters.
- That the Shipping Line Company further confirmed that they had not received any communication about the alleged loss of the delivery note as claimed by the applicant.
- That in exercise of its powers under Section 130(2) of the Act, the Respondents through its authorized officers detained the Applicants goods. Sections 130 (2) states the goods under Customs Control which belong to any person shall be subjected to a lien for such debt and may be detained by the Partner state until such duty is paid.
- That Mr. Ian Kaniu Ndichu who is the Applicant's General Manager, recorded a statement on 6th January, 2010 in his office regarding the loss of the three containers and he explained to him the reasons why the two subject containers in this matter could not be released. It is therefore not true that Applicant has not been told of the reasons for the non-release of its containers.
- That the Inspection and Verification Report which is in the Applicant's Affidavit clearly states that the Owner/Declarant is to be referred to the Senior Assistant Commissioner, Investigations and Enforcement who is to explain the reasons for the detention of the containers.
- That the Detention Order referred the owner of the goods to the Senior Assistant Commissioner, Investigations and Enforcement for a detailed explanation of why the Applicant's containers had been detained. The Applicant's contention is that no reasons were given for the detention of their containers is therefore not true.
- That the Respondent's have detained the Applicant's goods as a lien for the tax debt incurred for the loss of the three containers aforesaid which were cleared without the requisite payment of taxes as provided for in Section 130(2) of the Act.
- That it is not true that the Respondents have refused to accept dialogue and

clear the Applicant's eight (8) containers as Import duties are paid on the basis of self-assessment and payment is accepted as long as all entries are in order. The Applicant has not given the eight containers numbers that he claims to have been denied the opportunity of paying taxes in respect of.

- That the Respondents have not acted unlawfully or in excess of their jurisdiction as their actions were all in line with their duties, Obligations and powers to ensure collection of taxes to the Government of Kenya as provided in the Act.
- That due to the above circumstances the containers have been lawfully detained as a lien for taxes due and payable to the Respondent by the applicant for containers that were irregularly cleared without payment of taxes due.

The Applicant with the leave of the court filed a supplementary affidavit sworn on 19th March 2010.

The parties agreed that the application would be heard on the basis of written submissions. Both the Applicant and the Respondents duly filed and served written submissions and authorities.

The Respondents state that investigations conducted by their officers revealed that three container numbers MSK U81522941, PCIU 9964857 and MSKU 8330093 belonging to the applicants were irregularly cleared from the Compact Customs Freight Station without payment of the requisite customs duties. That Investigation revealed that the Applicant's clearing agent was involved in the alleged action that resulted in the loss of Government revenue.

As a result the Respondent detained the Applicant's two containers which are the subject of this application.

The facts of this case is contentious. The Respondents are investigating the alleged irregular clearance of three containers belonging to the Applicant which are alleged to have been cleared without payment of taxes due to the Government of Kenya. It is said that the Applicant's agent has been implicated in the matter and in order to safeguard the loss of taxes due to the Government of Kenya, the Respondents have detained the applicant's two containers as lien for the tax debt due as allowed under Section 130 (2) of the Act.

Section 130(2) of the East African Community Custom Management Act 2004 which mandated the Respondent to execute, it is stipulated.

Section (130)(2)

“Goods under customs control which belong to any person from whom duty is due and any goods afterward imported or entered for export by that person, shall subject to a lien for such debt and may be detained by the partner state until such duty is paid and the claim of the relevant partner state shall have priority over the claims of whatever nature of any other person upon the goods and the goods may be sold to meet the duty due if the duty is not paid within two months after the goods are detained.”

From the said provisions I do find and hold that the Respondent is entitled to withhold and detain goods of the Applicant as lien for outstanding taxes and other dues only to the Respondent. The Respondent is entitled to detain any goods subsequently imported as a lien of debts due or claimed on previously imported goods. The powers of the Respondent are immense and wide. They must be exercised reasonably and fairly.

This court exercising its judicial review powers cannot in law consider the merits of the dispute. The court can only deal with whether the actions and the Respondents were ultra vires or intra vires the Act. The court is obliged also to look into whether there was due process.

This court cannot be an investigator as to whether a Criminal offence was committed or not. That is the function of the Attorney General and the Police. It is alleged that an agent of the Appellant has been charged in court. I have seen a charge sheet in the affidavits. The case appears to be still pending. The Respondents claim that the investigations are ongoing and could lead to the arrest of more people. The judicial review Court cannot enter the arena of investigations and matters which may touch on claims or causes of action of a civil nature.

The law is that it is an offence under the Act to clear goods without payment of duty. It is the mandate of the Respondent under the Act to ensure that all requisite duties under the Act are paid. The applicant claims that the loss of the three containers was while in the custody of the Respondents agents, Compact Freight System Limited. The Respondent on its part claims that the said Compact Freight Systems is an agent of the Applicant.

This court in this judicial review cannot determine the issue whose agent had custody and control of the containers when they got lost. This court cannot know who is liable for the loss of the said 3 containers. The Applicant has proceeded to demand for the loss of the container and are in the process of commencing legal proceedings against what it alleges is the agent of the Respondent and Kenya Ports Authority. The demand letter is dated 4.01.2010. The alleged agent by a letter from its advocates denied the allegations claim. They denied being agents of the Respondent. They stated that their goods were cleared by a company called Transvista Freight Limited who were agents of the Applicants. A counter notice was then issued to the said Transvistan. The said company Transvista on its part denied liability and demanded an apology.

The question of the 3 containers is therefore, controversial and contentious. They are disputes to be resolved in other fora i.e. the Criminal and Civil Courts.

With regard to the goods detained, I do find that in the circumstances there appears to be outstanding taxes due on the 3 missing containers which belong to the Application.

Until the disputes are resolved or investigation completed, the Respondents are entered under the Act to demand payment of the taxes on the missing containers or to treat them as outstanding debts. On the basis of this the Respondents under Section 130(2) are entitled to detain the goods which are subject matter herein as a lien for the outstanding amounts payable as duty and other taxes under the Act.

As a result the applicant is not entitled to the remedies sought herein. This is not a matter appropriate or suitable for the grant of judicial review orders. I, therefore, dismiss the application with costs to the Respondents.

Dated and delivered at Mombasa this 9th day of July 2010.

M.K. IBRAHIM

J U D G E

Coram:

Ibrahim, J

Mr. Hassan for the applicant

Mr. Kamau h/b for Ms. Mwangi for the Respondent

Order

Ruling delivered in their presence.

IBRAHIM, J