



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Application 865 of 2007

THE REPUBLIC

EX-PARTE MOHAMED ALI SALEH..... APPLICANT

AND

THE COMMISSIONER OF CUSTOMS & EXCISE RESPONDENT

RULING

This is a Notice of Motion dated 18th September, 2007 filed by M/S Gikandi & Company advocates on behalf of the ex-parte applicant, **MOHAMMED ALI SALEH**. The respondent is named as **THE COMMISSIONER OF CUSTOMS & EXCISE**. The application was filed under Order 53 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The orders sought in the application are as follows-

(a) *An order of certiorari to bring into this court the decision of the Respondent to seize and detain the Ex-parte applicant's lorry registration number KAU 912W and pulling trailer No. ZB 5227 and the said decision to be nullified through an order of certiorari. The said decision is contained in a notice of goods deposited in customs Warehouse No. 955570 dated 3.6.2007.*

(b) *That an order of prohibition be granted prohibiting the Respondent or any other person acting on his authority from removing or in any way dealing with the Ex-parte applicant's said lorry and trailer registration number KAU 912 W and trailer No. 2B 52227.*

(c) *That an order of mandamus be granted to compel the respondent to forthwith and immediately release to the Ex-parte applicant his lorry registration No. KAU 912 W and trailer No. ZB 5227.*

(d) *That the costs of the application be provided for.*

The application is supported by the affidavit sworn on 30th August, 2007 by **JOSEPH NZIOKI NDETO**, a Port Clerk of the applicant. The application is also supported by **STATEMENT** dated 30th August, 2007. All these were filed with the Chamber Summons for leave, as required by law.

The grounds of the application are that the applicant is the owner of lorry registration No. KAU 912W together with trailer Registration No. ZB 5227. That the lorry and trailer was for transport hire from customers, as a business. That on 30th May, 2007, the applicant's port clerk, Mr. Ndeto got business to transport 1x40 feet container of second hand clothes from Mombasa to Nairobi for consideration of

transport costs of kshs.75,000/= and Commission of Kshs.5000. That the lorry and trailer and documents were cleared out of Mombasa Port by Kenya Police Customs Officers, and Port Personnel. That the container was loaded, but at gate No. 18, the respondent's personnel stated that there was an anomaly with the way the container was cleared. That on Friday 29th June, 2007 the applicant was served with a notice of goods deposited in customs warehouse No. 95579 which was surprisingly dated 3rd June, 2007. That the applicant was an innocent transporter and the lorry and trailer had been detained since June, 2007 while the respondent continued to suffer massive losses.

In response to the application the respondent filed a replying affidavit sworn on 5th November 2007 by **BONIFACE MBOGO MWAURA**; a Chief Inspector of Police seconded to the Kenya Revenue Authority in the Investigations and Enforcement department. It is deposed in the said affidavit, inter alia, that Ms Long Street Distributors (*an importer*) through his agent (*Trans Effective Company Ltd*) sought for customs clearance and release of consignment container No. SEAU 8675088 STC using forged documents i.e. Forged Entry No. 719615 and Forged MPRO No. 0796347. It was also deposed that Mr. Mohamed Ali Saleh through his agent was facilitating the conveyance of the uncustomed consignment vide his truck Reg. No. KAU 912W and a trailer Reg. No.ZB5227, and the container and truck were therefore deposited/seized vide r8995579 for purposes of investigations. It was also deposed that under section 211 of EACCM Act, the vehicles used in the goods liable for forfeiture shall itself be liable to forfeiture. It was deposed that relevant documents had been forwarded for examination to CID Headquarters, and a report was awaited. It was deposed that the elements of forgery and anomalies observed in respect of entry No.719615 were-

“(a) Two separate Mombasa Port Release Orders, (MPRO) were used with the same customs Assignment No. 719615. The 1st one was the genuine one and the container was CAX U 9941114 SEAL. 025710. The final one that the applicant purported to clear was No. SEAU – 8675088 SEAL: 0258541, and is forged as it has a different container consignment number. Two different containers cannot be released on the same Customs Assignment Number. The description of the goods is also different.

(b) The 2nd entry was not validated for exit and delivery to the owner as the same entry No. MSA 719615 has been validated before and cannot transact the same business against two different consignments

(c) The two different containers could not have been imported on one entry, as the pagination would flow, but the documents produced are both of a page 1 of 1 and cannot therefore be of the same entry.”

It was also deposed that the retention of the applicant's truck was justified because the Revenue Protection Services report indicated that the truck owner Mohamed Ali Saleh had never produced any proof of a transport contract so he is a prime suspect, and that the applicant and his port clerk had refused to assist in investigations and information.

The respondents also filed written submissions on 26th November, 2007 through their counsel M/S J.K Lavuna advocate. The identified issues in the written submissions are two. Firstly, whether the seizure by the respondent contained in a notice of goods deposited in Customs Warehouses dated 3/6/2007 was ultra Vires the relevant provisions of the law, illegal, in violation of any statutory procedures, unreasonable or unjust and devoid of natural justice. Secondly, whether the applicant is entitled to the reliefs sought under the provisions of Order 53 of the Civil Procedure Rules.

The reasons for the seizure were given in the written submissions. They are firstly, that container NO. SEAU 8675088 STC was seized as the goods uncustomed, and false documents were being used to release the consignment. Secondly, truck Registration No. KAU 912W belonging to the applicant was seized because it was conveying uncustomed goods and was thereby used to facilitate the offence.

It was also submitted that the fake documents were forwarded to the CID Headquarters for expert examination and investigations but the report had not yet been received, though daily follow ups were

being done.

In the submissions, the East African Community Customs Management Act (EACCMA) 2004 were cited. These were sections 19, 159, 203, 210, 212, 213 and 214. Those sections deal with the powers and functions of the respondent to collect taxes and seizure. It was contended that the applicant had waived his option of compounding the offence under section 219 of the Act. It was contended that the seizure was procedurally done, and because of the forgery of documents, investigations were on going. It was further submitted that the applicant has failed or refused to disclose the names of the people who gave him the business or the owners of the containers, which people should be within his knowledge. It was contended that the respondent should therefore be left to perform its statutory duties by carrying out investigations. Releasing the items seized will scuttle investigations. Therefore the orders sought should not be granted. A number of case authorities were cited by the respondent's counsel.

I have considered the application, documents filed, the submissions and the authorities cited. In my view, the issues are three. Firstly, whether the respondent was justified in seizing the applicant's lorry and trailer. Secondly, whether the respondent is justified in continuing to detain the said lorry and trailer. The third issue is whether the orders sought should be granted.

I turn to the first issue as to whether the respondent was entitled to seize the lorry and trailer. The applicant does not deny the contention of the respondent that the respondent seized the container and the lorry and trailer to facilitate investigations on purported forged documentation used by the employee of the applicant to clear the container from the port of Mombasa using the subject lorry and trailer. Under section 203 of the Act, it is an offence to make or use false documents. Under section 213 of the Act, the Commissioner (**respondent**) can seize goods which are liable to forfeiture. The procedure for seizure is provided for under section 214 of the Act. In my view, the respondent herein was perfectly entitled to seize the lorry and trailer of the applicant for investigations, and further legal action after investigations.

I now turn the second issue as to whether the respondents are entitled to retain the said lorry and trailer from 2007, which is now about two years. The reasons for continuing to hold on to the items seized, is that the CID had not finalized their technical investigations and provided the report to the respondents. In my view, the period of two years is inordinately long for carrying out investigations. As at now, the respondents do not say how far the CID have gone with their investigations. They do not indicate what problems or challenges the CID are facing. They do not indicate the period of time they expect the CID to take to finalise the investigations and deliver their report. The CID are clearly the respondent's agents. Investigations have to be completed within a reasonable time. In my view, the investigations on the alleged use of false documents have taken unreasonably long, and there is still no indication as to when they will be completed.

The provisions for seizure are found under section 213 and 214 of the Act. I will highlight the same hereunder. The relevant parts of section 213 provide as follows-

213(1) An officer or a police officer or an authorized public officer may seize and detain any aircraft, vessel, vehicle or goods, animal or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable for forfeiture; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.

- (2)
- (3)
- (4)
- (5)
- (6)

(7) The Commissioner may at any time prior to the commencement of any proceedings relating to any aircraft, vessel, vehicle, goods, animals or other thing which had been seized under this Act, if he or she is satisfied that it was not liable to seizure, release and return it to the person from whom it was seized.

It is clear from the above provisions of the law that where an officer has reasonable grounds, he may seize goods and vehicle as was done in the present case before prosecution is commenced. It is also clear that the Commissioner (**respondent**) may also at any time before commencement of proceedings, release the seized item or items if he is satisfied that the item is not liable to seizure.

Section 214 of the Act, on the other hand provides for the procedure for seizure.

It is not clear in our present case whether the Commissioner (**respondent**) has, or has not decided to take any action provided for by the law. Because the Commissioner has not exercised his power under the Act, to either charge the applicant or his agent or release the items, I really do not know under what powers he is still holding the lorry and trailer. I have not been referred to any law that allows the respondent to hold on to the detained or seized items, indefinitely. The continued detention of the lorry and trailer in my view appears to have no basis in law, and is unreasonable.

The third issue is whether I should grant the orders sought. The orders sought are for certiorari, prohibition and mandamus with respect to the lorry and the trailer. I have stated earlier that the respondent's counsel has cited several authorities. The case of **AHMED KUMILIYE -VS- KENYA REVENUE AUTHORITY** – Nairobi Misc. Application No. 1101 of 2007 was cited. That ruling dated 9th November, 2007 is distinguishable. It was a ruling at leave stage, where the court declined to grant stay orders. The case of **PILI MANAGEMENT CONSULTANTS LTD -VS- COMMISSIONER OF INCOME TAX** – Mombasa Civil Application No. 525 of 2006 is also distinguishable. That case related to the powers of the Commissioner of Income Tax, under the Income Tax Act, not the Customs Act. The same situation applies to the case of **REPUBLIC -VS- KENYA REVENUE AUTHORITY – Nbi HC** Misc. Application No. 665 of 2003. On the other hand, the case of **KENYA NATIONAL EXAMINATIONS COUNCIL -VS- REPUBLIC** – Nairobi Civil Appeal No. 266 of 1996 is also distinguishable, as orders of mandamus were not granted simply because examination results had already been cancelled, and no order of certiorari to set aside the said cancellation had been sought. In effect there were no results which the Examinations Council could be compelled to release.

In our present case, I am of the view that the orders sought can and should be granted, not because the respondent had no powers to seize the items for investigations, but because he does not appear to be carrying out investigations, and has not or does not appear interested in applying the provisions of the Act. Therefore the respondent's actions in retaining the lorry and trailer is unreasonable, without justification and illegal. The respondent cannot continue holding the lorry and trailer seized indefinitely, without taking any legal steps as provided for under the Act. In my view, the respondent's actions have become unreasonable and beyond or outside the statutory powers donated to him because he appears to be continuing to detain the lorry and trailer just for the sake of it. The reasons given by the respondent that he holds the motor vehicle and trailer because the applicant has not informed the Respondent as to who the owner of the container in issue is does not help the respondent. Even if the applicant were uncooperative, the respondents are required to operate within the powers granted to them by the law. They cannot break the law just in order to force the applicant to cooperate. If the failure to cooperate is an actionable wrong, then legal action authorized by law has to be taken against the applicant and his agent. In my view, the respondent has ample powers under the statute to act decisively to charge the culprit and forfeit the item seized. In our present case, the respondent appears to be holding the lorry and trailer indefinitely and administratively. That continued detention cannot be accepted by this court. I find that the respondent has no legal basis for continuing to detain the vehicle and trailer. I will grant the prayers sought.

Consequently, I order as follows-

1. An order of certiorari be and is hereby granted to bring to this court and quash the decision of

the Respondent to detain the ex parte applicant's lorry registration number KAU 912W and pulling trailer No. ZB 5227 and the said decision is hereby quashed forthwith.

2. An order of prohibition be and is hereby granted prohibiting the Respondent or any other person acting on his authority from removing or in any other way dealing with the ex-pate applicants said lorry and trailer registration number KAU 912W and trailer No. ZB 5227 pursuant to a notice of goods deposited in Customs Warehouse No. 955570 dated 3.6.2007.

3. An order of mandamus be and is hereby granted to compel the respondent to forthwith and immediately release to the ex parte applicant his lorry registration No. KAU 912 W and trailer No. ZB 5227.

4. Costs of these proceedings are awarded to the ex parte applicant against the Respondent.

Dated and delivered at Nairobi this 23rd day of July, 2009.

George Dulu

Judge.

In the presence of-

Mr. Kaluu for the applicant

Ms. Lavuna for respondent

Kevin Court Clerk.