



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

MISC APPLI 593 OF 2008

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER ORDER
LIII OF THE**

CIVIL PROCEDURE RULES

AND

IN THE MATTER OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE SUGAR ACT NO. 10 OF 2001

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT

BETWEEN

REPUBLIC APPLICANT

V E R S U S

KENYA SUGAR BOARD 1ST RESPONDENT

KENYA REVENUE AUTHORITY..... 2ND RESPONDENT

EX-PARTE: WESTERN INVESTMENTS

J U D G M E N T

Before me is a Notice of Motion dated 15th October, 2008 filed on the same date by M/s Asige Keverenge & Anyanzwa advocates on behalf of the ex-parte applicant named **WESTERN INVESTMENTS**. The application was filed under Order 53 of the Civil Procedure Rules. The respondents are named as **KENYA SUGAR BOARD** and **KENYA REVENUE AUTHORITY**. The orders sought are as follows that-

- 1. An order of certiorari do issue to quash the decision and order made by the 1st Respondent on 23rd June, 2008 revoking the applicant's certificate of registration and rendering it invalid for processing the release of the Applicant's 19 containers of sugar when the processing of the same had***

been completed and full requisite statutory duties and taxes thereon as demanded by the 2nd respondent duly paid to the 2nd respondent by the applicant.

2. An order of mandamus do issue commanding and compelling the 2nd Respondent to issue a customs release order for the release of the Applicant's 19 containers of sugar lying at Kilindini Port of Mombasa free from any demurrage charges, customs warehouse rent, port charges and any penalties accrued from 24th June, 2008 when approval for processing of the release of the applicant's 19 containers of sugar was granted until the date of such release is made.

3. Any further directive as may be deemed necessary be given.

4. Costs of this application be provided for.

The application is grounded on the **STATEMENT** dated 25th September, 2008 filed with the Chamber Summons for leave as well as the **VERIFYING AFFIDAVIT** sworn on 24th September, 2008 by **SAID MOHAMMED ABDI** described as a director of the applicant, also filed with the Chamber Summons for leave.

The grounds of the application are inter alia, that the applicant as a licenced sugar importer for the year 2008, in November, 2007 imported 19 containers of sugar and 8 containers of rice and entered the same under import entry number 1167225 as rice and duly paid duties and taxes. The 2nd respondent issued a Notice of Seizure dated 9th June, 2008, and following verification the applicant sought compounding by the Commissioner under section 219 of the East African Custom's Management Act, 2004 and duly paid fines in the sum of Kshs.620,000/= and additional duties and taxes in the sum of Kshs.8,300,727/= and in addition paid customs warehouse rent in the sum of kshs.493,350/=. On 30th June, 2008 the 2nd respondent informed Kenya Ports Authority that delivery could be made to the consignee and on same date the applicant sought release order, and that was when the 2nd respondent's Senior Assistant Commissioner Kilindini orally informed the applicant that no release order could be issued as the 1st respondent had issued a directive to the 2nd respondent not to process any sugar imports. On 18th September, 2008 the 2nd respondent supplied the applicant with copy of a letter dated 23rd June, 2008 which letter notified the 2nd respondent that the applicant's certificate of registration as a sugar importer had been cancelled. The applicant was not notified of the 1st respondent's decision and as at the time the 1st respondent made its decision the applicant had already imported the 19 containers and the 2nd respondent had finalized processing the release to the applicant, who had already paid all duties and taxes due. It is therefore contended in the said grounds that the decision revoking the applicants certificate of registration and failure to issue a customs release order is unlawful and illegal, ultra vires the statutory functions of the respondents; an abuse of power, unreasonable and irrational, in bad faith and error of fact, unfair and perverse within the Wednesbury Principle, unfair and unjust.

The applicant's counsel on 4th December, 2008 filed written submissions. After highlighting what is in the grounds of the application it was contended, inter alia, that the 1st respondent acted unreasonably and maliciously and did not give the applicant a fair hearing before taking the drastic action thus breaching rules of natural justice. It was contended that the communication on the cancellation of the certificate registration of applicant had so far not been sent to the applicant. It is denied as, alleged by a Mr. James Siro, that the said communication was conveyed to the applicant. Therefore, the cancellation was ultra vires, in bad faith and against the legitimate expectations of the applicant who expected release of the said sugar after payment of all the taxes and duties. It is also contended that the applicant, as a business name can properly come to court in terms of Order XXIX rule 1 of the Civil Procedure Rules. In any event, the certificate of registration of the applicant as a sugar importer is in the name of the ex-parte applicant and not in the name of its partners. It is contended that after payment of all taxes and duties, the 2nd respondent has no power to decline to release the applicant's goods. It is further contended that the averments in the replying affidavit of Jopkangor Kipkurui on behalf of the 2nd respondent lacks merit as the Permanent Secretary Ministry of Agriculture does not have any powers under the Sugar Act (**No. 10**

of 2001).

The applicant relied on the case of **TRANSOUTH CONVEYORS LTD –VS- KENYA REVENUE AUTHORITY & 2 OTHERS Civil Appeal No. 89 of 2007**, consolidated with Civil Appeal No. 92 of 2007 **STUNTWAVE LTD –VS- KENYA REVENUE AUTHORITY**, wherein the court held-

“..... We had earlier held that the Appellants have shown circumstances which show that they were perfectly entitled and legitimately so that KRA would clear their sugar after they satisfied the preconditions. Those are circumstances which in our view entitled them to an order of mandamus. KRA is a public body whose statutory duty is to clear imported goods where importers have met the preconditions for importation.”

In both cases both the Kenya Revenue Authority and the Kenya Sugar Board were respondents.

On behalf of the 1st respondent the **KENYA SUGAR BOARD**, M/s Okongo Omogeni & Company advocates filed a replying affidavit on 18th November, 2008. The said replying affidavit was sworn on 17th November, 2008 by Mr. James Siro described as the Head of Surveillance Unit. It is deposed in the said affidavit, inter alia, that the subject sugar was imported into the country by ship on 23rd November, 2007 without the applicants having obtained registration from the 1st respondent as sugar importers. It is also deposed that the applicants only approached the respondents in May, 2008 which was after their attempt to smuggle sugar into the country and also without disclosing that the applicants were attempting in a disguised attempt to validate illegal sugar imported in November, 2007 when the applicants did not hold any import registration certificate. It is further deposed that the registration certificate No. KSB/CRI/265/07 issued to the applicants could not apply retrospectively to sugar already illegally imported into the country wherein the applicants had actually initially declared the sugar as rice and later pleaded guilty, and consequently on 20/6/08 the 1st respondent on learning of the same revoked the import registration certificate and communicated the decision to the applicant. It is also deposed that the importation did not meet the regulatory requirements of the Sugar Act and was therefore prohibited importation and the sugar should be forfeited and not allowed illegal entry into the country. It was deposed that the licence was revoked procedurally as the 1st respondent has a moral responsibility to protect the local sugar industry and guard against sugar smuggling. It is also deposed that a search had disclosed that the applicant was registered on 15/9/05 as a business name and therefore the application is incompetent and bad in law.

The 1st respondent also on 18th February, 2009 filed written submissions. In the said written submissions there are issues related to preliminary objections, and secondly, the merits.

On the preliminary points it was pointed out that the ex-parte applicants were registered as a business name under Cap. 499 of the Laws of Kenya. Therefore institution of any suit by them had to adhere to Order XXIX Rule 1 of the Civil Procedure Rules, which states-

“Any two or more persons claiming or being liable as partner and carrying on business in Kenya may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing cause of action.”

It is contended that as at the time of filing these proceedings the 1st respondent had cancelled the registration of Western Investments, and therefore the said firm was non-existent or not recognized in law. It was contended also that it could, in any event, only come to court through its proprietors. But since its registration was cancelled it could not come to court, because it was non-existent.

On the merits of the case, the 1st respondent contended that it exercised discretionary powers in granting the certificates of registration for importers of sugar, such as the ex-parte applicant. Reliance was placed on the Sugar Act No. 10 of 2001 and the Sugar (***Imports, Exports and by products***) Regulations 2003 which give discretionary powers to the 1st respondent by providing that an application

for registration as a sugar importer must be “**approved**” before registration and issuance of a certificate is undertaken. Reliance was placed on the case of WELAMONDI –VS- CHAIRMAN ECK [2003] IKLR 496 wherein the court stated-

“..... mandamus cannot issue to compel the exercise of discretionary power let alone its exercise with a view to arriving at a particular result..... mandamus looks at the present situation and aims at enforcing a duty which has not been performed.....”

Reliance was also placed on the case of REPUBLIC –VS- KENYA REVENUE AUTHORITY – Ex Parte Aberdare Freight Services Ltd. [2004] 2KLR 546, wherein the court stated-

“It is clear to the court that the order of mandamus sought does not and would not lie because there is no public duty or statutory power which the respondent has failed to exercise.”

It was emphasized that the power of court to grant mandamus orders is discretionary and where the applicant’s conduct is wanting, like in this case where the applicant applied for issuance of a certificate of importation after the sugar had already been imported without disclosing that fact, the order of mandamus cannot and should not issue, because the applicant obtained the issuance of the certificate by misrepresentation. It was also argued that the same applied to the request for grant of certiorari orders. Reliance was placed on the case of REPUBLIC –VS- JUDICIAL SERVICE COMMISSIONS Ex-parte Pareno- Misc. Civil Application No. 1025 of 2003.

It was contended that the 1st respondent had a very important function of regulating the sugar industry in the country and protecting the local sugar sector under section 4 of the Sugar Act. Section 27 of the Act is emphasized. Section 27(1) of the Act provides-

“27(1) Subject to such regional and international trade agreements to which Kenya is a party, all sugar imports into the country shall be subject to the prevailing import duties, taxes and other tariffs and such imports shall be controlled by the Board.”

It was contended that the import entry in November, 2007 when the subject sugar was imported described the said sugar as rice. That was a false declaration of cargo. It was further contended that in terms of Regulation 8(1) of the sugar Regulations, the action by the applicant of importing the sugar in 2007 before being registered as a sugar importer was a criminal offence, which also meant that the orders sought could not be available. The said Regulation provides-

8(1) Any person who-

(a) Imports or exports sugar or its by-products without a certificate of registration; or

(b) Fails to make returns to the Board as required by these Regulations, commits an offence and shall be liable on conviction to a fine not exceeding six thousand shillings, or imprisonment for a term not exceeding six months, or to both.”

It is contended that there was ample case law that the court cannot assist any party in the furtherance of an illegality. The case of MISTRY AMAR SINGH –Vs- KULUBYA [1963] E.A. 408 was relied upon. Also the case of HEPTULLA –VS- NOOR MOHAMMED [1984] KLR 580 was relied upon, wherein the Court of Appeal stated-

“No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.”

The 2nd respondent, Kenya Revenue Authority, filed submissions and further submissions. It was contended that mandamus was not available against the 2nd respondent, as there was no allegation that the 2nd respondent either acted in excess of its jurisdiction or that the applicant was denied principles of

natural justice. Reliance was placed on the case of **KENYA NATIONAL EXAMINATIONS COUNCIL –VS- REPUBLIC Ex-parte Geoffrey Njoroge – Civil Appeal No. 266 of 1996.** It is also contended that at the time the subject sugar was due for release, the applicant did not have a certificate of Registration as a Sugar Importer, the same having been revoked by a letter dated 28th May, 2008 by 1st respondent. Further, there was a letter dated 6th August, 2008 addressed to the Commissioner General of the 2nd Respondent by the Permanent Secretary Ministry of Agriculture that the said sugar be forfeited to the State and be destroyed under government supervision.

At the hearing, Mr. Asige highlighted the submissions on behalf of the ex-parte applicant. Mr. Omogeni highlighted the submissions on behalf of the 1st respondent, while Mr. Matuku highlighted the submissions on behalf of the 2nd respondent.

It is not in dispute that the applicant imported the subject sugar in November 2007, when they were not registered sugar importers. It is not in dispute that they disguised the said sugar as rice. They only applied for a certificate of registration as sugar importers when the 2nd respondent found that part of the consignment imported was sugar and not rice. It is not in dispute that the ex-parte applicant applied for a certificate of registration as sugar importers in May 2008, and were granted the same for a short period of 28/05/08 to 30/06/08. It was cancelled by the 1st respondent before expiry date, resulting in these proceedings.

I have considered the arguments put forward by parties in this case. The arguments by the 1st respondent are that the ex-parte applicant was guilty of non-disclosure of material facts. Thus the certificate of registration as a sugar importer was issued in error for sugar already imported which was wrong. Therefore they were entitled as the regulator to cancel the certificate of registration. They also state that the applicant cannot come to court in its own name. They rely on the Civil Procedure Rules. They also state that the orders sought are discretionary and the court should not grant the same, in the circumstances of this case. They also say that the ex-parte applicants are guilty of an illegality therefore the court should not assist them. The 2nd respondent claims that they have not breached any statutory obligation.

I will start with the issue of illegality. It is in my view true that the applicant was involved in an illegality, both under the Customs Laws as well as the Sugar Regulations. In my view, the provisions of the East African Community Customs Management Act (**EACCMA**), which are in the main Act of Parliament are superior to the Sugar Regulations, which is subsidiary legislation.

Under section 219 of the EACCMA, the Commissioner has powers to compound an offence. The said section provides-

219. (1) The Commissioner may, where he or she is satisfied that any person has committed an offence under this Act in respect of which a fine is provided or in respect of which any thing is liable to forfeiture, compound the offence and may order such person to pay a sum of money, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may deem fit; and the Commissioner may order any thing liable to forfeiture in connection with the offence to be condemned.

(2) The Commissioner shall not exercise his or her power under subsection (1) unless the person admits in a prescribed form that he or she has committed the offence and requests the Commissioner to deal with such offence under this section.

(3) Where the Commissioner makes any order under this section-

(a) the order shall be put into writing and shall have attached to it the request of the person to the Commissioner to deal with the matter.

(b) the order shall specify the offence which the person committed and the penalty imposed by the

Commissioner;

(c) a copy of the order shall be given to the person if he or she so requests;

d) the person shall not be liable to any further prosecution in respect of the offence; and if any prosecution is brought it shall be a good defence for the person to prove that the offence with which he or she is charged has been compounded under this section; and

(e) the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court.

In our present case, the Commissioner did compound the offence. Therefore, in my view, there cannot be further existing illegality after the Commissioner compounded the offence in terms of section 219(e) of the Act. I therefore have to discount the issue of illegality in this case. The cases cited are not applicable. On the name used, I find that the Civil Procedure Rules do not apply to judicial review proceedings. Therefore Order XXIX of the Civil Procedure Rules is inapplicable. I find that the correct party has come to this court as ex-parte applicant.

It has been argued that the applicant is asking the court to issue orders on discretionary powers. I fully agree with the decision in the **WELAMONDI** case (supra). In my view, if the 1st respondent had discretion, that discretion had already been exercised when they issued the certificate of registration of the applicant as a sugar importer. At this stage, we are not dealing with the discretion to issue the certificate of registration as a sugar importer, but the cancellation of the certificate already issued.

In my view, this is a classic example of two or more government agencies not acting in unison, that is the 1st respondent, and the 2nd respondent, and Permanent Secretary for Agriculture, and pushing the blame on a third party.

There is no provision of the law or any regulation quoted that would allow the 2nd respondent the unfettered power to cancel the certificate of registration already issued, without prior information or chance to the applicant to be heard on the issue. I agree that the 1st respondent has a statutory duty to regulate the sugar industry in the country. However they have to act reasonably, fairly and within the requirements of principles of natural justice. As it is now, the 2nd respondent has compounded the offences already committed, has collected taxes duty and fine and is duty bound to release the sugar as the Commissioner in his own wisdom has not condemned the subject cargo. At the time the 2nd respondent collected taxes, the 1st respondent had issued a certificate of registration of the applicant as a sugar importer. The 2nd respondent was duty bound to release the sugar, save for communication from the 1st respondent. The law under section 219(e) of the EACCMA is clear that the decision of the Commissioner is final.

I find and hold that the 1st respondent has acted unreasonably and contrary to the principles of natural justice. In my view, all the judicial review prayers sought can and should be granted. There is nothing that the Government will lose, having collected all taxes and duties due, and I see no offer from the 2nd respondent to refund the taxes and duties collected. Obviously, the 2nd respondent cannot be forced by a Permanent Secretary in the Ministry of Agriculture, who does not appear to have any statutory role under the applicable Acts of Parliament to refund taxes and duties already collected. This is what the said Permanent Secretary purported to do in his letter dated 6th August, 2008.

That letter is of no legal effect.

Consequently, and for the above reasons, I allow the application and grant the certiorari and mandamus orders prayed for.

The 1st respondent will bear the costs of the application.

It is so ordered.

Dated and delivered at Nairobi this 29th day of September, 2009.

GEORGE DULU

JUDGE.

IN THE PRESENCE OF-

Mr. Keyanzo holding brief for Mr. Asige for ex-parte applicant

Mr. Omogeni for 1st respondent

Mr. Mutuku for 2nd respondent

David -Court Clerk.