



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

MILIMANI COMMERCIAL COURTS

Civil Case 116 of 2009

PRIME BANK LIMITED PLAINTIFF

VERSUS

COMMISSIONER OF CUSTOMS DEFENDANT

RULING

The plaintiff's chambers summons dated 25th February 2009, is brought under the provisions of order 39 of the Civil Procedure Rules section 3A of the Act and section 16 of the Government Proceedings Act. The applicant is seeking for an order of injunction to restrain the defendant or its officers or agents from enforcing or imposing liability on the plaintiff in regard to transit bond Reference Number PBL/L.G./06/526/4, dated 7th August 2006, pending the hearing and determination of the suit.

This application is premised on the grounds that on 7th August 2006, the plaintiff issued a transit bond Reference Number PBL/L.G./06/526/4 jointly with Triton Petroleum Limited in favour of the defendant for a sum of Ksh.25 million which was in the nature of a guarantee and was to subsist up to 7th August 2007, according to the endorsement. The transit bond was issued in the prescribed format but it was endorsed with expiry date which clearly stipulated that the plaintiffs' liability was to be up to 7th August 2007. The plaintiff was willing to accept liability within the period of the bond and after the expiry of the period of the bond, the plaintiff was supposed to be discharged.

On the 12th February 2009, the plaintiff received a letter dated 29th January 2009 from the defendant calling upon them to make a payment of Ksh.14,606.845/- under the said transit bond. The plaintiff contends that the demand for this amount of money was without basis because the transit bond lapsed before the demand letter was made. The plaintiff protested the validity over the defendants' demand but the defendant persisted in their intention to recover the said sum which according to the plaintiff is oppressive, a null and void as the plaintiff was discharged by effluxion of time.

Counsel for the plaintiff argued that under section 120 of the Evidence Act, the defendant is estopped from asserting anything that is not stated in the bond. The defendant should discharge the bank unconditionally because the bond lapsed after one year. The bond was to last for one year and the bank considered itself discharged. Due to failure by the defendant to take action they are now estopped by their own indolence to wake up after one year and demand payment. The conduct of the defendant was oppressive to the plaintiff it is in excess of their mandate and an abuse of the office. Counsel urged the court to offer protection by issuing the declaratory orders.

The Commissioner of Customs is appointed pursuant to the provisions of section 5 of the East Africa customs Community Management Act of 2005. Under section 221 of the Act, the Commissioner of Customs may sue or be sued. Counsel therefore submitted that the suit was properly before the court. It was not also not necessary to issue a notice under section 13A of the Government Proceedings Act because the relief sought is only a declaration. Therefore there was no need to serve a notice upon the Attorney General on behalf of the Government.

This application was opposed by Mr. Ontweka counsel for the defendant. He relied on the replying affidavit by Pamela Ahango sworn on 17th April 2009. Counsel argued that the application is seeking for an injunction against the Commissioner of Customs. According to the defendant a suit cannot be instituted against the Commissioner of Customs but the Kenya Revenue Authority which should be sued in its corporate name. under the East Africa Community Customs Management Act, each Partner State is supposed to appoint a Commissioner of customs who is actually appointed under the Kenya Revenue Authority Act. As regards the transit bond, counsel submitted that it is in the prescribed form CB8 (rule 96(4) which is a general bond. The plaintiff was bound by the conditions of that bond which was to remain in force for a period of three years, according to the provisions of the EACCMA.

The argument that the bond expired by effluxion of time is without basis because the plaintiff did not apply for the cancellation of the bond. The defendant enforcement department carried out a reconciliation to establish the securities held. This was in view of the emerging revelations that Triton Petroleum Limited was facing fraud and financial improprieties in various dealings with other stakeholders, it was established that the security bonds were outstanding as follows:

Entry Number	Amount in Kshs.
2007 MSA 922385	2,257,348.00
2007 MSA 922422	2,257,348.00
2008 MSA 1214832	2,253,784.00
2008 MSA 1282721	2,257,351.00
2008 MSA 1295391	<u>4,606,845.00</u>
Total Amount	<u>14,606,845.00</u>

That is when the demand for the outstanding amount was made to the defendant and the letter was also copied to Triton Petroleum Limited. The defendant was demanding for the amount which was collectable from the transactions which were in the system. The bond was available for a period of three years from 7th August 2006 to 7th August 2009. By the same argument counsel for the defendant argued that the plaintiff is estopped from saying the prescribed form cannot be reduced to one year when it is printed on the form that it is valid for three years. Moreover the principle of estoppel cannot negate the clear provisions of the statute.

Under section 5 of the Kenya Revenue Authority Act, the defendant is authorized to administer revenue collection under the supervision of the Minister for Finance and what the defendants is doing is enforcing what is clearly within its functions. It cannot be an abuse of power when the defendant is demanding the sum from the applicant to discharge themselves from their obligations. The applicant has not tendered any evidence to show they discharged themselves. The applicant has submitted themselves to the jurisdiction of the Civil Procedure Act and relied on the provisions of EACMA, they cannot now rely on a constitutional reference which was a different proceedings altogether, thus the case of **Royal Media Ltd vs Commissioner of Excise Duty** was distinguished.

From the above summary of the rival submissions and the matters pleaded, I have identified two issues for determination as I see them. Firstly; whether this suit is properly before the court. Secondly,

whether the plaintiff is entitled to the orders sought against the defendant. I will deal with those two issues seriatim.

On the first issue this suit is against the Commissioner of customs and the orders sought in prayer No.2 and 4 are injunctive relieves. Counsel for the plaintiff argued that under the EACCMA particularly section 221 proceedings may be brought against the Commissioner in their name. However this act as the preamble suggest is an act of the community to make provisions for the management under administration of customs and for related matters. Further under section 5 it is provided as follows:-

“There shall be appointed, in accordance with Partner States’ legislation, a Commissioner responsible for the management of Customs by each of the Partner States and such other staff as may be necessary for the administration of this Act and the efficient working of the Customs.”

By dint of the above provisions, the Commissioner of Customs is appointed according to the Kenya Revenue Authority Act which is a body corporate. Under section 3(2), any suit against the KRA arising from the performance of the functions or the exercise of any of the powers of the authority shall be deemed as legal proceedings against the Government within the Government Proceedings Act. Under the Government Proceedings Act, any party desiring to institute proceedings against the Government under section 13(a) is supposed to issue a notice which should be for a period of 30 days.

Although it was not necessary for the plaintiff to issue a notice in this case because the orders sought are declaratory, there is a further problem which is compounded by the provisions of section 16 of the Government Proceedings Act. It is provided that a court cannot make an order of injunction against the Government but merely declare the rights of the parties. The plaintiff’s application seeks for injunctive relieves at this stage pending the hearing and determination of the suit. According to section 16 of the Government proceedings Act, an injunctive order sought cannot issue. I am aware this court is vested with the discretion to grant an order declaring the rights of the parties. It is also trite that discretion must always be exercised judiciously based on evidence and the law. Before such an order is made, the court has to be satisfied that the plaintiff has a prima facie case with a probability of success at the end.

It is already determinable that the plaintiff instituted this suit against the Commissioner of Customs who is unsuited. Apart from that, the defendant is authorized by law to collect taxes and especially the customs and exercise Act Cap 473 section 3 which provides :-

“There shall be appointed a Commissioner of Customs and Excise and such other officers as may be necessary for the administration of this Act and the efficient working of the customs, all the Commissioners so appointed shall, subject to the direction of the Minister; be responsible for the control and management of the customs and for the collection of, and accounting for, customs and excise revenue.”

It cannot be said that the defendants demand for the settlement of the transit bond was in excess of the power and unreasonable acts meant to harass and oppress the plaintiff. The validity of the transit bond was faulted because it was endorsed that the banks liability was to be discharged on or before the 7th August 2007. This creates curiosity because it is endorsed on a prescribed form which contradicts the provisions of section 107 of the EACCMA especially 107 (3) which provides

“All bonds required to be given under this Act shall be so framed that the person giving the bond, and any surety thereto, is bound to the Commissioner for the due performance of the conditions of that bond; and any such bond may, unless sooner discharged by the due performance of the conditions thereof, be discharged by the Commissioner on the expiration of three years from the date thereof, but without prejudice to the right of the Commissioner to require fresh security.”

At this interlocutory stage, I have considered whether an endorsement of the prescribed form can defeat the provisions of the above statute, however it is for the trial court to determine. The other matter

to take into account is the fact that the plaintiff does not claim to have settled the bond, thus even if the plaintiff pays the sum demanded to the defendant which is the lawful revenue authority, they cannot suffer irreparable loss because the sum can be recovered if found not due to the defendant.

Having found that the suit is wrongly instituted against the Commissioner of Customs because the acts complained about were executed by the defendant in its duties which are controlled by the Kenya Revenue Authority Act in as far as the Commissioner was acting as the agent of KRA and within the parameters of the mandate given by the law, I am not persuaded that the act of demanding the settlement of the bond is oppressive null and void. Further an injunctive relief cannot issue against the Government Authority. Finally, even if the court were to issue a declaration, the plaintiff who had not paid any money to settle the bond cannot be said will suffer irreparable loss which cannot be compensated with damages.

For the aforesaid reasons I decline to grant the orders sought and dismiss the application with costs to the defendant.

RULING READ AND SIGNED ON 13TH NOVEMBER 2009 AT NAIROBI.

M.K. KOOME

JUDGE