



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Appli 1028 of 2007

NIXON ONYANGO ODERA.....APPLICANT

Versus

KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGMENT

By the Notice of Motion dated 28th September 2007 the exparte Applicant, Nixon Onyango Odera seeks Judicial Review orders against the Respondent, Kenya Revenue Authority. The orders sought are as follows:-

1. An order of certiorari do issue to quash and declare as nullity the Respondent's decision contained in the Notice of goods deposited in Customs Warehouse dated 25th July 2007, seizing and/or detaining the Applicant's goods and/or container No. PCIU2169812 containing cartons of Tomato Paste and Batteries while the goods were wrongly and/or by mistake shipped to Kenya and ought to be shipped to Dubai the country of origin;
2. An order of prohibition to prohibit the Respondent from interfering, disposing and destroying the contents of the container Number PCIU 2169812 or the Applicants goods in any manner whatsoever and howsoever and further to prohibit the Respondent from charging, demanding and receiving demurrage and storage or any other charges in respect of the said container and its contents;
3. An order of mandamus do issue to compel the Respondent to release the container No. PCIU 2169812 together with its contents of Tomato Paste and Batteries to the Applicant for reshipment to JEBEL – ALI in Dubai the country of origin and further to compel the Respondent to refund all duties and all demurrage and storage charges incurred by the Applicant in regard to the aforesaid container;
4. Costs of the Application be awarded to the Applicants.

The Application is based on the Verifying Affidavit of the Applicant dated 17th September 2007, a further Affidavit dated 7th November 2007 and the amended statement dated 8th October 2007 and skeleton arguments filed in court on 29th October 2007. The Application was opposed and Lois Mwangi, the Resident Verification Officer of Kipevu Container Freight Station Yard in Mombasa swore an Affidavit dated 25th October 2007, and the Respondent also filed submissions dated 31st October 2007.

The Applicant's case is that he purchased goods from Cotton Tex International F.Z.E. of Dubai and

shipped the goods to Mombasa Kenya. The goods were 1850 cartons of Tomato Paste. He was not present in Dubai. He received the Bills of Lading from the seller (NO. 001) which we handed over to Calbens Conveyors International Freight Masters, the clearing agents as evidenced by letters of 21st June 2007 and 7th June 2007 (MOO 2 & 3) to Pil Kenya Ltd. That the clearing agents lodged the clearing documents and the cheque with the Kenya Revenue Authority (NOO6 & 7) and the goods handling charges were duly paid to Kepevu Container Depot Ltd. and Kenya Ports Authority (NO 8, 9, 10 & 11). However, upon the Customs & Excise Department opening the container for inspection in the presence of the agent, it was discovered that the goods shipped did not match those cleared by the Import documents. The Applicant immediately contacted the importer vide his letter of 10th July 2007 (N 0012) and the importer acknowledged their mistake that the container was meant to be for Djibouti and they requested that the container be reshipped back to Dubai and they would meet all the expenses. The Applicant on 27th July 2007 wrote to the Deputy Commissioner of Customs Services Department Southern Region asking for permission to re export the goods back to Dubai – (NOO 16). But the Respondent by letter of 25th July 2007 served a notice on the Applicant through the clearing agent Calbens Conveyors, that the goods were detained and seized (No. 0017). Despite requests for release the Respondents refused to release the goods and as a result the Applicant has incurred losses, costs and demurrage charges and that the Respondent's officers have informed him that the Respondent intends to destroy the goods. It is the Applicant's contention that the Notice dated 25th July 2007 is dely, destroying or disposing of goods in container FCIU 2169812 is unreasonable and without jurisdiction, was made arbitrarily and capriciously, was made in bad faith and with ulterior motives, is contrary to public policy, is void and should be quashed.

In his submission, Mr. Ochwa Counsel for the Applicant submitted that S.202 of the East African Community Management Act provides that if one imports goods that are concealed or intended to deceive he is liable to criminal proceedings and goods would be seized and that he is not charged with such offence meaning that the Applicant has not committed any offence. He further submitted that S. 18 (1) under which the goods are seized does not apply to the goods herein because they are not prohibited goods and there has been no gazette notice to that effect, further he urged that the seizure notice dated 1st August 2007 was never served on them and the notice is meant to defeat these Judicial Review proceedings. That in any event the seizure should have taken place within one month and the seizure notice therefore offends S. 214 and 216 of the East African Community Management Act. Counsel relied on the case of **KEROCHE INDUSTRIES V KRA & 5 OTHERS** where the court held that if a decision is oppressive or unreasonable it amounts to an abuse of power. Counsel urged that no prejudice will be suffered by the Respondents if the goods are reshipped to Dubai.

In opposing the Notice of Motion, Ms. Mwangi deponed that on 25th July 2007, she was verifying goods at Kipevu Container Freight Station Mombasa when she came across the disputed container, which had been declared as Tomato Paste vide Entry 774087 (LMI). She did the verification with a Mr. Gatei and Mairura of the Respondent's Mombasa Anti-Smuggling Team when they discovered the goods to have been Mis declared as containing 'Tiger Head' branded dry cells in 1000 x 24 dozen packages concealed under the Tomato Paste packages. She exhibited photographs (LM 2) of the packaging. The container was deposited with Customs Warehouse on 25th July 2007 for contravening S.202 as read with S.18 (1) and 2nd schedule Part A of the East African Community Customs Management Act 2004 (LM 3) and on 1st August 2007, Mr. Mairura seized the container vide seizure notice No. 028702 of 1st August 2007. That the goods were imported contrary to S. 200, 202, and 203 of East African Community Act 2004 and were seized under S. 213 of the Act. Mr. Okello, Counsel for the Respondent submitted that the Respondents were justified in detaining and seizing the goods because the goods were not declared as required by S. 203 of the East African Community Management Act. He also submitted that 2 months had not yet lapsed when this Application was filed and the Respondents were within time to seize the goods. He urged that an order of certiorari cannot issue because the Application does not seek to quash the seizure notice, LM 4. It was also submitted that the decision of the Respondent was not made in excess of the Respondents powers and that does not make the decision unreasonable or contrary to rules of natural justice.

I have now considered the Application, the Affidavits filed, the amended Statement, submissions of all Counsel and in my judgment I will consider the nature and scope of Judicial Review analyze the submissions of the parties and the law and make my findings.

The **SUPREME COURT PRACTICE 1992 VOL 53/1-14/6** states as follows of the nature and scope of Judicial Review:-

“The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the Application for Judicial Review is made, but the decision making process itself.

It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The court will not however, on a Judicial Review, Application act as a ‘Court of Appeal’ from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is ‘Wednesbury’ unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law, the court would, under the guise of preventing the abuse of power be guilty itself of usurping power.”

The principles expounded above clearly show the function of the court to be to consider whether the procedure leading to the detention and seizure of the Applicant’s goods was done within the Respondents mandate under the East African Community Customs Management Act, was reasonable and complied with the rules of natural justice. This court has no jurisdiction to adjudicate on the merits of the Respondent’s decision. If it did so it would be acting as a Court of Appeal and therefore usurping the Respondents mandate under the East African Community Customs Management Act, 2004.

It is common ground that the container which had been brought in by the Applicant upon verification by the Customs Officials was found to contain not only Tomato Paste which were the goods that were imported but also contained Batteries which had not been declared nor had duty been paid for them. The Applicant does concede to that fact. The Applicant’s explanation was that the company which shipped the goods did so inadvertently as other goods were destined for Djibouti.

It is the Respondents case that the goods were imported contrary to S. 200, 202 and 203 of the East African Community Management Act.

S. 200 reads:-

“A person who acquires, has in his possession, keeps or conceals, or procures to be kept or concealed any goods which he or she knows, or ought reasonably to have known, to be uncustomed goods commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty per cent of the dutiable value of the goods involved or both.”

In the above Section, the Applicant is liable to comment if he knew or had reasonable knowledge that the goods were uncustomed. Even though the Applicant’s defence is that he did not know of the batteries having been packed with the Tomato Paste, it is evident he had only paid duty for the Tomato Paste but not the Batteries.

S.203

“A person who imports or exports goods

(a) which are concealed in anyway;

(b) which are packed in any package, whether or not together with other goods in a manner likely to deceive any officer;

(c) which are contained in any package of which the entry or application for shipment does not correspond with such goods, commits an offence and shall be liable on conviction to imprisonment for a term not exceeding five years or to a fine equal to fifty percent of the value of the goods involved.”

According to the Respondent, the Applicant brought into the country batteries that were concealed and duty was not paid and that contravened the above Section. Photographs LM 2 were taken after the container with the cartons was opened. I do agree with the Respondents that it is apparent from the photograph that the cartons containing the batteries were packed in the middle of those with tomato paste which is evidence of concealment. If the Respondent had not done 100% verification of the containers, it would not have been found out that there were batteries packed in the middle of the container. No duty had been paid for the batteries and that constitutes an offence committed under S. 202 of the EACCM Act

Section 203 provides:

“A person who in any matter relating to the containers-

(a) makes any entry which is false or incorrect in any particular, or

(b) makes or causes to be made any declaration, certificate, application, or other document, which is false or incorrect in any particular or”

In so far as the Applicant did not declare that the batteries were part of the consignment in the container, the Declaration form LM I in which only tomato paste was declared was false and incorrect and the same contravened S. 203 of the EACCM Act. The Applicant having breached the above Sections was liable to prosecution though at the time of filing this Notice of Motion on 28th September 2007 no charges had been preferred against him. Instead, on 20th June 2007, the Respondent issued a Notice of Goods deposited in customs Warehouse, pursuant to S. 202 and S. 18(1) of the 2nd schedule part A.

Under S. 210 of the EACCM Act, prohibited goods and uncustomed goods are liable to forfeiture. Under S. 213 (1) of the EACCM Act, an authorized officer may seize and detain goods that are liable to forfeiture if the officer has a reasonable ground to believe they are liable to forfeiture and may be seized and detained regardless of the fact that any prosecution for an offence under the Act which renders the liable to forfeiture has been or is about to be instituted. There is no specific time limit given for the preferring of criminal charges. This Section therefore negates the Applicants argument that he is innocent because he has not been prosecuted under the above provisions of law (200, 202 and 203 EACCM ACT)

The Applicant contends that the Respondents contravened S.18 (1) of the EACCM Act in that the batteries were prohibited goods in that their importation was prohibited. S. 18 (1) provides that goods specified in Part A of the 2nd schedule are prohibited goods and their importation is prohibited. Part A of the 2nd schedule lists several kinds of prohibited goods. The Respondents did not specifically point to any of the listed items as referring to the batteries. Though the Applicants alleged that the batteries are counterfeit, the Respondent did not demonstrate how they reached the conclusion that they are counterfeit goods.

A consideration of S. 200, 202 & 203 of the EACCM Act clearly demonstrates that the Applicant was in breach thereof having imported uncustomed goods for which duty was not paid and he cannot contend that the Respondent acted ultra vires the Act. Having found undeclared goods for which duty was not paid for, the Respondent was justified to act as it did. After all, it is only the word of the Applicant that the batteries were inadvertently shipped to Mombasa instead of Djibouti but from the manner of packing the container the court is persuaded to find that the packers intended to conceal the fact that batteries were packed in that container.

The prayer that the Applicant seeks to quash is the decision (Notice) dated 25th July 2007 in which the Respondent detained the goods. However the Respondents issued a seizure Notice on 1st August 2007 (LM 4), if the court were to grant an order of certiorari to quash the detention Notice of 25th July 2007 but not the seizure notice, the court would be acting in vain as the seizure notice (order) of 1st August 2007 would remain in force and the goods would not be released in any event. It was the Applicant's submission that the Respondents issued the notice of 1st August 2007 with the intention of defeating this Judicial Review Application because the Respondents were out of time. Under S. 216 of the EACCM Act, where any Notice of claim has been given to the Commissioner, in accordance with S.214 he may within 2 months from receipt of the claim require the claimant to institute proceedings for recovery of the forfeited goods, within 2 months of the Notice or require the claimant to institute proceedings or if the commissioner fails to institute proceedings then the goods should be released but prohibited goods should be disposed off as the Commissioner may direct. In the instant case, the notice of deposit was issued on 25th July 2007 and a seizure notice on 1st August 2007. Two months would have lapsed on 25th September 2007. However the Applicant commenced these Judicial Review proceedings on 18th September 2007 before the 2 months lapsed. By the time the Judicial Review Application was commenced, notice of seizure had been issued. There is no good reason why the seizure notice has not been challenged. Courts do not act in vain and I find that an order of certiorari would not issue to quash the Notice of 25th July 2007 when the seizure notice of 1st August 2007 still subsists.

An order of certiorari lies to quash a decision that is made without jurisdiction, or is made contrary to rules of natural justice or is an error on the fact of the record. I have found earlier that the Respondent had the mandate to issue the Notice to detain the goods under S.200, 202 and 203 of EACCM Act. The Applicants have not demonstrated that the Respondents acted in bad faith or arbitrarily or capriciously as alleged and the said order of certiorari would not lie (See the case of **KENYA NATIONAL EXAMINATION COUNCIL V REP (supra)**)

The 2nd prayer is that of prohibition to bar the Respondent from interfering, or disposing off the contents of the Applicants container or demanding storage and other demurrage charges. An order of prohibition will issue to restrain a person who acts in excess of his jurisdiction or contrary to the rules of natural justice. See the **KENYA NATIONAL EXAMINATION COUNCIL CASE**. As observed above the Respondent has not acted in excess of its mandate under the Act nor is there evidence of breach of rules of natural justice.

The third prayer is for an order of mandamus to compel the Respondent to release the container to the Applicant so that it can be shipped back to Dubai and also compel the Respondent to refund all duties and storage charges incurred by the Applicant. An order of mandamus will issue to compel the performance of a statutory duty. In this regard the Applicant has not pointed to any statutory duty imposed on the Respondent that the Respondent has refused or neglected to perform. That order cannot lie.

In the result, the Notice of Motion dated 28th August 2007 is unmerited. It is hereby dismissed with costs to the Respondents.

Dated and delivered this 14th day of March 2008.

R.P.V. WENDOH

JUDGE

Read in the presence of

Mr. Ochwa for the applicant

Ms Mwaniki for Respondent

Daniel: Court Clerk