



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

**Misc. Civ. Appli. 1120 of 2007**

**REPUBLIC..... APPLICANT**

**V E R S U S**

**KENYA REVENUE AUTHORITY.....RESPONDENT**

**EX-PARTE: MFANCO AGENCIES LIMITED**

**J U D G M E N T**

This is a Notice of Motion dated 22<sup>nd</sup> October, 2007 filed by Cootow & Associates Advocates on behalf of the ex-parte applicant MFANCO AGENCIES LTD. The respondent is the KENYA REVENUE AUTHORITY. The Notice of Motion is purported to be brought under Order LIII Rules 1,2,3,4 and 5 of the Civil Procedure Rules (*Cap. 21*) and Section 8 and 9 of the Law Reform Act (*Cap 26*) and all other relevant provision of the Law. The orders sought in the application are as follows-

1. *An order of certiorari do issue to remove to this Honourable Court for purposes of quashing the decision of the respondent contained in a letter dated May, 17<sup>th</sup> 2007 reference KRA/1 & E/ACSO/17/07 suspending the Clearing and Forwarding Licence of the applicant MFANCO AGENCIES LIMITED.*
2. *An order of certiorari do issue to remove to this Honourable Court for purposes of quashing the decision of the Respondent contained in a letter dated July, 19<sup>th</sup> 2007 reference KRA/1&E/ACSO/17/07 requiring the applicant to pay the Commissioner of Customs Kshs.1,261,084.00.*
3. *An Order of prohibition do issue prohibiting the Respondent from exercising its powers under the East African Community Customs Management Act, 2004 in an arbitrary and capricious manner and from in any way thereby interfering with the applicant's business, operation and goods that have been validly and/or may be validly imported through the port of Mombasa.*
4. *An Order of mandamus do issue directing the Respondent to carry out its statutory obligation under the East African Community Customs Management Act 2004 in, a judicious manner,*
5. *Costs of the application be awarded to the ex-parte applicant.*

The application was grounded on the statutory STATEMENT dated 9<sup>th</sup> October, 2007 filed with the Chamber Summons for leave. The STATEMENT repeats the reliefs sought herein above. There are several grounds listed in the STATEMENT. In summary the grounds are as follows:-

That the applicant as a clearing and forwarding company on 20<sup>th</sup> April, 2007 received instructions and documents from its client ABDUL RAZAK GENERAL AGENCIES to clear a container number TGH54R U – 8882237 and its contents of various foodstuffs from the port of Mombasa, which was cleared from the port in transit to Uganda. That the lorry carrying the container registration number KAU 018A Trailer ZC2954 and the container disappeared at Athi River Police Station due to the negligence of Kenya Police Officers guarding the same. That the respondents by a letter dated 17<sup>th</sup> May, 2007 suspended the clearing and forwarding licence of the applicant thus denying the applicant its right to conduct business and consequently incur-irreparable losses. Further the respondent by letter dated 19<sup>th</sup> July, 2007 arbitrarily demanded that the applicant pays a total of Kshs.1,261,084.00 as taxes arising from the non-recovered transit goods. It is also averred in the statement that the applicant was always acting on instructions of a known principal ABDULRAZAK GENERAL AGENCIES who dealt directly with the respondent and the Kenya Police in recovering the stolen foodstuffs. It is also averred in the statement that any losses incurred by the respondent are recoverable through the transit bond which was issued to the applicant by Kenya Orient Insurance Co. Ltd. and approved by the respondent but the respondent had instead arbitrarily chosen to make the demands for payment from the applicant instead of either the insurance company or the principal ABDULRAZAK GENERAL AGENCIES for the taxes arising from non recovered transit goods.

The application is opposed and the respondent, the Kenya Revenue Authority, filed a replying affidavit sworn on 8<sup>th</sup> January, 2008 by ELIJAH OLE SAAYA, a Revenue Officer in the Investigations and Enforcement Department of the respondent. In the replying affidavit, it is deponed that the applicant as the agent of ABDULRAZAK GENERAL AGENCIES on 23/4/2007 declared a transit container number TGHU-8882237 containing various foodstuffs in transit from United Arab Emirates to Kampala Uganda. It is deponed that the transport truck registration KAU 018A/ZC 2594 was to leave Mlolongo Transport Monitoring Unit on 8<sup>th</sup> May, 2007, but on 10<sup>th</sup> May, 2007 the respondents received information that the said truck was seen at Eastleigh 3<sup>rd</sup> Street offloading transit goods. It is deponed that consequent upon this report, and in exercise of the respondent's powers under the East African Community Customs Management Act, 2004 the respondent suspended the clearing and forwarding licence of the applicant. It is also deponed that cartons of assorted foodstuffs were found in an unmarked godown in Industrial Area and some shops in Eastleigh. It was also deponed that the duty payable on the non-recovered goods which were diverted for home consumption was a total of Kshs.1,261,083/60, which was demanded from the applicant since the applicant made a false and incorrect declaration of duty contrary to section 203 of the East African Community Customs Management Act, 2004. It is further deponed that the applicant wrote letters dated 17<sup>th</sup> and 23<sup>rd</sup> August, 2007 and made proposals for payment, but failed to see the Senior Deputy Commissioner to finalise the matter as requested in a letter (*from the respondent*) dated 22<sup>nd</sup> November, 2007. It is also deponed that the pending criminal prosecution against third parties were not a bar to the action being taken by the respondent against the applicant, and that the respondent has not acted unlawfully or *ultra vires* its powers, nor irrationally or unfairly.

The parties counsel also filed written submissions.

In summary, the applicant's submissions are as follows- That the applicants were a clearing and forwarding company who received instructions from a client ABDULRAZAK GENERAL AGENCIES to clear a container No. TGHU-8882237 from the Port of Mombasa which contained various foodstuffs; that the applicant cleared the said container which was in transit to Uganda and was under the escort of armed Kenya Police and customs officers of the Respondent; that the transport lorry registration number KAU 0184A trailer No. ZC 2954 and the subject container were stolen or disappeared at Athi River Police Station due to the negligence of Kenya Police officers who were guarding it; that the subject lorry was a hired lorry and did not belong to the applicant and the goods were owned by ABDULRAZAK GENERAL AGENCIES; that the respondent by letter dated 17<sup>th</sup> May, 2007 suspended the clearing and forwarding licence of the applicant though the goods were stolen under the watch and protection of the Kenya Police Officers and the respondent's officer; and that the respondent admitted in paragraph 23 of its replying affidavit that a criminal case had been instituted against the persons found in possession of the goods. The applicant contends in the written submission that the applicant had not been convicted, imprisoned or fined for committing any offence under the East African Community Customs

Management Act 2004; that the respondent did not cite any law under the said Act when it suspended its licence; that the respondent failed to issue a notice to the applicant of intended suspension of the trading licence under section 208 of the Act; that the applicant did not aid, abet, counsel or procure the commission of an offence under the Act; that suspension of a licence is not envisaged as one of the penalties under section 209 of the Act; and that the decision of the applicant to suspend the trading licence of the applicant indefinitely was illegal, oppressive, and *ultra vires* the power of the respondent or its officers. The applicant relied in the written submissions on the case of KEROUCHE INDUSTRIES LTD -VS- KENYA REVENUE AUTHORITY [2007] eKLR – that any penalty must be imposed on clear words; that the penalty of Kshs.1,261,083.60 imposed on the applicant by the respondent was arbitrary, and that it was also in contravention of section 148 of the Act which makes the owner of the goods primarily liable for offences regarding acts or declarations made by an agent. It is further emphasized that the court has to take a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the potential of the decision irretrievably ruining the applicant to determine the allegation of abuse of power. It is also stated in the written submissions that section 203 of the Act did not apply as the subject goods were declared in accordance with import/export/transit/warehousing declaration form, and the respondent had not lodged any claim with the applicant's insurers M/s Kenya Orient Company Ltd who executed the transit bond. In the written submissions also the applicant sought to rely on the case of NAIROBI H.C. MISC. CIVIL APPLICATION NO. 665 OF 2003 – REPUBLIC -VS- KENYA REVENUE AUTHORITY – EX PARTE TWIGA PROPERTIES to support the contention that an order of mandamus will issue to a slovenly and incompetent authority which has failed to carry out a duty or function imposed upon it.

The respondents written submission are in summary as follows-

That the applicant was at all material times licenced by the respondent under the provisions of the East African Community Customs Management Act 2004 as an agent for declaration and clearance of goods; that the applicant was at all material times acting as agent of ADULRAZAK GENERAL AGENCIES for the declaration and clearance of the subject goods; that Kenya Orient Company Ltd. executed a transit bond for K`shs.332,408/= to cover taxes for the goods; that the container disappeared from Athi River Yard on 10<sup>th</sup> May, 2007; that in June, 2007 a total of 975 cartons of the goods were recovered with the assistance of the police; and that a verification and valuation of the non-recovered goods relying on invoice values for the goods revealed that duty on the non-recovered goods was Kshs.1,261,083.60 and that the applicant had made a mis-declaration at the time of entering the goods. The respondent highlighted the following issues in the written submissions-

(a) *Whether the respondent's decision have been made in excess or without jurisdiction and are otherwise ultra-vires or are unreasonable or are made arbitrarily or capriciously.*

(b) *Whether the respondent's decisions violate/frustrate the legitimate expectation of the applicant or are contrary to public policy.*

On question (a) above the respondent's written submissions were that *ultra vires* meant that an administrative authority had acted unlawfully, that is, either without or in excess of jurisdiction or unprocedurally irregular or in an irrational and unreasonable manner. That is the situation, it is contended, where a court will intervene. The court can also intervene where a public body has taken a decision in bad faith. Reliance on this was placed on Halsbury's Laws of England volume 1 (1) paragraph 74 at page 74; and paragraph 82 at pages 180-181; and John Alder's book on General Principles of Constitutional and Administrative Law, 4<sup>th</sup> Edition pages 382-383.

It was contended that the respondent under section 5 of the Kenya Revenue Authority Act (*Cap. 469 of the Laws of Kenya*) was the agent of the Government for collection and receipt of all revenue and was entitled to issue licences to agents for declaration and clearance of any goods and baggage and could suspend such licences under Section 145(3) of the East African Community Customs Management Act, 2004 (EACCMA) which allowed the Commissioner to suspend any such licence on the grounds that the holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud or for any other reason that the Commissioner may deem fit. In addition, it

is contended in the written submissions that under Section 147 of EACCMA that an authorized agent who performs any act on behalf of the owner of any goods is deemed to be owner of the goods and is personally liable for payment of any duties and the performance of all acts in respect of the goods. Therefore, it is contended, since the applicant was the agent for the subject goods he was obliged to provide sufficient security to cover taxes. Since there was no application lodged for refund of deposit or cancellation of bond within 30 days from the date of exportation as required under Regulation 104 (17) of the EACCMA Regulations 2006, the goods were deemed to be for home consumption and therefore duty became payable.

It was also the contention in the written submissions that there was no violation or frustration of legitimate expectation of the applicants as there was no representation or promise made by the respondent in exercise of its statutory powers to the applicant. It was emphasized that the reliefs of certiorari, prohibition and mandamus sought could not be available to the applicants in view of the provisions of the written law as well as the decisions of the courts in various court cases. Therefore the application should be dismissed with costs, and that the applicant be obliged to pay taxes due in the amount of Kshs.1,261,083/60 plus penalties and interest.

At the hearing of the application, Mr. Odiwa appeared for the applicant, while Ms. Mwaniki appeared for the respondent.

Counsel for the applicant, Mr. Odiwa, sought to rely on the written submissions and list of authorities filed on behalf of the applicant. Counsel highlighted the written submissions that the applicant was a clearing and forwarding agent, and that the subject lorry and container and goods were not lost while in their care. In any event, the respondent admitted in paragraph 3 of their replying affidavit that police had carried out investigations and the culprits arraigned in court. Counsel emphasized that taxes were not due from his client, and in any case Section 135 of the Act did not provide for suspension of licence. Counsel submitted that the respondents could not impose taxes on unrecovered goods and that no charges had been preferred against the applicant to justify any action by the respondent against the applicant. Counsel also submitted that though the respondent in letters dated 17/5/2007 and 23<sup>rd</sup> May, 2007, "LUM3" and "LUM4" purported to compound the offences, the respondent did not have jurisdiction to so compound unless there was an admission. Counsel asked that the said letters and its decisions be quashed by certiorari. Counsel emphasized that in the case of *KEROCHE INDUSTRIES –VS- KRA (supra)* the court held that Judicial Review reliefs were available in case of decisions that were beyond jurisdiction, abrupt, unfair, without good faith, oppressive and which have potential of ruining an applicant. Counsel submitted that the order of prohibition sought was against the applicant acting in an arbitrary and capricious manner. The order of mandamus was sought to direct the respondents to act in accordance with the law. The applicant was also seeking costs of the proceedings.

In response, Ms Mwaniki for the respondent, submitted that the respondent filed a replying affidavit sworn on 8/1/2008 and a further affidavit sworn on 6/2/2008. She also sought to rely on the written submissions and list of authorities of the respondent filed on 6/2/2008.

Counsel emphasized that the applicant as a licenced clearing and forwarding agent entered the subject container and executed a transit bond with M/s KENYA ORIENT INSURANCE COMPANY for Kshs.332,408/= to cover taxes for the goods. Counsel submitted that when the container and goods disappeared from Athi River Yard on 10/5/2007 it did not have special Police/Customs escort status, though the yard belonged to the respondent. On the night the truck disappeared the owner of the truck, in unexplained circumstances, replaced the driver with a driver of Somali origin.

Later in June, 2007, Counsel, submitted, some of the foodstuffs were recovered in Eastleigh and Industrial Area Nairobi. On verification, it was found that the duty payable for the non-recovered goods was Kshs.1,261,083/60 which meant that the applicant had made a misdeclaration at the time of entering the goods. That was why a demand for extra duty was made and the applicant invited to resolve the issue as well as the compounding of the offence of making a false entry. Counsel stated that *ultra vires* had not been established as the respondent acted within the law. Counsel also submitted that there was no violation of legitimate expectation. In any case, Judicial Review was concerned with the process rather

than the merits. Counsel submitted that the applicant was obligated by law to declare the correct value of goods and to provide sufficient security. The burden was also on the applicant regarding the disappearance of the goods, as he has not shown that the goods disappeared outside his control.

Counsel submitted that, on the law and authorities cited, orders of certiorari, prohibition and mandamus could not issue in the case before the court.

Counsel emphasized that the agent (*applicant herein*) was liable on behalf of the owner of goods under the Act and regulations. The licence of the applicant could also be suspended. Counsel asked that the Notice of Motion be dismissed with costs. As well, counsel submitted the applicant do pay the duties assessed together with penalties and interest.

Having summarized the facts and the arguments, I have now to go to the issues for decision and make decisions on those issues. At the outset, let me state that the issues revolve around the imposition of duty on goods by the respondent allegedly payable by the applicant, a clearing and forwarding agent. The issues also relate to the issue of suspension of the trading licence of the applicant by the respondent on the allegation of the applicant's failure to comply with statutory requirements. Many arguments have been put across on both sides.

The first order sought by the applicant is an order to remove to this court and quash the decision of the respondent contained in a letter dated May, 17<sup>th</sup> 2007 reference *KRA/I & E/CUS/ACSO/17/07* suspending the clearing and forwarding licence of the applicant *MFANCO AGENCIES LIMITED*.

For the sake of clarity, the contents of the said letter are reproduced as follows-

May 17, 2007

MFANCO AGENCIES LTD

P.O. Box

MOMBASA

Dear Sir/Madam

RE: T810 No. 2007 MSA 690773

1X40 FT CONT. No. TGHU 8882237

STC 3000 PCS OF FOODSTUFF

TRUCK REG. NO. KAU

018A/ZC2954

It has been established that the above truck was involved in diversion of the captioned transit goods.

Please arrange to report to the undersigned at Times Tower Building 26<sup>th</sup> Floor immediately you receive this letter.

Meanwhile, be advised that your Clearing and Forwarding licence has been suspended.

Yours faithfully,

J.K. NYAMACHE

for: SENIOR DEPUTY COMMISSIONER

According to the applicant, the respondent did not have powers to suspend the trading licence in the circumstances of this case. The respondent did not have the legal powers to do so, and acted arbitrarily, in bad faith, and oppressively. The respondent on the other hand maintained that it had the powers to suspend the trading licence of the applicant, based on the facts of the case and the laws applicable. The respondent especially relies on the provisions of section 145 (3) of EACCMA. I will reproduce the said subsection for the sake of clarity-

145. (3) *The Commissioner may refuse to issue a*

*licence or may by order, suspend, revoke or refuse to renew, any such licence on the ground that the applicant or holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reason that the Commissioner may deem fit.*

Indeed, the Commissioner (*respondent*) has powers to suspend a clearing and forwarding licence.

The above are wide powers indeed in the hands of the Commissioner. There does not appear to be a limit for the reasons on which the Commissioner can suspend a licence of a clearing and forwarding agent. There also does not appear to be a limit on the duration of the period for which a licence can be suspended. None of the Counsel before me alluded to any limit on the reasons or the duration of the suspension, if any.

The exercise of these powers, being statutory powers to be exercised by a public authority are definitely amenable to Judicial review. In this particular case, were the powers to suspend the clearing and forwarding licence of the applicant exercised in good faith, and in accordance with the principles of natural justice.?

The applicant, through his Counsel contends that the applicant was not convicted, imprisoned or fined for committing an offence under EACCMA Act 2004, and therefore his licence could not be suspended. Though the Commissioner has statutory powers to suspend a licence for any reason that he deems fit, that public power has to be exercised in compliance with principles of natural justice. In my view, the Commissioner should have quoted the law under which he acted. He should also have given the specific reasons and default of the applicant that necessitated the suspension of the trading licence of the applicant. The reason given in the letter for suspension of the licence does not hold water as it does not say who caused or how the diversion occurred. In addition, the evidence or facts before me indicate that the disappearance of container and lorry was from the Athi River Yard of the Respondent which is under charge of the respondent and police. It should in fact have been the respondent to explain the disappearance or diversion, not the applicants. I will quash the decision suspending the clearing and forwarding licence of the applicants, as I find that it was not based on any justifiable or legal ground.

The second prayer for certiorari is with regard to imposition of duty. On this the applicant's Counsel submitted that the imposition of duty of Kshs.1,261,083/60 was *ultra vires* as there were no clear provisions in the law for imposition of such a penalty. Counsel emphasized the decision of KEROCHE INDUSTRIES LTD (*supra*). Counsel

submitted that since the applicant did not commit any offence under Section 148 of the EACCMA 2004 as the goods were stolen while in transit to Uganda and while they were under the escort of police and officials of the respondent, such a penalty could not possibly be imposed on the applicant. Therefore the power used to impose the penalty was not lawfully exercised. It was an abuse of power by frustrating legitimate individual expectations. Counsel also contends that the respondent could not suffer any prejudice or losses as the transit bond executed by Kenya Orient Company Ltd. covered this. Therefore the contention was that the respondent acted unreasonably and without jurisdiction.

The respondent's Counsel on the other hand contended that under Section 147 of the EACCMA 2004, a clearing agent was fully liable for the tax liability. The applicant as an agent was required under Section

85 of the Act and Regulation 104(3) of the 2006 Regulations, had an obligation to provide sufficient security to cover taxes for transit goods. Also that the security bond should have been cancelled within 30 days from the date of exportation, otherwise the goods, are deemed to have been imported for home consumption and duty shall be paid immediately. Therefore the argument is that the duty levied is lawful and done in good faith, as the applicants made an incorrect declaration of the taxes in respect of the subject transit goods.

Indeed, in the case of KEROCHE INDUSTRIES LTD -VS- KENYA REVENUE AUTHORITY & 5 OTHERS (2007) eKLR at page 30 Nyamu J. cited with approval what was stated in the case of RAMSAY LTD -VS- INLAND REVENUE COMMISSIONER (1992) AC 300 in which the principle for taxation on a subject were stated thus-

*“A subject is only to be taxed on clear words not upon intendment, or upon the equity of an Act. Any taxing Act of Parliament has to be construed in accordance with this principle. What are clear words is to be ascertained upon normal principles; these do not confine the courts to literal interpretation.”*

Were there clear provisions of the law to impose the duty upon the applicant?

Section 147 of the Act provides-

*147. A duly authorized agent who performs*

*any act on behalf of the owner of any goods shall for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under the Act provided nothing herein contained shall relieve the owner of such goods from such liability.”*

Regulation 104(17) of the East African Community Customs Management Regulations 2006, on the other hand provides-

*“104(17) Where no application is submitted under sub-regulation (16) within thirty days from the date of exportation the goods shall be deemed to have been imported for home consumption and shall be liable to any import duty chargeable on similar goods imported for home consumption at the rate in force at the time the goods are entered for home consumption, and the duty shall be paid immediately by the owner of the goods.”*

It is clear from the legal provisions that an agent can be liable for payment of duty in addition to the owner. However, in our present case, I find that the imposition of duty on the applicant was done *mala fides*, and in order to shift responsibility from the respondents themselves. The goods container and lorry disappeared while in the escort of the respondent's officers and police. It disappeared from Athi River Yard of the respondent. Secondly, it is not known how the goods that were said not to have been traced could have been valued for tax purposes. In my view, the applicant could only possibly be responsible if it was shown that he had control of the movement of the goods. He does not appear to have had such control, and no evidence was placed before me to suggest so. In my view, the legitimate expectation of a person who lets the transit cargo to be in the escort or control of customs and police officials is that they will carry out their duties effectively and honestly, and cannot negligently and without explanation lose the goods, and then the respondent imposes duty on other parties. In my view the imposition of the duty on the applicant was irrational, and done in bad faith and without jurisdiction. I will quash the duty imposed. The issue of under declaration of value does not help the respondent. It is not clear where they got the so called invoices on which they assessed the value of goods for taxation. Therefore the second prayer for certiorari is granted.

I now turn to the prayer for prohibition. The prayer for prohibition is in the following terms-

*“An order of prohibition do issue prohibiting the Respondent from exercising its powers under the East*

*African Community Customs Management Act, 2004 in an arbitrary and capricious manner and from in any way thereby interfering with the applicant's business, operations and goods that have been validly and/or may be validly imported through the port of Mombasa."*

The respondent can exercise its powers under the Act in a lawful manner and in accordance with the powers conferred upon it by the law. Prohibition can only be for the future and for actions of the Respondent that are improper, unlawful and *ultra-vires*. It cannot be issued against the exercise of powers lawfully conferred by written law, unless the provisions of the subject written law are declared to be invalid. Prohibition also has to be specific.

There are no facts placed before me that would indicate that the respondent intends to act in any unlawful manner, that can convince me to issue an order of prohibition. I will decline to grant prohibition orders.

On the request for an order of mandamus, I find no reason why I cannot issue the order requested in view of my findings under prayer 2 of the Notice of Motion as above.

The costs of the application will be to the applicant in any event.

Consequently, I order as follows-

*1. An order of certiorari be and is hereby issued to remove to this court for the purposes of quashing the decision of the respondent contained in a letter dated May, 17<sup>th</sup> 2007 reference KRA/1&E/ACSO/17/07suspending the clearing and forwarding licence of the applicant MFANCO AGENCIES LIMITED, and the same is hereby quashed forthwith.*

*2. An order of certiorari do and is hereby issued to remove to this Honourable Court for the purposes of quashing the decision of the Respondent contained in a letter dated July, 19<sup>th</sup> 2007 referred KRA/11E/ACSO/17/07 requiring the applicant to pay the Commissioner of Customs Kshs.1,261,084/= and the same is hereby quashed forthwith.*

*3. I decline to grant the prohibition orders sought.*

*4. An Order of mandamus do and is hereby issued directing the respondent to carry out its statutory obligations under the East African Community Customs Management Act 2004 in a judicious manner, with regard to the applicant and the issues herein.*

*5. I grant the costs of this application to the applicant.*

*It is so ordered.*

Dated and delivered at Nairobi this 19<sup>th</sup> day of September, 2008.

**GEORGE DULU**

**JUDGE**