REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Misc Civ Case 1064 of 2006

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS UNDER

ORDER LIII OF THE CIVIL PROCEDURE RULES

A N D

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

IN THE MATTER OF: THE SUGAR ACT NUMBER 10 OF 2001

A N D

IN THE MATTER OF: COMESA TREATY

A N D

IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT

B E T W E E N

REPUBLIC……APPLICANT

-VERSUS-

KENYA REVENUE AUTHORITY……..……RESPONDENT

EX-PARTE SIMBA COMMODITIES LIMITED

R U L I N G

This is a simple application by Simba Commodities Limited, the Ex-parte Applicant (the Applicant), brought under the provisions of Order 53 Rules 1,2,3 and 4 of The Civil Procedure Rules. It seeks all the three Judicial Review orders of certiorari, prohibition and mandamus. This is how it arises.

Last year a company known as Mat International Limited imported 10800 metric tonnes of sugar under the COMESA FTA regime. For some reasons which are not clear it decided to re-export that sugar, 2800 MT to Zanzibar and the balance of 8000 MT to Madagascar. On the basis of that decision Kenya Sugar Board which regulates *inter alia* the importation of sugar into Kenya advised the Kenya Revenue Authority, the Respondent herein, to allow the importation by other firms of up to that quantity, subject to

its own confirmation of that re-exportation.

The Applicant apparently got to know of that re-exportation and imported 5062.5 MT of sugar from the COMESA region under the same regime on 2nd and 14th September 2006. Just before and soon after landing the consignments at the Port of Mombasa it lodged with the Respondent the relevant documents for the clearance of the sugar but todate Respondent has not cleared the sugar. Reason? That it has not confirmed that Mat International Limited indeed re- exported the sugar and that it wants to be sure that the sugar is not going to be smuggled back into the domestic market and cause the Government to lose revenue. It says it has called for Landing Certificates from its counter-parts in Zanzibar and Madagascar but it has only received one from Zanzibar stating that only 1,100 MT was re-exported to that country. Until it receives the confirmation of the re-exportation of the rest it can only allow the Applicant to clear only 1,100MT.

The Applicant on the other hand complains that it was not until the filing of this application that the Respondent called for the Landing Certificates from those two countries and that at any rate the Respondent having itself supervised the re-shipping by Mat International of that sugar it does not require any further confirmation of re-exportation

Besides that, it was submitted for the Applicant, the Respondent has allowed the same Mat International, subsequent to the Applicant's said importation, to clear two consignments of sugar under the same regime.

As a result of the unwarranted delay, the Applicant states, it has as at 15th January 2007 incurred storage charges of Sh.19,425,000/= and continues to incur about Sh.500,000/= per day. It therefore prays that an order of certiorari do issue to bring up to this court and quash the Respondent's decisions of 31st August, 27th September and 24th November 2006 refusing to process, clear and release to it the 5062.5 MT of sugar. It also prays for an order of mandamus to compel the Respondent to process, clear and release to it that sugar. Before that is done it prays for an order of prohibition to prohibit the Respondent from processing, clearing and or releasing any other importers' sugar from the COMESA region on the same regime.

In response to those complaints and allegations the Respondent states that it is authorized under the EAC Customs Management Act to confirm re-exportation such as the one in this case and having sought that confirmation it is within its mandate and the court should not interfere.

Regarding the loss the Applicant is allegedly suffering the Respondents states that having not waited for the said confirmation to be received before importing its sugar the Applicant's loss, if any, is self inflicted.

In his submissions Mr. Matuku for the Respondent argued that the orders sought are at any rate not available to the Applicant; certiorari because the Applicant has not exhibited copies of the impugned orders; prohibition because there is no legal basis for prohibiting the Respondent from processing and releasing the other importers' sugar and mandamus because it is acting within its statutory mandate.

I find no substance at all in any of the Respondent's contentions.

It is common ground that the importation of the 89000 MT quota from the COMESA region last year was on first comes first served basis. Mat International having decided to re-export the consignments it had brought in fair play would require that any or all of the other importers could recoup that quantity. Having not cleared that sugar into the domestic market and having admittedly supervised the re-shipping of the sugar for re-export the Respondent did not require anything else in order to clear the Applicants' sugar. Mat International's consignment was not transit goods passing through the country that the Respondent could entertain fears of being diverted into the domestic market. This was sugar taken back into the high seas and the only way it could be brought back into the country is through the Port of Mombasa where the Respondent maintains a vigilant eye.

That the sugar can be smuggled back into the country is in my view an excuse rather than a reason for delaying the clearing of the Applicants sugar. How can it be smuggled back into the country other than through the port of Mombasa? If the fear is that it can come in through *panya* routes, then the Respondent is admitting that it is incapable of policing the entry points in which case anyone else and not necessarily Mat International can bring in sugar or any other goods through those routes.

The contention that the Applicant should have waited for confirmation that Mat International's sugar had been re-exported before importing any sugar itself has equally no substance. As soon as Mat International intimated that it wanted to re-export its sugar all that the Respondent required to do was to ask it, as it were, to get out of the queue and clear other importers' consignments. After that even if Mat International decided against the re-exportation and brought back its sugar it was to join the queue from where it found it and if by the time it got to the clearing point the 89000 MT quota was exhausted too bad for it. It would have had to pay duty.

All these go in to show that the Respondent has acted quite unreasonably and unfairly in this matter thus calling for orders of this court against it. See **Re H.K. (an infant)[1967] 2 QB 617**.

Mr. Matuku's contention that the Respondent did not exhibit copies of the impugned decisions is laughable. How can anybody exhibit a verbal decision? The application is allowed in its entirety with costs to the Ex-Parte Applicant.

DATED and delivered this 9th day of February 2007.

D.K. MARAGA

JUDGE