



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

Misc Appli 307 of 2007

FOREVER LIVING PRODUCTS KENYA LIMITED L.C.C.....APPLICANT

Versus

THE COMMISSIONER OF CUSTOMS.....RESPONDENT

JUDGMENT

This is an application for Judicial Review. The ex parte Applicant, Forever Living Products Kenya Ltd. LCC seeks the following orders against the Respondent, the Commissioner of Customs Services;

- (1) That this court be pleased to issue an order of certiorari to remove into the High Court for the purposes of being quashed the decision made by the Commissioner of Customs and Excise and Commissioner General of the Kenya Revenue Authority determining and demanding the custom duty and VAT payable by the Applicant to be Kshs.11,417,384/= and to stay and quash the decision dated 13th March 2007;
- (2) That an order of mandamus do issue directed at the Commissioner General of Kenya Revenue Authority declaring that all duties and VAT payable pursuant to the aforementioned importations have been paid as evidenced by the receipts;
- (3) That an order of mandamus do issue directed at the Commissioner General of Kenya Revenue Authority the Respondent, to cease any acts of harassment, intimidation and duress against the Applicants and its bankers relating to the unlawful Customs and Excise and VAT demands;
- (4) An order of mandamus do issue that the demands made by the Respondent for Kshs.11,417,384 are not in accordance with the East Africa Community Customs Management Act, 2004 and VAT Act;
- (5) Costs of the Application be paid to the Applicant.

The Application is premised on the Statutory Statement and Verifying Affidavit sworn by Sammy Mwedekeli, the Country Manager of the Applicant, both dated 26th March 2007. The Applicant also filed skeleton arguments on 24th April 2007.

The Notice of Motion was opposed and Hadi Abdulahil Sheikh, a principal officer of the Respondent

swore an affidavit in reply. It is dated and filed in court on 18th April 2007 while skeleton arguments were filed on 8th May 2007.

Mr. Ombati urged the Notice of Motion on behalf of the Applicant whereas Mr. Ontweka appeared for the Respondents.

Briefly, the Applicants case is as follows: the Applicant, a company incorporated in the USA is registered as a foreign company in Kenya and involved in importation and distribution of food supplements from the USA. In the year 2005, the Applicant imported a consignment of food supplements weighing 15,929. 280 kgs as per the Bill of lading No. 502424962 (SM 2). The shipper was Aloe Vera of America and the consignee was the Applicant, Forever Living Products, Kenya Ltd. LCC. The Respondent assessed the duty on the consignment at Kshs.723,765/= and the same was duly paid on 26th October 2005 vide payment slip 757044 (SM 3). The Applicant claims to have appointed Alpha Impex Logistics International Ltd as their clearing agent and paid for the said services (SM 6). Unknown to the Applicant, their agent subcontracted Series Agencies Ltd. Mombasa as their agent and yet there was no authority given to Alpha Impex to subcontract the services. The Applicants later learnt that a notice was sent to Series Agencies as their agents and in exercise of their powers under S.131 of the East African Community Customs and Management Act, the Respondents issued an agency notice to Standard Chartered Bank to pay the Respondents the Sum claimed in the notice sent to the Series Agencies. The Bank made the payment to the Respondents resulting in the Applicant's Account being rendered un-operative and stalling the Applicants operations. The Applicants complains against the actions of the Respondents as follows;

- (i) That the Respondents failed to serve the Applicants with the 30 day notice required by S.131 of the EACCM Act rendering the Agency Notice issued to Standard Chartered Bank void ab initio;
- (ii) that the agency notice was made arbitrarily the Applicant having been unaware of the notice;
- (iii) that the Respondents were in breach of rules of natural justice as the Applicant has not been given an opportunity to be heard;
- (iv) that the Respondents actions are an abuse of power and bad in faith.

On the contrary, Sheikh Abdulahi in his affidavit of 18th April 2007 averred that on 26th February 2006 the Applicant's importation Reference No. C 400/2005/MSA/CO 77593 was selected for audit and was found to have been undervalued following which the Respondents made demands on the Applicants on 6th February 2006, which included the computation of how the figures were arrived at. Reminders of the demand followed on 11/5/06, 15/8/06, 12/3/07 (HAS 1 (a) (b) & (d). As per the documents availed to the Respondents, the declared agent for the Applicant was Series Agencies but not Alpha Impex Logistics International and that if the Applicants failed to disclose who their agent was, it was material non disclosure. The deponent justified the collection of the tax because they have the mandate to do so within 5 years and so far only one year had lapsed before the demand. That the agency notice was issued on 13th March 2007 and it was not until 13th April 2007 that the Bank prepared the cheque in satisfaction of the debt (HA 54) and that therefore, this Application has been overtaken by events the debt having been satisfied. The Respondents also urge that there is an elaborate procedure in the EACCM Act through which the Applicant can challenge the decision of the Respondents.

This being a Judicial Review Application, this court is not concerned with the merits of the decision made by the Respondents to charge extra tax on the Applicants. What is under attack and what this court is concerned with is the process by which the Agency notice was issued and effected.

The Supreme Court Practice 1997 Vol 53/1 – 14/6 states:

“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 which he has been subjected and that it is not part of that purpose to substitute the opinion of the judiciary or individual judges for that of the authority constituted by law to decide the matters in question.”

The Respondent is a statutory body established by S. 3 of the Kenya Revenue Authority Act Cap 469. The said Act administers other Acts which include the Value Added Tax Act Cap 476, the income Tax Act Cap 470 and the EACC Management Act, 2004 as provided in the 1st schedule of the Act and its functions entail assessment, collection, accounting and general administration of Government revenue.

The Agency notice under challenge was issued pursuant to S. 131 of the EACCM ACT. It provides as follows:

“S. 131 (1) the Commissioner may, by written notice addressed to any person (in this Section called the agent) appoint that person to be the agent of another person (in this Section called the principal) for the purposes of collecting duty due under this Act from the principal where the Commissioner is satisfied that the agent –

- (a) owes or is about to pay money to the principal;**
- (b) holds money for or on account of the principal;**
- (c) holds money on account or some other person for payment to the principal;**
- (d) has authority from one – other person to pay money to the principal;**
- (e) holds goods belonging to the principal which are liable to duty and on which duty has not been paid,**

and the commissioner shall in the notice specify the amount of duty to be collected by the agent, which amount shall not exceed the amount or value of the goods, held or owing by the agent for or to the principal

(2) The Commissioner may, by notice in writing require any person to furnish the Commissioner within thirty days from the date of service of the notice, with a return showing details of any moneys or goods which may be held by that person from whom duty is due under this Act.

(3) This section shall apply to an agent appointed as though he or she were a duly authorized agent acting on behalf of the owner.

(4)

The Respondent having been given the mandate to issue agency notice under the above Section, the question is whether the said notice was issued as required? But before doing that I think it is imperative to establish whether or not Series Agencies Ltd. was the Applicant’s Agents and whether a notice issued to them was proper. Mr. Ombati urged that there is no evidence that Series Agencies was the agent of the Applicant and that in any event, looking at the alleged notice of 6th February 2006 addressed to Series Agencies (HAS 1 A) it bears no address and there is no evidence of postage or service on the said Series Agencies. However, the court notes that the Imports/Exports/Transit/Warehousing Declaration Form exhibited by both the Applicant & Respondents as SM 4 and HAS 1A(3) respectively, does show at paragraph 18 of the form that the declared agent of the Applicant is Series Agencies, Mombasa. Infact the Respondent issued the receipt No.6227568 to Series Agencies, dated 29th October 2005 (part of SM 6). It was not denied by the Applicants that it is the document that enabled the Applicants to import the goods. The Applicant has not endeavored to explain the inclusion of Series Agencies in their export/import Declaration Form.

At paragraph 8 of the same document, the consignee is named as the Applicant, "FOREVER LIVING PRODUCTS KENYA LTD. 367 NAIROBI. This document Originates from the Applicants. There is no other document showing their agent to be Alpha Impex International and I do find that by their own document, the Applicant's declared agent was Series Agencies, Mombasa and they cannot turn back at this stage to deny Series Agencies. Section 148 EACCM Act imposes liability on an owner for acts of a duly authorized agent. In this case the Applicants declared Agent is Series Agencies. Alpha Impex International does not feature anywhere in the documents submitted to the Applicant. The only document linking Alpha Impex to the transaction is an invoice raised by Alpha Impex to the Applicant.

Of issuance of the notice:- Exhibit HAS 1 'A' dated 6th February 2006 was addressed to Series Agencies Mombasa, just as they had described themselves in the Export/Import declaration form. The letter indicates that a copy was made to the importer. The reminder dated 11th May 2006 was also addressed to Series Agencies. The next 2 reminders dated 15th August 2006 and 12th March 2007 were addressed directly to the Applicant at the address given by them in the declaration form. This is before the Agency notice was issued to Standard Bank on 13th May 2007. The Applicant disputes the address on the reminders to be the Applicant's but that their address is 44919 00100 Nairobi as per address directory for the years 2006/2007 which was annexed to the authorities.

From considering the documents placed before this court however, it is apparent that the Applicant has several postal addresses. Whereas the Import/export Declaration Form indicates the address of the Applicant to be 367 Nairobi, an invoice raised by Alpha Impex Logistics part of SM 6, the Applicants own document, the Applicant's address is shown as 5790 00200. There is then the postal address indicated in the Directory 44919 00100 Nairobi.

The Applicants cannot blame the Respondents for using an address which the Applicants provided themselves. The Applicants are blowing hot and cold evidence that they are not candid. They are bound by their own information contained in the declaration form.

Of service of the notice:- It was Mr. Ombati's argument that there should have been personal service on the Applicant, or service should have been by registered post. Whereas these two modes of service would have been preferred and a sure mode of service, I am satisfied that the Applicants were served by way of post. Even if no address appears on the notice to Series Agencies, which was addressed as provided in the Export/Import declaration form, there must have been a way of serving the said Series Agencies that had been adopted otherwise it would have been clearly indicated by the Applicants in the Declaration form. As regards the notice to the Applicants, copies were sent to them on 6th February 2006 and 11th May 2006, while the reminders were directly sent to them on 15th August 2006 and 12th March 2007. Surely all these notices and demands could not have failed to reach the Applicants for a period of one year. It is also notable that the Applicants did not disclose when they came to learn of that notice was issued to Series Agencies. I do find and hold that the Applicants received the notices in good time and refused or ignored to pay up or raise any queries on the notice. They cannot hide behind the fact that service should have been by registered post or personal. After postage of notices was made, the Respondent allowed sufficient time for the Applicant to receive and make good.

I have considered the authorities cited by the Applicant - MATIBA V AG (1995-1998) 1 EA 192 where the Applicant alleged that the judge had failed to give him a hearing and the court upheld that contention. In this case the underpayment of duty was discovered after some payment had been made. 4 notices were issued to the Applicants over a period of one year. If the Applicant disputed the new tax assessment in the notice they should have challenged it in accordance with S.229 of EACCM Act instead of ignoring the notices. The Applicants were given more than ample notice and cannot claim to have been denied a hearing or that the decision was arbitrary.

Similarly in the case of TAIB V R a Court of Appeal decision reported in Daily Nation Newspaper of 14th May 2007, does not apply as the facts are not the same and unlike this case there was no notice to the Applicant in that case.

If the Applicant had appointed Alpha Impex as their agent, they failed to disclose that fact and are doing so late in the day, and I do find that failure to have done so amounts to material non disclosure of facts indicative of lack of candour on their part. The agent should have been disclosed in the declaration documents and at the time of demand in 2006. It is a wonder why the Applicants did not. I do agree with the Respondents that this Application does amount to an abuse of court process and the court will be reluctant to assist a party that has been indolent till the bank acted. Even after the agency notice was issued to the bank nothing was done till the bank issued the cheque.

Would the court have granted the remedies sought in the Notice of Motion?

Judicial Review orders are discretionary in nature and the court may decline to grant them even if deserved. If the court is of the view that they are not the most efficacious in the circumstances of the case they will not be granted. In this case, I have found that sufficient notice was given to the Applicants and they sat back till the agency notice took effect. I believe the Bank must also have notified them of the agency notice. The Applicant, knowing the effect of such notice should have acted with expediency. Time was of essence. They would not be entitled to the prayer of certiorari to quash the agency notice.

Prayer 2 seeks an order of mandamus to declare that all duties and VAT which were due have been paid. That prayer cannot be granted due to the manner in which the prayer it has been couched. It is couched like a declaration. An order of mandamus is a command from the High Court to a public body or public officer charged with performance of a public duty which the Public body or officer has refused or neglected to perform. See the case of KENYA NATIONAL EXAMINATION COUNCIL V REP CA 266/96. It sets out the nature and scope of the 3 Judicial Review Orders.

What the Applicant seeks in that prayer is a declaration which is not available in Judicial Review. The only orders available in Judicial Review are certiorari, mandamus and prohibition (S. 8 Law Reform Act and Order 53 Civil Procedure Rules). Besides, if the court were to make that order, it would have to go into the merits of the Respondent's decision as to whether or not the duty was fully paid or how much was payable. That is not the purview of Judicial Review as this court would be substituting the Respondent's decision with its own. That prayer cannot be granted.

In prayer 3, the Applicant seeks an order of mandamus directed at the Commissioner to cease acts of harassment, intimidation on the Applicants or its bankers. Again that prayer is couched like a prayer for an injunction. There is no provision for issuance of orders of injunction in Judicial Review. If it were to be a prayer for prohibition the same cannot issue because a prohibition is an order of the High Court issued to prevent a decision that is yet to be made. The 3rd prayer could not be granted.

Prayer 4 seeks an order of mandamus to issue that the demands of Kshs.11,417,384/= is contrary to EACCM Act and the demands breach rules of natural justice. Again this prayer is in the form of a declaration.

The Applicant has not disclosed any statutory duty imposed on the Respondent which the Respondent has refused, failed or neglected to perform and which he should be compelled to by order of mandamus. It cannot issue even if it was deserved.

In addition to the above, the Applicant sat on their rights and an order of mandamus cannot issue because the agency notice has taken effect. Equally an order of certiorari cannot issue for reasons addressed in the judgment.

The Application is accordingly dismissed with the Applicant bearing the costs.

Dated and delivered this 25th day of June 2007.

R.P.V. WENDOH

JUDGE