



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc Civil Appli 258 of 2007

**IN THE MATTER OF: AN APPLICATION BY AKABA INVESTMENTS LIMITED FOR
JUDICIAL REVIEW ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS**

AND

**IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT AND THE SUGAR ACT,
ACT NO.10 OF 2001, THE COMESA TREATY**

AND

**IN THE MATTER OF: THE CUSTOMS AND EXCISE ACT CAP 472 LAWS OF KENYA
AST AFRICAN CUSTOMS MANAGEMENT ACT**

BETWEEN

AKABA INVESTMENTS LIMITED APPLICANT

VERSUS

KENYA REVENUE AUTHORITY RESPONDENT

JUDGMENT

This is an application for judicial review dated 20th March 2007. It seeks an order of certiorari to remove to the High Court of Kenya for quashing the decision of the Respondent made on 9th March 2007 refusing and/or declining to process Import Entries No 627479 and 627505 and consequent failure to clear the Applicant's consignment of 3,000MT of sugar imported from the COMESA region.

The applicant also seeks a similar order of certiorari in respect of Entry No 627976 for another consignment of 1000 MT of sugar.

The affected party is the Kenya Sugar Board.

The applicant has also sought an order of prohibition prohibiting the Respondent from levying customs duty on the two consignments and an order of mandamus directed at the Respondent to accept and process the Applicants documents of importation relating to the two consignments of sugar.

The Court has read the Statement, verifying Affidavit the further affidavit and the two affidavits in reply filed by the Respondent.

The Respondent and the affected party issued two conflicting notices Gazette concerning the period for the Duty Free Comesa sugar as follows:-

1. By a Legal Notice No 12 of 1st March 2004 the Minister for Finance declared that all the sugar imported from the COMESA Free Trade Area amounting to 89000 MT in each year until the end of February 2008 would be duty free.
2. On 12th January 2007 the affected party the Kenya Sugar Board by Gazette Notice 296 notified the registered sugar importers who wished to import sugar during the year 2007 under the COMESA duty free terms for raw/white sugar upto 89,000 MT to do so do between 1st February, 2007 and 28th February 2008.
3. On 2nd February 2007 the Respondent Kenya Revenue Authority put an advertisement in the Standard Newspaper of 2nd February 2007 that the effective date of importation will be 1st March 2007.

The Applicant contend that the two consignments landed on 1st March 2007 and 11th March 2007 respectively and this was well within the stipulated time. And they also lodged with the Respondent Import Entries 62 74 79 62 7505 and 62 79 76 on 1st and 2nd March for clearance. On 9th March 2007 the Respondent without giving any reasons declined to process the Entries.

The Respondent's response is that the affected party without consulting the Minister for Finance issued its own Gazette Notice as above which was in conflict with the earlier Gazette Notice and also in conflict with past practice concerning the COMESA duty free sugar which always stipulates 1st March 2007 to be the effective date to end of February 2008.

That in accordance with the established custom the Commissioner of Custom Services commenced processing for release of all COMESA duty free sugar which was landed on or after 1st March 2007 on "a first come first serve basis" with reference to the date of arrival of the marine vessel carrying the sugar.

The Respondent states that the Applicant's sugar in the quantity of 1000 MT arrived on Board Marine vessel MSC SUDAN/769R on 27th February 2007 (before the effective date) and therefore not entitled to the duty free terms as per the Gazette Notice of 2004.

That on 8th March 2007 the Respondent was forced to suspend the processing for release of all COMESA Duty Free following suspension of Licence by the affected party of some importers who included MAT International Ltd. Upon communication from the Ministry of Agriculture and the Minister for Finance the Respondent was advised to ignore the licence suspensions as the same had been done without Board approval of the affected party.

When the processing of COMESA Duty Free Sugar resumed after the suspension of some COMESA sugar importers were clarified, the Applicant's second consignment of sugar in the quantity of 3000 MT which arrived on Board MCC/HIMALAYA/770R on 11th March 2007 was not next in line as the processing for release was on a "first come first serve basis" and that the sugar quota of 89 000 MT for 2007/2008 was exhausted before the Applicant's sugar could be reached.

The Respondent states that it sought clarification on the licence suspensions for equity reasons and that it treated all importers uniformly and equitably on a "first come first serve basis" determined by the date of arrival of the marine vessel.

I have considered the documentary evidence produced by all the parties and it is clear from Pauline Jepkangor Kipkulei that the documents relied on by the Applicant to support that its consignments were

within the Gazette Notice of 2004 were not genuine documents as regards the dates of landing of the two consignments. In particular the Board's Register shows that the landing of the first consignment was on 27th February 2007 and MSC Sudan arrived in Kilindini on 1st March 2007.

Judicial Review is substantially targatted at decision making processes and I find no serious challenge to the information contained in the Respondents affidavit filed on 7th June, 2007. The applicant could before the hearing have sought leave to respond concerning the contention that their documents touching on arrival were not genuine.

It is also clear to the court that the issue of the suspension of licence of the other rival importers is a matter before another court. I cannot comment on this.

In my view since what is essentially in issue is whether the consignments are duty free or not the starting point is for the court to consider who had authority to issue the Gazette Notice concerning the COMESA Duty Free Sugar. On this my finding is that since matters of duty fall under the Minister for Finance and under the relevant Act the Respondent is charged with the responsibility of collecting duty it is the Gazette Notice of 2004 which regulated the issue at the relevant time. In addition the Gazette notice had the force of practice concerning duty free sugar from 2004 to the year in question.

Turning to the law, the only valid issue for determination is whether the Gazette Notice of 2004 created legitimate expectation in favour of the Applicant which the respondent is trying to thwart or frustrate.

As regards the 1st consignment which landed on 27th February 2007 there cannot possibly be any legitimate expectation because the effective date for any expectation would be 1st March, 2007 and not 1st February 2007. An expectation based on 27th February would anyway be neither legitimate nor reasonable.

On the second consignment of arrival date of 11th March 2007, the arrival date according to the "CB8" clearance of 2007/2008 – Revised quota allocation in order of vessel was long after the duty free quota and had been exhausted. The alleged carrier ship does not feature anywhere in the detailed chart, which is written in a chronological order. The last ship No 9 was Al Mansourah and as at 6th March 2007 the COMESA quota of 89 000 MT had only MT 5000 left or remaining and which in turn was reserved pending determination of an appeal filed by a company known as Transouth Ltd. The challenge if any to CB8 is in the view of the court unconvincing because Mansourah was boarded by the Respondents officers on 11th March 2007, long after the exhaustion of the quota.

Since the affected Party has no statutory responsibility to collect duty it had no mandate to issue any Gazette notice leave alone a conflicting notice concerning the effective date of 1st February 2007, which appears to have designed to suit the applicants first consignment of 27th February 2007. The affected party had no authority to issue the notice. There cannot in law be legitimate expectation without proof of actual or ostensible authority.

This is a case of the pot calling "kettle" black. The way out is however to stick to the law and especially the powers concerning the collection of duty. The affected party has clearly signed a memorandum with the Respondent concerning the collection of sugar levy and this is done on its behalf by the Respondent. It is the court's view that the affected party was meddling with matters of collection of duty which were statutorily outside its purview. As a result considerable confusion was caused by the two conflicting notices and I find that the applicants' notice had no validity and it was not capable of creating legitimate expectation in favour of the applicant. On 18th June, 2004 the Sugar Act was added to the 1st schedule of Kenya Revenue Act (Cap 469) which in effect meant that the Respondent was entitled to take the steps they took.

The orders sought especially mandamus direct the targeted public body or person to perform a statutory duty which it has failed to do. There is no duty which the Respondent has failed to perform. Certiorari

would have taken care of the alleged legitimate expectation but as held above there is none on the facts although I shall shortly examine the requirements in law.

It follows that the only statutory duty the Respondent has is to collect duty in respect of all the consignments falling outside the 2004 Gazette notice and it is not alleged that it is refused or declined to collect duty as per the enabling statute. The prayer sought in the application are misconceived see **KENYA NATIONAL EXAMINATION COUNCIL v R ex-parte GEOFFREY GATHENJI NJOROGE and NINE OTHERS CA 266 OF 1996** and my own judgment in the case of **R v KENYA REVENUE AUTHORITY ex-parte ABERDARE FREIGHT Ltd HC Misc 946 of 2004**. The Respondent cannot be restrained or estopped from performing its statutory duty of collecting duty on the basis of the date of arrival.

After the **ABERDARE FREIGHT CASE** the only development in this regard of which I am aware of is that **R v KENYA REVENUE AUTHORITY ex-parte KEROCHE Misc Civil Application No. 743 of 2006** where I held that in the event of a public body being guilty of abuse of power or guilty of a violation of the rule of law a judicial review court can intervene to stop the abuse or a violation of the rule of law since in that instance the public body is deemed not to have the powers in the first place because both grounds of abuse of power and violation of the rule of law operate as if the power never existed in the first place. In the case before me however there is neither allegation nor proof of abuse of power or violation of the rule of law and therefore the new jurisprudential development as stated in **KEROCHE** does not apply at all.

The Respondent must perform its statutory duty of collecting the duty as per the statute – see **ABERDARE CASE**.

As indicated above I now focus on the meaning of legitimate expectation. I have in several decisions now defined what legitimate expectation is including the case of **R v REGISTRAR GENERAL ex-parte SMITH KHISA** and even the **ABERDARE CASE** cited herein. In the context of this case however, Lord Frazer in the case of **COUNCIL OF THE CIVIL SERVICE UNION v MINISTER FOR THE CIVIL SERVICE 1985 AC 374, H.L.** defined it as:

“where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefits or privilege and if so, the courts will protect his expectation by judicial review as a matter of public law.”

And as explained by Lord Diplock in **O'REILLY v MACKMAN [1983] 2 AC 237**:

“Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”

In the **KEROCHE CASE** I found legitimate expectation on the facts as supporting express promise or past practice and conduct. There are at the moment two types of legitimate expectations. The first one is procedural legitimate expectation and second is substantive expectation. The Keroche one was substantive. Going by the above definition of legitimate expectation Legal Notice No 12 of 1st March 2004 constitutes an express promise to all importers of sugar that the imported sugar as described from 1st March 2004 to end of February 2008 would be duty free – subject to the quota being for 89,000 metric tones of sugar per year. The same promise was repeated in the Newspaper by KRA's advert of 2nd February 2007 which literally set out the same terms as per Legal Notice No 12. LN 12 was given by the Minister for Finance but the advert of 2.2.2007 was given by KRA and it canceled the Affected Parties notice since the Sugar Act is one of the Acts which Kenya Revenue Authority is authorized to administer for the purpose of revenue. What stands out as requirements of the express promise on which the legitimate expectation would be based are:

- i. Importation within the stipulated period and arrival within the period

ii. The quota not being exhausted on a first come first served basis. On the basis of the evidence availed to the Court the applicant did not satisfy the two requirements and therefore its claim based on legitimate expectation must fail. With a light touch it is hoped that this would mark the end of “Sugar wars” in our Courts concerning the Comesa imports, come February 2008 because for quite sometime, the Courts had literally been converted into stages or platforms of annual “sugar wars” by both the regulating bodies and the importers!

In the result the Notice of Motion dated 20th March 2007 is dismissed with costs to the Respondent and 2nd interested party to be shared equally and paid by the applicant and the affected party (KSB).

DATED and delivered at Nairobi this 20th day of July 2007.

J.G. NYAMU

JUDGE