



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Misc Civ Case 214 of 2005**

**IN THE MATTER OF: AN APPLICATION BY W.E. TILLEY**

**(MUTHAIGA) LIMITED FOR LEAVE TO**

**APPLY FOR AN ORDER OF CERTIORARI**

**AND**

**IN THE MATTER OF: THE KENYA REVENUE AUTHORITY**

**AND**

**IN THE MATTER OF: THE CUSTOMS AND EXCISE ACT CHAPTER**

**472, LAWS OF KENYA**

**AND**

**IN THE MATTER OF: DEVJI MEGHJI & BROTHERS LIMITED**

**R U L I N G:**

Pursuant to leave granted on the 8<sup>th</sup> day of April 2005 and pursuant to the provisions of Order LIII rule 3 of the Civil Procedure Rules, W.E. Tilley (Muthaiga) Ltd., hereinafter referred to as the applicant took out a motion dated 11<sup>th</sup> April 2005. In that motion the applicant prayed for the following orders:

**“(a) An order of certiorari to bring into this court the decision of the Kenya Revenue Authority made on 19.10.2004 to sell the**

applicant’s food processing and refrigeration equipment comprised of Baader 694, Auto feeder, Baader 695, wolfking mincer, RB Mincer, Vac Paker, Bag sealer, stall compressor, Technofrigo comp, stall screw, surge drum, liquid Pumps, condenser, electric panel, box strapper, oil Separator and block frames imported into Kenya by the applicant in container numbers MSKU 607489/7 and TRIU 548537/6 and to quash the sale of the said Goods by the Kenya Revenue Authority conducted On 19.10.2004.

(b) Costs of this application.”

A verifying affidavit sworn by William Kinyanyi and statement of facts were filed in support of the motion. The respondent, Kenya Revenue authority and Devji Megji & Brothers Ltd, the interested party opposed the motion.

When this motion came up for hearing Kenya Revenue Authority turned up for the hearing to oppose the motion. There was no attendance on the part of the interested party.

This dispute began its journey on the 2<sup>nd</sup> day of February 2004 when the applicant purchased the goods set out in the motion hereinafter referred to as the applicant's goods' from Primecatch (exports) Ltd. of Musoma, Tanzania at a consideration of 10,000,000/=. The market value of the goods is said to be estimated at Kshs.20,000,000/=. The applicant has managed to show that it paid duty, V.A.T. and the penalties imposed all totaling to Kshs.519,065/= on 19.4.2004 with Kenya Revenue Authority which duly acknowledging receipt. There was also evidence to show that the Minister for Finance waived payments of the customs warehouse rent on the 13<sup>th</sup> day of July 2004 pursuant to the Customs & Excise Regulations. The Minister further waived duty and V.A.T. on the goods on the 2<sup>nd</sup> day of June 2004.

The applicant has complained that despite the respondent having the above information, it purported to auction the applicant's goods on 21.5.2004 via a Kenya gazette notice. It is the submission of Mr. Kinyua for the applicant that the respondent did not give the applicant notice as required under Section 34 of the Customs & Excise Act. It was pointed out that the gazette notice of 21.5.2004 was designed in a manner that it would make the applicant not to realize that its goods were being auctioned. It is shown that the notice indicated the consignee of the goods was Maersk K. Mombasa whereas it was within the knowledge of the respondent that the actual consignee was Primecatch (Exports) Ltd. It is the submission of Mr. Kinyua Advocate that the manifest was later changed to show that the applicant was the consignee. It was further pointed out that the respondent purported to sell the goods yet by the duty and other taxes had been paid. The applicant has further averred that by the 2<sup>nd</sup> day of April 2004 the respondent already knew that the applicant owned the goods and it was surprised why it did not include the applicant's name in the Kenya gazette.

On its part the interested party was of the view that it was an innocent purchaser for value. The third party in opposing the motion relied on the affidavit of Vallabhdas Devji Patel sworn on 17<sup>th</sup> June 2005. In that affidavit a copy of the relevant Kenya gazette notice is annexed to that affidavit. What is clear is that the applicant was not named in the Kenya gazette notice.

The respondent on its part relied on the replying affidavit of James O. Olela sworn on 8<sup>th</sup> June 2005 to oppose the application. In that replying affidavit it is shown that by a gazette notice of 25.6.2004 the applicant's goods were advertised for sale on 3.8.2004. The sale however did not take place until 19.10.2004 when the property was finally sold. It is the submission of Mr. Matuku for the respondent that the goods were sold pursuant to Section 34 of the Customs & Excise Act Cap. 472 Laws of Kenya. It is said that the goods were not collected from the warehouse within two months as required and that is why they were sold.

I have carefully considered the arguments tendered by the learned advocates on both sides. I have also perused the motion plus the accompanying statement of fact plus the verifying affidavit. I have further taken into account the affidavits filed in opposition. What emerges from the annexures is that the applicant's goods were advertised for sale in which the consignee is named as Maersk K. Mombasa. It is not denied that the respondent knew that the goods were the property of the applicant. This is clearly evidenced in the certificate of inspection findings of 2.4.2004 issued by Kenya revenue Authority to the applicant. The certificate gave the description of the goods which the respondent later advertised for sale as the property of Maersk K. Mombasa. Section 34(1) and (2) of the Customs & Excise Act which provision was applicable by then, required the respondent to give notice to the owner of the goods of its intention to sell the property if the goods are not collected within 21 days. It is clear that the respondent did not give the applicant notice as required under Section 34(1) of the Customs & Excise Act. The

purported Kenya gazette notice of 21.5.2004 and that of 25.6.2004 were not sufficient because the applicant was not named. Instead Maersk M. Mombasa was named as the consignee. The failure to issue the relevant notice means that the respondent acted in excess of jurisdiction and in breach of the law. The respondent's action therefore was null and void. It could not have conferred rights because the required procedure was not followed. In a nutshell the respondent acted ultravires the provisions of section 34(1) of Customs and Excise Act. In view of my findings I am convinced that the respondent's decision is amenable to judicial review.

In the final analysis I am satisfied that the motion is well founded. The same is allowed as prayed with costs to the applicant being shouldered by the respondent.

**Dated and delivered at Mombasa this 31<sup>st</sup> day of May 2006.**

J.K. SERGON

JUDGE

In open court in the presence of Mr. Kinyua h/b Karigithu for the Applicant .

N/A for the interested party.

Kashindi h/b Matuku for Respondent.

SERGON, J