



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIVIL 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

A N D

IN THE MATTER OF: THE KENYA REVENUE AUTHORITY

A N D

IN THE MATTER OF: THE CUSTOMS AND EXCISE ACT CHAPTER 472, LAWS OF KENYA

A N D

IN THE MATTER OF:DEVJI MEGHJI & BROTHERS LTD.

Coram: Before Hon. Justice Mwera

Kinyua for Applicant

Omollo for Respondent

Court clerk – Kazungu

R U L I N G

We were set to hear the applicant's notice of motion dated 11/4/2005 brought under order 53 rule 3 Civil Procedure Rules. It seeks judicial review order of certiorari to bring up and quash the decision of the Kenya Revenue Authority (KRA) by which, it is claimed, it moved to sell the applicant's food processing and refrigeration equipment on 19/10/2004 contrary to law. But then Mr. Omollo, for the interested party, desired and the court allowed him to argue his notice of motion, dated 7/6/2005. He invoked this court's inherent jurisdiction to set aside the order of 12/4/2005 by which the original applicant got leave to bring the substantive motion for the said quashing orders (certiorari).

The court heard that if the sale complained of was done on 19/10/2004, the decision leading to it must have been made much earlier, even before 21/5/2004, the date the sale was advertised in the official gazette. That what the original applicant should be seeking is to quash the decision to sell the equipment but not the sale itself. That that being so, then the applicant got leave more than 6 months after the decision complained of had expired and accordingly the order granting leave was of no effect. And that

after the sale, (in public), the interested party took the goods and the property therein, a state of things that need not be disturbed now. That the better option open to the applicant would be to endeavour to sue KRA, if the applicant makes out a case, in damages. It was added that the relevant law did not stop KRA from carrying out sales as that of 19/10/2004, except that seemingly, the applicant saw some irregularities not amounting to nullities, in the way that sale was conducted.

Mr. Kinyua maintained that his client sought quashing orders against the sale of 19/10/2004 and properly so. And that KRA had acted in excess of or outside the law that mandated it to carry out sales of the type noted here. This counsel's main point was that the 6 –month time limit to seek quashing orders only relate to judgments, decrees, orders or proceedings in inferior courts – and not null acts as done by bodies like KRA.

The short route to this tussle is that Order 53 rule 2 CPR answers it all. Its relevant parts read:

“1.(1)

2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act;”

No more need be added to that clear statement of the law. Before us is a prayer to quash a decision of KRA – not an inferior court or tribunal handing down judgments, orders, decrees, convictions or conducting proceedings in similar vein. It can only be surmised that challenging acts like these of KRA should be within reasonable periods vis a vis the interests of justice. The interested party's motion should thus be dismissed as mis conceived.

This court however, would remark in passing that the original applicant would do well in the circumstances to consider whether or not the alternative remedy of damages would be a better course to seek relief against KRA. However that is only in passing.

In sum the motion dated 7/6/2005 is dismissed with costs. Dates to be taken to argue the application dated 11/4/2005.

Orders accordingly.

Delivered on 27th October 2005.

J.W. MWERA

JUDGE