



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MISC. CIVIL APPLICATION NO. 1406 OF 2003

**IN THE MATTER OF: AN APPLICATION FOR THE ORDERS OF
CERTIORARI AND MANDAMUS**

**AND IN THE MATTER OF: CUSTOMS & EXCISE ACT CHAPTER 472
OF THE LAWS OF KENYA, KENYA LAW
REFORM ACT AND JUDICATURE ACT**

REPUBLIC..... APPLICANT

AND

KENYA REVENUE AUTHORITY..... RESPONDENT

EX-PARTE - (MOSES BEKABYE)

R U L I N G

1. The Notice of Motion dated 25th November 2003 is brought by Moses Bekabye, the Ex-parte Applicant and he seeks the following orders: -

(a) That the Honourable Court be pleased to issue an Order of Certiorari to remove into the High Court and quash the decision of the Commissioner of Customs and Excise Department contained in a letter dated 1st July 2003.

(b) That the decision of the Commissioner of Customs and Excise contained in the letter dated 1st July 2003 be and is hereby quashed and the motor vehicle Mercedes Benz E220 CDI Entry No. T810 – 3624 of 30th November 2001 Chassis No. WDB21 00062B 323176 be released unconditionally forthwith.

(c) That the Honourable Court be pleased to issue an order of MANDAMUS directing and commanding the Respondent to unconditionally and forthwith release motor vehicle Mercedes Benz E220 CDI Entry No. T810 – 3624 of 30th November 2001 Chassis No. WDB21 00062 B 323176.

(d) That the Respondent be and is hereby compelled to unconditionally and forthwith release the motor vehicle Mercedes Benz E220 CDI Entry No. T810 – 3624 of 30th November 2001 Chassis No. WDB21 00062 B3231756.

(e) That the Respondent be condemned to pay the costs of this Application.

2. In the statement of facts, the Verifying Affidavit and in submissions by counsel appearing for him, the said Moses Bekabye has set out the facts in support of his Application.

EX-PARTE APPLICANT'S CASE

3. Motor vehicle Mercedes Benz E220 CDI Entry No. T810 – 3624 of 30th November 2001 Chassis No. WDB21 00062 B323176 was in November 2001 imported through the port of Mombasa by the Exparte Applicant (whom I shall be referring to as “Bekabye”). He is a Ugandan National and a resident of Kampala in Uganda. His intention was that the motor vehicle aforesaid would be transported by road to its final destination, namely Kampala upon clearance by the Kenya Revenue Authority.

4. By a letter dated 15th November 2001, Bekabye instructed Hansar Abdallah, c/o Bambini Africa Ltd. P. O. Box 55175 Nairobi. It is important for reasons that I shall get to at a later point to set out the contents of the letter in full. It says: -

“Dear sir,

RE: LETTER OF INSTRUCTIONS

The said Bambini Africa Ltd. or Hansar Abdallah obtained an extension of the transit period for the motor vehicle after the initial period of transit had expired. The letter dated 14th January 2002 from the Respondent granted extension to 28th January 2002 with a rider that “no” further extension shall be allowed”.

5. Curiously and notwithstanding the rider above, by letter dated 11th February 2002, the Respondent extended the transit period for a further 30 days from the date of that letter. The purpose of the extension was *“to facilitate re-exportation and bond cancellation”*. This extension therefore was to lapse on or about 11th March 2002.

6. On 21st February 2002 however, the Respondent served on one Mohamed Farooq Chaudry a Notice of Seizure on the grounds that; the motor vehicle subject of these proceedings, *“is uncustomed and liable to forfeiture under section 196 of the Customs and Excise Act, Cap 472 Laws of Kenya”*.

7. A handwritten notation on the copy of the Notice of Seizure exhibited as “MB4” has words to the effect that the said Mohamed Farooq Chaudry had been paid Kshs.2000,000/- which had been borrowed from him by Hansar Abdallah to clear the motor vehicle from the port of Mombasa.

8. It would seem however, that even after the said Mohamed Farooq Chaudry withdrew his claim, the motor vehicle was not released for reasons that it had now attracted certain charges at the Respondent's warehouse. That was not the end.

9. On 27th May 2003 a letter from the Respondent (references to the Respondent include such references as to actions taken by his juniors) directed to Bambini Africa Ltd. and to the attention of Mr. Hansar Abdallah states as follows: -

“I refer to your letter dated 19th February 2003 and that of Miss Loyce Ambasa of 18th February 2003.

I am directed to inform you that the Commissioner of Customs and Excise has declined to grant your request as contained in the said letters. It will be recalled that on 11th November 2002, Miss Ambasa in person presented the Senior Deputy Commissioner with a Sale Agreement between one Moses Bekabye as seller of the subject vehicle and herself as purchaser, and requested to be allowed to pay taxes on the car. This request was allowed. Miss Ambasa therefore must pay the taxes due on the car.”

10. An Affidavit dated and sworn on 22nd February 2003 from the said Miss Ambasa shows that she withdrew her claim to the motor vehicle. The same was still not released on account of the outstanding warehouse rent.

11. Bekabye and his agents then became desperate. They sought assistance from the Minister of Local Government (it is not clear how his office comes into the matter) and the Ugandan High Commission (presumably because Bekabye is one of their own) to no avail. Letters dated 3rd November 2003 and 27th January 2003 by Bekabye indicate the role of the Minister and the High Commission respectively.

12. On 1st July 2003 and in reply to a letter of even date from M/s Bambini Africa Ltd. the Respondent stated as follows:

“We have checked our records and confirmed that extension of transit period obtained for the above vehicle was valid. There was therefore no violation of transit period as provided for in the provisions of Regulation 96 of the Customs and Excise Act. We however, advise you that the accumulated customs Warehouse rent is payable before the Notice of Seizure is relaxed and the vehicle released to yourselves.

Please note that the accumulated customs warehouse accrued as a result of a dispute of ownership between your client and a Miss Ambasa”. (Emphasis added)

It is this letter that is the subject of the proceedings before me.

RESPONDENT’S CASE

13. The Respondent has this to say on the matter; that there is no dispute that the Applicant was within the extended period for transit. However, the motor vehicle on transit was interfered with on two occasions; -

i) as a security for payment of the sum of Kshs.200,000.00 to Mr. Farooq Chaudry aforesaid.

ii) attempted sale to Miss Loyce Ambasa.

14. These two matters raised reasonable grounds to warrant seizure of the motor vehicle and to seek that customs duties be paid as the same was being handled in contravention of its transit status.

15. I am referred to Section 187 of the Customs and Excise Act where even an attempt to commit an offence under the act is punishable. I am also referred to Section 186(f), which makes it an offence to fraudulently evade payment of duty as indicative of the Applicant’s actions. Similarly I was referred to Section 185 (d) (iii) which makes it an offence to keep or conceal uncustomed goods.

16. As regards the warehouse rent chargeable, I was also referred to Section 34(2) of the Act where it is provided that once a vehicle or other thing is kept there, then rent is payable and in this case, the warehouse is properly due.

17. I should now turn to the determination of the matter and I am of the view that the beginning and the end of the matter should be whether there were reasonable grounds to seize the motor vehicle.

NOTICE OF SEIZURE

18. The Notice of Seizure referred to at page 6 paragraph 4 of this Ruling is predicated upon the sole ground that the motor vehicle was liable to custom duty. Ordinarily of course, a vehicle on transit is not liable to be seized and become liable to forfeiture under Section 196 of the Act unless under Section 196(f) it has been “*moved, altered or in any way interfered with, except with the authority of an authorized officer*”. 19. I am satisfied that the Notice of Seizure was lawfully effected as Mohamed Farooq Chaudry had himself taken possession of it as collateral for monies he had advanced to M/s Bambini Africa Ltd. or its principal, Hansar Abdallah.

20. I should pause here and note that while instructing Hansar Abdallah, Bekabye expressly authorized him to pay all clearing and forwarding charges relating to the motor vehicle. In fact on that authority, Hansar Abdallah held himself out as the agent of the Applicant with all authority regarding the motor

vehicle. The Applicant has not said in all the evidence before me that the said agent acted without authority. I take it that he did. Indeed, even if the agent had no authority, Sir Raymond Evershed MR said in *Canadian Pacific Railway vs. Lockhand* {1942} All ER 467 and which statement was quoted with approval in *Patel vs. Yafeji & others* {1972} EA 28 at page28, that “a master ... is liable for acts which he has not authorized provided they are so connected with acts which he has authorized that they may rightly be regarded as modes, although improper modes of doing them” The actions of Hansar Abdallah and/or Bambini International Limited fall in this category.

21. Turning back to the seizure, I am satisfied that by converting the motor vehicle into collateral, the protection of a transit period was lifted and the vehicle became as if destined for Kenya and was liable to be held as if customs duties was due.

22. I shall find the same with regard to the attempted sale to Miss Loyce Ambasa. That was perpetuation of the alteration and interference with the status of a vehicle on transit. 23. Having so found, Section 12(1) (h) is clear that once goods are liable to seizure or under a notice of seizure, the same shall be safely secured at the Warehouse. This is what the Respondent correctly did. It follows that rent shall be paid under Section 34. 24. There was no argument as to what should have happened upon the Notice of Seizure being given. I should not therefore, take that route, as the parties did not plead it.

CONCLUSION

25. Having found that contrary to the assertion by the Applicant, Notice of Seizure was lawfully issued and that having been the *Exparte* Applicant’s sole ground for bringing the Application, I have no reason to go to other issues. Once that ground fell, then his case crumbles in a *domino-effect-like* manner. 26. I hereby find specifically that from the arguments advanced before me, there is no reason given to justify grant of the orders sought.

27. I hereby dismiss the Application dated 25th November 2003 with costs to the Respondents.

Dated and delivered at Nairobi this 17th day of February 2004

I. LENAOLA

Ag. JUDGE

17.2.2004

Before Lenaola Ag. J.

Amos CC

Ruling read in the presence of:

Mr. Magari for the Respondent

No appearance for the Applicant

I. LENAOLA

Ag. JUDGE