



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

MISCELLANEOUS CIVIL SUIT No. 302 OF 2004

**IN THE MATTER OF: AN APPLICATION BY AFRICOM MERCHANTS LTD
FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI MANDAMUS AND PROHIBITION
A N D
IN THE MATTER OF: KENYA REVENUE AUTHORITY ACT
A N D**

**IN THE MATTER OF: THE CUSTOMS & EXCISE DEPARTMENT OF KENYA
REVENUE AUTHORITY**

A N D

REPUBLIC

=V E R S U S=

KENYA REVENUE AUTHORITY.....RESPONDENT

EX-PARTE

AFRICOM MERCHANTS LIMITED.....APPLICANT

R U L I N G

On 20/4/2004 this court granted leave to make application for Judicial Review to the Respondent herein (Ex-parte Applicant). The leave was directed to operate as stay of the implementation of the Applicants' letter dated 31/3/04 which addressed and states:-

“RE: WAIVER OF CUSTOMS WAREHOUSE RENT ON 750 M/T EGYPTIAN SUGAR EX-KOTA INTAN YPS022 OF 13/07/2003 B/L NO. BAISMBAP031685 – M/S AFRICOM MERCHANTS LTD.

I refer to your letter dated 22nd March, 2004 addressed to the Permanent Secretary, Ministry of Finance concerning clearance of 750 M/T sugar imported from Egypt under COMESA rates of duty as per Treasury's letter Ref.ZZ 45/09 dated 27th February, 2004 and respond as follows:-

- 1) That we have carefully considered the circumstances under which authority to clear the sugar under COMESA rates was granted and allowed the sugar to be entered for clearance through the Customs under COMESA rates of import duty.
- 2) That we have taken note of the fact that the sugar was also granted waiver of Customs Warehouse rent

as per Treasury's letter Ref: DFN.415/07 dated 9th January, 2004. We also note that the waiver was granted as a result of our recommendation to the Treasury as per our letter of even reference dated 22nd December, 2003. Please note that our recommendation was based on the fact that M/s Africom Merchants Ltd were to re-export the sugar or pay full duties as the COMESA quota had been exhausted at the time the sugar was imported. The applicant now appears to benefit from both duty exemption and full waiver of duties. In the circumstances it would appear the waiver was granted under false pretences by M/s Africom Merchants Ltd., the sugar importers. I am in the circumstances considering recommending cancellation of the rent waiver by the Treasury. Before I do so I wish to give you a chance to choose between payment of import duty or Customs Warehouse rent as granting both would be a complete violation of the criteria for granting waiver of Customs Warehouse rent. The sugar

remained in Customs Warehouse for almost a year unentered on the understanding your client was looking for export market or payment of taxes. Your client must honour his part of the commitment to us.

Yours faithfully,

F.M. THURANIRA

COMMISSIONER OF CUSTOMS & EXCISE

c.c. Permanent Secretary,

The Treasury,

NAIROBI. (ATT: MR. NJERU KIRIRA)

Commissioner General,

KENYA REVENUE AUTHORITY

Senior Deputy Commissioner,

MOMBASA

Senior Assistant Commissioner

KILINDINI."

It is my opinion that the above quoted letter displays a decision having been taken that the Respondent shall pay Customs Warehouse rent.

It is also my view that the letter was a demand for payment but the amount to be paid is not disclosed. This letter was written after the judgment of the High Court Judge D.K. Maraga on 15/12/2003. In that case the court ordered the Applicants to process the Respondent's documents to enter the sugar. The court had this to say:- "In this case the Government of Kenya had the restriction on importation of Duty Free Sugar from COMESA Region up to March 1st 2003. The Respondent and other Government authorities knew that. It is not clear why they waited until the period expired before seeking extension. When they sought in March 2003 and there was delay as would be expected the Respondent was not able to domesticate the restriction until the 12/9/03 when the Applicant had already imported the sugar. The Respondent cannot be allowed by its own dilatories to adversely affect the Applicants existing contractual rights and obligations by arguing that the Applicants can re-export the sugar or seek alternative market. It is to be hoped that the Respondent and other Government Authorities charged with the responsibility of protecting the local Industry will act more diligently than they did in this case."

In view of the above one would have expected that the Applicant would have immediately upon payment by the Ex-parte Applicant of Kshs.4,680,915/- and receiving Form No.4338 from the

Respondent, it would have released the sugar to the Respondent. After all the sugar had been classified as perishable commodity. I find the failure to do so is nothing less than contempt of court.

There is no evidence that there was an appeal against that court judgment. Again, by filing this application there is delay caused in releasing the sugar. Ground 4 on the application mentions that Kshs.5 million is now due as at 23/4/04 no explanation as to how this amount is arrived at. But in his submission from the bar counsel for Applicant submitted that if Kshs.5 million was paid they would release the sugar to the Respondent. He complains that the order releasing the sugar was premature as the other party was not heard. And that the court ordered a blanket undertaking in favour of Applicant. As Mr. Kiarie submits the undertaking is not limited in the amount. It is not said that the Respondent cannot pay Kshs.5 million therefore the undertaking is adequate. I agree with the counsel. The court notes that there is no dispute about the ownership of the sugar. It belongs to Respondent. Also that this High Court (Maraga, J.) has already ordered release of the sugar.

The interest of the Applicant is the alleged payment of money claimed which is covered by the undertaking. Therefore, the order releasing sugar forthwith does not prejudice the Applicant. It minimizes accrual of amount of rent claimed. It minimizes loss of sugar – perishable commodity. These issues are causing the Respondent great financial loss. I repeat what this court has said, if Government Authority intend to protect local Industry a better method must be found.

I have carefully reconsidered my order granting stay – meaning the stay of implementation of letter dated 31/3/04 and ordering release of the sugar. Legally there is no Warehouse Rent due. The court (Maraga, J.) said so on the ground that the Applicant has delayed the release of the sugar for so long. However, if it is proved to be due the undertaking will cover the claims of the Applicants. The Judicial Review is already filed. It could be set down for hearing immediately.

I do not see any reason advanced to warrant review of orders made. The court has inherent powers to do justice in every case where justice so demands as in this case.

The application is dismissed with costs to the Respondent.

Dated at Mombasa this 9th day of June, 2004.

JOYCE KHAMINWA

J U D G E

Mr. Mwendwa:

I apply for stay for 7 days from to-day.

I apply for typed certified copies of proceedings.

Mr. Kiarie:

On stay this sugar is perishable commodity.

No loss will be occasioned to the Applicant. There is an undertaking.

I pray that the order be refused.

COURT:

The Applicant shall be supplied with typed copies of proceedings and ruling upon payment of copying charges.

On the issue of stay, it will be noted that this court has now twice ordered that the sugar be released to the importers. The sugar was classified by the Applicant himself several months ago as perishable commodity.

I see no reason whatsoever to order the detention of the sugar for any further period. The Applicants do not appear to appreciate that this court previously (Maraga, J.) has found that the Applicants are to blame for continued detention of the sugar in the Warehouse and therefore the importer is not liable to pay any Warehouse Rent. I have also found on similar terms.

In the circumstances, I reject the prayer for stay.

JOYCE KHAMINWA

J U D G E

9/6/2004