



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)

CIVIL CASE NO.730 OF 2001

PANATECHLIMITED.....PLAINTIFF

VERSUS

COMMISSIONER OF CUSTOMS & EXCISE

KENYA REVENUE AUTHORITY.....DEFENDANT

RULING

This is the respondents application dated 17/10/2001 for an order that the exparte orders issued by court on 17.7.2001 granting leave to take out Judicial Review proceedings by way of prohibition be set aside and stay granted together with leave be vacated on the ground that the Directors of the applicant have refused to comply with paragraph 2(ii) of the order in that they have not sought the acceptance of the Commissioner of Customs and excise of the Personal guarantees furnished and in that guarantees furnished are not acceptable to the Commissioner of Customs and exercise.

Mr. Francis Thurania, the Acting Commissioner of Customs and Excise deposes in his supporting affidavit, inter alia, that Directors of Applicant have not furnished the guarantee to him; that instead Directors furnished guarantees to court which are not acceptable to the Commissioner and that it was condition precedent that before Commissioner complied with order the Directors of the applicant had to give a guarantee to the Commissioner acceptable to the Commissioner Mr. Suresh Nanalal Kantaria the Managing Director of the applicant has filed a replying affidavit which I have studied and considered. It is clear from the application that respondents is not complaining that leave to apply for an order of prohibition was not granted properly. The complainant of the Respondent that conditions for stay of Agency Notice were not complied with. There are therefore no grounds for settling aside the leave already granted.

The order of stay was granted on two conditions (i) The applicants shall not repatriate the funds in the three respective accounts.

(ii) Directors of Applicants given a guarantee to Commissioner of customs and exercise and acceptable to the Commissioner that they will pay the sums claimed as customs duty in the event that the applicants intended application for Judicial Review does not succeed. Mr. Suresh Nanalal Kantaria states that the guarantees were served on the respondent and in particular on Mr. Muwoth I note from the court record which fact is accepted that the original personal guarantee was filed in court on 25.7.2001

The order of the court is specific. The guarantee was to be given to the Commissioner and had to be acceptable to him. There is no evidence tendered by applicant in the Judicial Review application that the guarantee was sent to the commissioner for perusal and approval. There is not a single letter to the Commissioner forwarding the guarantee to the Commissioner which is annexed. There is not a single

letter annexed showing that the Commissioner refused to accept the guarantee or that the Commissioner returned the guarantee. The fact that the Original guarantee was filed in court is evidence that the original was sent to the Commissioner for approval. The fact that guarantee was filed in court does not show that the guarantee was given. The guarantee was not to be given to court. The guarantee was not to be filed in court. If applicant had any difficulties pertaining to the guarantee it could have filed appropriate application in court either for approval of guarantee otherwise. Referring to Mr. Kihuthu's technical objection to the application deviation from form which does not go to substance and which does not cause prejudice to the other party is not a ground for rejecting an application.

From the foregoing I am satisfied that the applicant in Judicial Review application has failed to comply with condition as to giving an acceptable guarantee to the Commissioner and that the order of stay should be lifted.

Consequently, I allow the application with costs to the extent that I set aside the order of stay of Agency Notices given on 12.7.2001

E.M. Githinji

Judge

22.5.2002

Mr. Maluku for applicant present

Mr. Muiruri holding brief for Kihuthu for applicant present

Mr. Maluku

I apply for leave to take Photostat copies of the the Ruling. I apply for certified typed copy of the Ruling

E. M. Githinji

Judge

Order: Leave to counsels do take Photostat copies of the

Ruling. Ruling to be typed and copies supplied as prayed

E. M. Githinji

Judge