



REPUBLIC OF KENYA

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

MISC APPLICATION NO. 1368 OF 2001

RAJENDRA RATILAL SANGHANI.....APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY.....DEFENDANT

RULING

The applicant Rajendra Ratilal Sanghani seeks three orders namely:

- (a) An order of certiorari to bring into the High Court and quash the decision of Kenya Revenue Authority (KRA) dated 14.10.2001 and Seizure notice no. 031182 of 24.11.99 purporting to require applicant to pay additional duty of Kshs 338,792
- (b) An order of prohibition to prohibit KRA from acting on that decision and imposing any additional duty.
- (c) An order of mandamus ordering KRA to respect the dictates of the customs & Excise Act and to forthwith release motor vehicle Registration KAD 777 to the applicant.

Applicant says that he bought motor vehicle Reg No KAD 777Q – a Mercedes Benz C180 locally from one Dalbir Singh Kandola in 1994 at shs 3,200,000. In 1996, the director of CID asked applicant to take the vehicle to the CID Headquarters. He did so. He was then asked to pay duty of shs 760,568 which he paid on 1.4.97. The vehicle was then released to him in September 1997.

On 24.11.99 KRA seized the motor vehicles through a Notice of Seizure. The notice of Seizure indicates that motor vehicle is unaccustomed and liable to forfeiture under S. 196 of the customs and Excise Act. Applicant entered into negotiations with KRA and by a letter dated 20.12.2000 KRA asked Applicant to pay shs 338,792 within 30 days and thereafter apply to be considered for a waiver of penalty and customs warehouse rent.

The letter further informed applicant that if he failed to pay the money demanded within 30 days the vehicle would be condemned and sold. Applicant refused to pay.

Mr. Michael Nicholas Omolo – a revenue officer with KRA filed a replying affidavit. He agreed that the motor vehicle was in 1997 handed over to customs by CID for collection of duty. He agrees that applicant paid shs 700,568 as duty for the motor vehicle. He explains that the seizure of the motor vehicle was a result of valuation which was carried upon the motor vehicle in comparison to similar makes and models in the market which established that there was under valuation of duty of Kshs 338,792. He states that applicant paid shs 760,568 duty instead of shs 1,099,360. He further explains that the short levy or

under collection of duty can be collected under S. 158 of the customs and Excise Act and to that extent the motor vehicle was unaccustomed and is liable to seizure and forfeiture under S. 196 of the Customs and Excise Act.

I have perused the provisions of 196 of the Act. It is true that unaccustomed goods are liable for forfeiture under the section. Unaccustomed goods are defined in S. 2 of the Act as, inter alia, including “dutiable goods on which the full duty has not been paid” As S. 202(1) of the Act provides, if the owner of the seized goods gives a notice of claim then the Commissioner may within 2 months from receipt of the claim

- (a) by notice in writing require the claimant to institute proceedings for recovery of the thing within 2 months.
- (b) Himself institute proceedings for consideration of the same.

It is also true that the Commissioner can under S. 158 demand the amount short levied within 5 years of the short levying.

But by S. 158(2), where the person fails to pay the amount short levied the Commissioner may order that any other entries or other documents presented by that person shall not be accepted by customs or revoke or suspend that persons licence until the duty short levied is paid. By Section 122 of the Customs and Excise Act the Commissioner can also recover any duty payable by instituting legal proceedings without prejudice to any other means of recovery. This is a case where the commissioner assessed duty on the applicants motor vehicle in 1997 at shs 760,568 which applicant paid on 1.4.97 and the seized motor vehicle was released to him. But over 2 years later on 24.11.99 the same motor vehicle was seized for the reason that it was unaccustomed and liable to forfeiture. Upon the seizure applicant wrote to the Commissioner informing him that duty had in fact been paid. The Commissioner responded by a letter dated 20.3.2000. He stated that he was unable to determine from the records whether or not the duties had been paid. He asked applicant to avail further evidence that duty of shs 700.568 had been paid.

It is clear from that letter from the Commissioner that by the time of the seizure of the motor vehicle on 24.11.99, the Commissioner had no records that the duty had been paid. It follows that the vehicle was not seized because of short levy of duty but because the commissioner had no evidence that any duty had been paid for the motor vehicle at all. It is now admitted by the Commissioner that by the time of seizure the applicant had in fact paid shs 760,568 as duty on the motor vehicle. According to S. 158 of the Customs and Excise Act the short levy is payable upon demand by proper officer Mr. Michael Nicholas Omolo concedes in his replying affidavit that this was a case of short levy. In fact documents filed show that the commissioner first informed applicant to pay additional duty and penalty without specifying the amount by a letter dated 11.5.200. It is by a letter dated 30.12.2000 that the Commissioner demanded the payment of shs 338792 as the principal amount within 30 days. Lastly, by a letter dated 9.8.2001 the commissioner demanded the payment of extra duty within 14 days.

Firstly, assuming (and without deciding) that the Commissioner had power to seize the motor vehicle to recover short levy it is my view that the Commissioner had no statutory authority to seize the motor vehicle before a proper officer had established that there was a short levy and had in fact demanded the payment of the extra amount and the owner of the motor vehicle had failed to pay. In this case, the motor vehicle was seized long before the commissioner had established that there was a short levy and before a demand for payment had been made and before applicant had been given a chance to pay or dispute the Commissioners claim.

The seizure of the motor vehicle in the circumstances was unlawful. Secondly, assuming that the vehicle was liable to forfeiture under S. 196 of the Act and was lawfully seized under S. 200(1) of the Act, the applicant claimed the motor vehicle immediately as provided by S. 200(4) of the Act.

The Commissioner was then required to comply with the procedure under S. 202(1) of Act of requiring the Applicant to institute proceedings or himself instituting in respect of the motor vehicle. By

S. 200(2) of the Act, if that procedure is not followed, then the Commissioner is required to release the motor vehicle to the claimant.

He did not follow that procedure and the continued detention of the motor vehicle became unlawful.

Thirdly, It is my view that the principle of *functus officio* applies in this case. The Commissioner who is required to assess the duty did in fact assess the duty which applicant paid and the motor vehicle was released. When the motor vehicle was seized again applicant made all attempts including obtaining valuation report from D.T. Dobbie to establish the value of the motor vehicle. He even informed the Commissioner that duty for a similar vehicle had been assessed at shs 662184 in 1996.

Respondent says that the motor vehicle was valued and it was found that there was under collection of duty of Ksh 338,792. The valuation reports were not shown to court or to the applicant. The respondent has not shown by documents that there was a difference in valuation of the motor vehicle on the two occasions and that there was an error in the first valuation. In the absence of the valuation reports the court can only assume that the demand for extra duty is arbitrary and that correct duty of shs 760,568 was properly levied.

For the foregoing reasons, I allow the application and grant the orders of certiorari, prohibition and mandamus respectively in terms of the application. I give the costs of the application to the applicant.

E. M. Githinji

Judge

8.10.2002

Mr. Omolo for applicant present

Mr. Ontweka for Respondent present

Mr. Ontweka

I apply for stay of decision to release the motor vehicle as intend to take an appeal against the decision.

Mr. Omolo

I object to the order of stay.

E. M. Githinji

Judge

Order:

1. Ruling to be typed and supplied to the two counsels

2. The order for mandamus is stayed for 7 days to enable respondent to file a formal application

E. M. Githinji

Judge