



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS CIVIL CASE 428 OF 2002

REPUBLIC.....APPLICANT

VERSUS

DIRECTOR OF FISHERIESRESPONDENT

***EX PARTE* WANAINCHI MARINE PRODUCTS (KENYA) LTD**

RULING

Leave was granted by this court to the applicant to apply for an order of *mandamus* under order LIII rule 1 of the Civil Procedure Rules in an *ex parte* application by way of chamber summons dated 9th September 2002, requiring the respondent to forthwith issue Fish Export Health Certificates to the applicant in respect of 13 containers of fishery products that the applicant had exported to the European Union during the period the (6th May and 26th June). Respondent had allowed the applicant to do so. The application also sought that the period between the service of the application and the day named therein be abridged. The matter was certified as urgent. The 13 containers were already at the port of entry in Italy but according to the Managing Director of the applicant company, the containers could not be cleared at the port of destination without the said certificates and that if the said certificates were not received soon, the whole consignment would be destroyed. The value of the said containers is approximately US \$ 1,110,948,07. Currently these containers are incurring heavy demurrage charges at the port of destination. Under the circumstances and in view of the perishable nature of the subject matter I granted leave on the same day (9.9.02). On 10th September 2002, the applicant took the next step and filed an application under certificate of urgency invoking order LIII rule 3 to shorten the time for hearing of the notice of motion *inter-partes*. I directed that the matter be heard *inter - partes* on 17.9.02 in view of the urgent situation and that the respondents be served within 2 days.

An attempt to serve the Attorney General Chambers in Mombasa failed as they declined to accept service, and rightly so because being an application seeking *mandamus* orders, it had to be served upon the respondent personally, in this case Mrs NK Gitonga the Director of Fisheries in the Ministry of Agriculture and Rural Development – Fisheries Department. The process server Mr Fredrick Kudoj in his affidavit of Services states that he received from M/s Kinyua Kamundi & Co Advocates Notice of Motion dated 10th September 2002 together with a statement dated 6/9/02 and two court orders issued on 9th and 10th September respectively for services upon Mrs NK Gitonga of Fisheries Department Nairobi. When he reached there, she was not in the office but he was directed to see Mr JW Kariuki for assistance. Mr Kariuki who is deputy director decided to telephone the Quality Inspector a Mr Mungai if he could accept service on behalf of the Mrs Gitonga who was away in Kisumu on official duties. A legal officer at Kilimo House was consulted and the process server was told to go and see a Mr Gichuru who, after scrutinizing the documents, advised an obviously now frustrated process server, that the documents

should have been served on the office of the Attorney General Mombasa. When told by the process server that Order 53 of the Civil Procedure Rules requires the respondent to be served first, the surprised legal officer sought a better legal opinion from the horse's mouth. He telephoned Ms Mbiyu of the AG Chambers Mombasa who confirmed as correct, the process server's advice. Mr Gichuru then informed the process server to leave the documents with the assistant director which he did, and so he thought, service was effected.

Meanwhile his office in Mombasa, as if not happy with the service, dispatched another set of documents to M/s HH & Mathews Advocates' process server in Nairobi to effect proper service with instructions to serve the same upon the Director of Fisheries Mrs NK Gitonga – at the Ministry of Agriculture & Rural Development Fisheries Department – Nairobi. On reaching that office at about 9.00 am, he was subjected to a similar merry go round scenario. He first went to the office of the Director and met a secretary, one Anne Gichuki. From her he learnt that the Director was out of town – in Kisumu on official business. He was directed to see Mr Kariuki and find out if Kariuki would accept service on behalf of the Director. Kariuki declined; but advised the process server to check in later. In his affidavit of service sworn on 13/9/02 at Nairobi, Mr Duncan Munyao describes the sequence of events.

Paragraph 5:-

That around 11.20 am I called the office of the director to find out if she had arrived in order to go and serve her. I was informed by Anne Gichuki that she had not arrived in the office.”

Paragraph 6:-

“That at about 2.30 pm I arrived at the offices of the Fisheries Department and went to the offices of the Director. Her secretary, Anne Gichuki informed me that she had not reported to the office and told me to try at around 4 pm.”

Paragraph 7:

That at around 4 pm, I again went to the offices of the Fisheries Department and in particular the office of the Director. The secretary Anne Gichuki informed me that the Director was in the office and I could wait since she was having a meeting.

Paragraph 8:

“That after about 20 minutes the Director called me into her office where I found her with two gentlemen one of whom I could identify as Mr Kariuki whom I had seen in the office that morning the same day”.

Paragraph 9:

“After the process server introduced himself and told her the purpose of his visit. She said he should have served the documents to the legal officer at Kilimo House. But the process server insisted that his instructions were to serve her personally.”

Paragraph 10:-

“He served the documents on the Director of Fisheries Mrs NK Gitonga by leaving them with her at 4.45 pm on 12th September 2002. She declined to sign. But service was fully effected.

I have taken the trouble of narrating this episode to highlight the difficulties met by the two process servers and how their efforts to perform their duty were deliberately hampered by these senior ministry officials who ought to know that ignoring court summons could have been fatal to their case. The simple rule is obey court and challenge them in court at the earliest opportunity. The courts will always give a fair hearing. They are duty bound to do so. Such an attitude as early displayed by the Ministry Officials

gives a bad impression of our civil service. The applicant carries on the business of fish processing at its complex at Liwatoni, Mombasa and employs, I have learnt, a man power of over 2000 employees. In this application by way of Notice of Motion dated and filed on 10th September 2002, the applicant seeks an order of *mandamus* directed to the respondent to forthwith issue Fish Export Health Certificate to the applicant in respect of the 13 containers of fishery products exported to the European Union (EU) between the period 6th May 2002 and 26th June 2002. It is opposed by the respondent through the Attorney General, represented by Mr Ousa Okello, a litigation counsel in the Attorney General's Chambers, Mombasa. The application is supported by two affidavits sworn by the applicant's managing director and general manager respectively and is grounded on the statement filed therewith for leave. It is dated 6/9/2002.

The applicant's case is that by letter dated 21st March 2002 the respondent temporarily suspended the applicant from exporting fish and fishery products to the European Union. This suspension was lifted on 6th May 2002.

The letter of suspension dated 21/3/2002 and addressed to the Managing Director of the applicant reads in part as follows:-

“NON-COMPLIANCE OF THE EU DIRECTIVE”

During the previous local and national inspections, various aspects of non-compliance with EU regulations by your establishments have been pointed out and you have all along promised to rectify. Unfortunately you have not kept your promises. The current EU, FVO inspection team has also noted that your factory is not fully compliant with the EU regulations. This letter is therefore, to inform you that your establishment is hereby temporarily suspended from exporting any fish and fish products to the EU until you have fully complied with the EU Regulation EEC/ 493/91, by rectifying all the shortcomings that have been pointed out to you in the past and present.

This suspension takes place immediately (the date of this letter) As soon as you feel confident you have complied, please apply for an inspection.”

SIGNED

NK GITONGA (MRS)

DIRECTOR OF FISHERIES.

By 6th May 2002, the applicant must have felt confident and applied for inspection as the suspension was lifted. The Director wrote a letter dated 6th May 2002 to the applicant and lifted the suspension and I now quote part of this letter: Its heading reads:-

“RE-LIFTING OF TEMPORARY SUSPENSION IMPOSED ON 21ST MARCH 2002 Reference is made to your letter Ref: AO/109/04 dated 2nd May 2002 and specifically the attachment ... the guarantees you have given with regard to the noncompliance issues raised by European Union Mission inspection team visit to your establishment in March, and the competent authority follow-up inspections ...

The suspension that was imposed on you on 21st March 2002 *vide* the letter Ref Misc/22 VOLIV(20) has therefore been lifted today, 6th May 2002 and you are therefore allowed to process and export fish and fish products to the EU. Once you exhaust the entire products in cold rooms we will review the progress you have made to advise further on your compliance status. By copy of this letter the DFO is asked to regularly monitor the establishment to ensure compliance during processing.

This letter is again signed by the Director of Fisheries Mrs NK Gitonga and copied also to the PS Ministry of Agriculture and Rural Development, as well as the Assistant Director of Fisheries, Coast

Province.

Between 6th May 2002 and 26th June 2002, the applicant processed and exported 13 containers of cooked frozen yellow fin loins to Genoa Italy. The member states of the EU cannot accept any loins fish products from third countries without fish export Health Certificates issued by the Competent Authority. Competent Authority is defined by the Fisheries (Fish Quality Assurance) Regulation 2000, to mean the Ministry for the time being responsible for fisheries. That is, the Ministry of Agriculture and Rural Development. Regulation 9(1) of those Regulations provides that a person intending to export fish or fishery product shall apply to the competent Authority for Fish Export Health Certificate.

The applicant's case is that it exported 13 containers of fish products to Italy as aforesaid but was denied fish Export Health Certificate in respect of those containers and that therefore those containers cannot be cleared through the Port of Genoa in Italy. The applicant has annexed application for fishery products:-

1. Export Permits
2. Field Inspection Reports
3. Certificates of Analysis in respect of the 13 containers

The respondent admits through the affidavit sworn by Mr Johnson Wainaina Kariuki (the Assistant Director of Fisheries) that such applications normally comprise of Field Inspection Reports:-

The application for Export Permits and Certificates of Analysis in respect of the 13 containers

The issue at hand is whether the respondent allowed the applicant to process and export to the European Union between the dates May 2002 and 26th June 2002 and if so, whether the applicant is entitled to Fish Export Health Certificate for the 13 containers. There is sufficient material on both sides to show that the applicants processed and exported fishery products to the European Union during that period and the procedure allowed was as stated by Mr Kariuki in his affidavit which touches on shipments between 14th May 2002 and 4th June 2002.

Mr Okello submitted that the suspension was lifted only to enable the applicant to process and export fish products that were in the cold rooms. While Mr Kinyua maintains that the respondent's letter of 6th May 2002 is clear in its terms that the suspension was lifted without any qualification except the continued regular monitoring of the applicants establishment to ensure compliance. I say so because there are Fish Export Health Certificate issued as late as 20th June 2002 indicating that production dates extended up to late June.

The letter of 6th May 2002 (lifting) cannot be interpreted to mean that the lifting of suspension was limited to the products at that time in the cold rooms. Paragraphs 27 and 28 of the affidavit of Johnson Wainaina Kariuki clearly shows that the respondent allowed the applicant to bring in and to process 500 tonnes of fish after 20th May 2002. The respondent would not have allowed the applicant to do so if the lifting on the suspension was limited to the raw material in the cold rooms on May 6th 2002.

In Mr Okello's submission, the applicant ought to have obtained Fish Export Health Certificates before exporting the fish products. Mr Kinyua disagreed saying that regulation 9(1) only required the applicant to apply – which he did. I would agree with the applicant's view that once the recommended Field Inspection Report, (showing that the fish and fish products have been handled, prepared or processed, packaged, labeled, stored and transported under safe and sanitary procedures) and certificates of analysis are issued in favour of the applicant then the issuance of fish Export Health Certificates is a matter of course. Both Field Inspection Report and Certificate of Analysis were produced by officers directed by the Director and with her authority. The respondent does not say that the applications were not approved. EU Regulation EEC/493/91 lays down the health conditions for the production and the placing on the market of fishery products are fulfilled.

Paragraph 26 of the affidavit sworn by the Assistant Director of Fisheries in the Ministry of Agriculture and Rural Development confirms that on 26th the Competent Authority issued certificates in respect of

the applicant's products in high seas. This point is also emphasized by the affidavit sworn by Abeid Oshan on 19th September. The affidavit shows that the application for the permit was made on 9th May 2002, approved on 14th May 2002 and the product shipped on 17th May 2002. The Health Certificate was yet again issued after shipment. Paragraph 29 of the same (Wainaina's) affidavit establishes that the Fish Export Certificates were and are issued when the application for those certificates is accompanied by the Field Inspection Report and the Certificate of Analysis.

It was submitted on behalf of the respondent that the respondent was wrongly sued and that the respondent in these proceedings ought to have been the Competent Authority and not the Director of Fisheries. Under section 3 of the Fisheries Act Cap 378 the duty and the powers to administer the Act are vested in the Director of Fisheries. The issuance of Fish Health Certificate is an administrative function and that is properly within the province of the respondent. Indeed annex A03 to the affidavit of Abeid Oshan shows that the certificate is issued at Nairobi by the respondent's officer LA Okal and under regulation 14 of the Regulations, the Competent Authority has to lay down the procedure for obtaining the certificates and it is the Director to administer that procedure. It is my considered view that, the powers of the director to administer the Act extend to the administration of the regulations which are themselves part of the Act.

I am satisfied that the respondent's refusal to issue Fish Export Certificate is unreasonable. The respondent is bound by statute to issue these certificates in the circumstances of these proceedings. The respondent's own officers having been satisfied that the applicant had fulfilled conditions specified by the EU regulations.

I therefore grant the application and issue an order of *mandamus* directed to the respondent or her officers to forthwith issue Fish Export Health Certificates to the applicant in respect of the 13 containers of fish & fish products as prayed.

Each party to bear its own costs

Dated and delivered at Mombasa this 1st day of October, 2002

L.P OUNA

JUDGE