



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL CASE NO.251 OF 2001

1. LITTLE JORAH LTD)

2. PEPE LTD)..... PLAINTIFFS

VERSUS

1. KENYA REVENUE AUTHORITY

2. COMMISSIONER OF CUSTOMS & EXCISEDEFENDANTS

R U L I N G

The applicant filed this suit by way of originating summons dated 16/3/2001 and amended on 20/3/2001 under order XXXVI Rule 5 of the Civil Procedure Rules and section 3 and 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

This originating summons was simultaneously filed with an application under certificate of urgency by way of chamber summons dated 16th March, 2001 seeking orders that the Respondent do release container number TEXU 5269049 forthwith for onward transmission to PEPE INLAND PORT.

The chamber summons application was heard on 16th March 2001 and orders as prayed were granted and the container was released and escorted by police and customs officials to Pepe Inland Port.

In this originating summons the applicant is seeking the following orders:

1. An order of declaration that the 1st Plaintiff/Applicant's container Number TEXU 5269049 was not liable to be held or detained by the Respondent at Mombasa.
2. An order that the mode of amendment provided under Rule 24 does not apply to cargo destined for Pepe Inland Port.
3. An order that movement of cargo to Pepe Inland Port is not subject to any other authority or letter from any other person or authority other than from the consignee or notifying party.
4. An order that a manifest is a document whose intent and purpose is to account for the goods.
5. An Order that all cargo shall be treated equally and no special preference shall be given by the service providers, the respondent or any other person or authority.
6. An order that no other formalities or documentation shall be required other than Pepe manifest or where applicable the Shipping Line Manifest to move cargo to Pepe Inland Port.
7. An order of declaration that the Respondents/Defendants are not empowered to detain and/or

withhold goods without giving notice and reasons in writing immediately upon such detention.

8. An order of declaration that the Respondents' acts of detaining the Plaintiffs/Applicant goods without notice and reason in writing are illegal and unlawful.

9. An order of declaration that the Respondent's acts of detaining the Plaintiff's goods without giving the Plaintiff an opportunity to be heard is unlawful and contrary to the rule of natural justice.

10. An order of declaration that the relationship between the Respondents and the importers is not that of the Respondents holding themselves as masters and the importers as slaves but vice versa.

11. An order of declaration that it is improper for the Respondents to criminalize revenue collection.

12. An order of declaration that no other person whether being a public officer or not is entitled to enter the Customs area, to interfere and/or to purport to deal with the importation procedure or goods other than a proper officer.

13. An order of declaration that under the Customs & Excise Act a Police Officer is not a trained revenue collector and is not a proper officer.

14. An order of declaration that an importer or his agent is entitled to pay duties in any office of the Respondent which is near him and that he is entitled to collect his goods from any customs area within Kenya upon production of the official receipt as proof that revenue has been collected.

15. An order of declaration that an owner of goods or his agent is entitled and that it is lawful to pay taxes or revenue in cash irrespective of the amount.

16. An order of declaration that it is unlawful for the Respondents to purport to limit the amount that it may receive in cash for payment of duty.

17. Any other order that this Honourable Court may deem just and expedient.

AND for determination of the following questions:-

1. Whether the Respondents/Defendants in the performance of duties/functions under the Customs & Excise Act Cap 472 Laws of Kenya are subject to the direction or control of any other person or authority other than the Minister.

2. Whether the Respondents/Defendants are empowered under the Customs & Excise Act to force cargo to be verified and/or cleared through Mombasa while the importer wants with just reasons for the cargo to be cleared in the nearest customs point of entry to his premises.

3. Whether the Respondent/Defendant is liable to pay loss and damages incurred to the said cargo due to the unreasonable detention of the said cargo from 16th January, 2001 up to and until the date the cargo will be released.

4. Whether a C10 applies to cargo manifested to Pepe Inland Port.

5. Whether Pepe requires any other documentation from any other person or authority other than a manifest to remove cargo from Mombasa Customs Area to Pepe Inland Port.

6. Whether the Respondents/Defendants have a right or duty to demand that an importer flies all the way to Mombasa to verify goods whose port of clearance is Pepe Inland Port.

7. Whether a Proper Officer performing his functions under the Customs & Excise Act is subject to the direction of another proper officer or any other person or authority.

8. Whether a Proper Officer under the Customs & Excise Act Cap 472 is the sole person empowered to deal and handle imported cargo and cargo for export.
9. Whether any other person be it a government agent and not an agent of the Respondent and/or not provided for under the Customs & Excise Act Cap 472 is entitled to ask for, handle and/or deal with the importers goods and/or documents in any manner whatsoever.
10. Whether any other public officers other than a proper officer under the Customs & Excise Act Cap 472 can under some fancy name or title invade the customs area, undertake the duties of the proper officer i.e. verification, investigation, valuation, handle marked entry copies or demand from the proper officer such copies.
11. Whether other government agents not provided for under the Customs & Excise Act are Proper Officers
12. Whether the Respondents are entitled to receive payment of duty in one station while the goods are in another station.
13. Whether the Respondents are entitled to arbitrary limit cash payments as they please.
14. Whether the Respondents are entitled to cause hardship and degrading punishment to the importers by forcing them to queue for long hours in the bank sourcing for banker's cheques so as to pay duty.
15. Whether an importer whose place of business is in Kisumu and has imported goods at the Port of Mombasa and which goods he wishes to clear at the Port of Mombasa to be delivered to a customer in Mombasa is entitled to pay the duty at the Respondent's offices in Kisumu and only have a dispatch to Mombasa to collect the goods.

The Application is based on the following grounds:-

1. The Respondents have illegally and without lawful cause detained the aforesaid container at the Port of Mombasa.
2. The Respondent's illegal acts and occasioning the Plaintiffs grave loss on a daily basis.
3. The Plaintiffs are entitled to an expeditious determination of the questions raised hereinabove so as to stem losses occasioned to all parties herein by delay.

The application is supported by the Affidavit of Benjamin Kipronoh sworn on 16th March, 2001.

The Plaintiffs/Applicants herein shall be referred to as Little Jorah and Pepe and the Respondents as KRA and the Commissioner.

The dispute herein is that Little Jorah being an importer imported certain goods parked inside Container Number TEXU 5269049, which was discharged by the Shipping Line at Kilindini Mombasa. The goods were to be on forwarded to Pepe Inland Port situated at Athi River as Little Jorah's place of Customs Clearance of the goods.

Pepe is a government authorised Inland Port just like the Inland container Depot at Embakasi operated by the Kenya Ports Authority. Pepe is authorised to on forward goods to its premises through a sub manifest, which it did with the goods in the said container belonging to Little Jorah. However, the Commissioner's officers detained the container at Mombasa and refused to allow Pepe to collect and on forward the said container to Pepe Inland Port Athi River without reason. It is for this reason that both Little Jorah and Pepe felt aggrieved resulting in the present suit.

The counsel for the Plaintiffs referred me to the Affidavit of Benjamin Kiprono and went on to submit that all goods whose sub-manifest has been generated by Pepe for on forwarding uncustomed goods to Pepe Inland Port Athi River for Customs Clearance where all the Customs procedures are carried out and duty is paid and are not liable to be detained for any reason at the Kilindini Mombasa by the Defendants or any other person or authority unless of course the owner decides to clear the goods through the Port of Mombasa where the formalities would be carried out.

He went on to submit that the container and the goods were detained wrongly by the Defendants without lawful reasons or authority and that these Defendants' acts were made in bad faith to frustrate the operations of Pepe.

Section 233 of the Customs & Excise Act provides that:- 233. Notwithstanding anything contained in this Act, the Commissioner may, in order to meet the exigencies of any special case:-

- (a) Permit goods to be loaded on to, or unloaded and removed from an aircraft, vessel or vehicle on such days, at such times, at such places, and under such conditions, as he may either generally or in any particular case direct;
- (b) Permit the entry of goods, and the report or clearance of an aircraft, vessel or vehicle, in such form and manner, and by such person, as he may either generally or in particular cases direct;
- (c) Dispense, wholly or in part, with any requirement imposed on an excise licensee under this Act.

From the foregoing and the Commissioner having gazetted PEPE LTD as an Inland Port under Section 9 of the Act and after the Commissioner having made a clear order to PEPE Inland Port of the manner and form to be used by the 2nd plaintiff, it is therefore clear in my view that cargo to Pepe Inland Port is not liable or subject to any other formalities and that Form C10 does not apply to the goods destined to Pepe. No other Customs formalities shall apply other than the Pepe Inland Port Cargo Manifest and I do hold and declare.

The Commissioner's decision and order that cargo to Pepe shall be moved from Kilindini Mombasa through a Manifest generated by Pepe is the correct interpretation of Regulation 24 and 25 of the Customs & Excise Regulations and further, it is obvious that once cargo has been discharged from the ship of Mombasa, the manifest is terminated unless the cargo was under a through Bill of Lading where it would mean that the carrier has agreed with the Shipper to on forward the goods after they have been discharged to an agreed final destination. In all other cases, the commissioner was right that a new manifest that a new manifest be made as in this case.

Regulations 24 and 108 are to be read together:-

An Application made in form C10 is made to the Proper Officer by the master or agent of an aircraft or vessel to amend the cargo manifest in Form C5 or the outward manifest in Form C2 as the case may be and that must be in respect of goods found to have been shipped short or in excess of the manifest.

A perusal of Form C10 reveals that the heading is "APPLICATION TO AMEND INWARD REPORT/OUTWARD MANIFEST" and the wording contained therein to seek the permission from the Proper Officer are styled as

"Permission is requested to amend the Inward Report/Outward Manifest of the aircraft/vessel by adding/deducting the under-mentioned packages which we declare were not landed in/exported from for the reasons stated hereunder".

The word manifest is not defined under the Act however the Chambers 20th Century Dictionary New Edition defines manifest as:- "a list or invoice of the cargo of a ship or aeroplane to be exhibited at the Customs House or a list of passengers carried by an aeroplane".

Simply, a manifest is a list carried by the transporting vessel or aircraft or Motor Vehicle indicating the count of the items being transported i.e. the number of containers or packages etc.

The Amending of inward reports provided for under Regulation 24 of the Customs & Excise Regulations does not apply unless the conditions precede the amendments of reports made under Regulation 25 are met. Regulation 24 and 25 provide that:-

Regulation 24.

(1) Where cargo reported for discharge at a Port or place in Kenya is found to be in excess or short of the report, or where it is found necessary to make an amendment in relation to the destination, ownership or status of such cargo, the master or his agent may make application to the proper officer for permission to amend the report.

(2) The application shall be in Form C.10 and shall set out the reasons for the discrepancies. 25. Before the proper officer permits the amendment of a report, the master or his agent shall satisfy him in the case of goods found to be short of the report that the goods -

(a) were not shipped; or

(b) were discharged and landed at a previous port; or

(c) were over -carried and landed at a subsequent port; or

(d) having been over -carried, have been returned to and landed at a port in Kenya on the return voyage, or by some other aircraft or vessel which loaded them at the port to which they were over -carried; or

(e) were lost at sea; or

(f) were stolen or destroyed before the aircraft or vessel arrived within Kenya:

Provided that the proper officer may, subject to the production of such documentary evidence as the Commissioner may direct, permit the amendment of a report where the master or his agent is unable to comply with these requirements.

Goods destined to PEPE are liable to Regulation 24 only if they fall within the conditions precedent to the amendment of report provided for under Regulation 25. I therefore hold that the Plaintiffs were not required to make a C10, which is the Application Form for the purpose of compliance with Regulation 24 above quoted.

One of the issues before the Court for determination is whether an importer can pay duty for his goods in one station and have verification or have the customs releasing formalities undertaken in another station upon proof of payment of duty was highly contested by the able counsel for the respondents whose argument was categorical that Customs duty must be paid at the station where the cargo is and the cargo verified and collected from that station, and that it would be impractical to have Customs duty paid in Nairobi and have the cargo be collected from some remote station upcountry where they may not be able to verify the authenticity of the payment receipt which would result in loss of government revenue.

To be able to adjudicate on this point exhaustively, the aid of the principal Act that is the Customs & Excise Act Cap 472 becomes necessary as in my view the place of payment of duties need not be the place of collection of goods and vice-versa. I take judicial notice that in Mombasa, payment of duties is made at Forodha and the goods are collected from Kilindini and in Nairobi payment for goods is made at the Forodha House while the goods are collected from Namanga or Embakasi or from wherever the goods might be. This position is confirmed by Regulations 221 of the Customs & Excise Regulations, which states that:-

“221. (1) Duties shall be paid at the custom house or at such other place as the Commissioner may direct.

(2) Credit notes showing that the amount of duty has been paid into a bank to the credit of the customs and cheques which have been certified by a bank or in respect of which a standing bank guarantee has been lodged with the customs may be accepted in payment of duty”.

The Regulation empowers the Commissioner to choose or direct where the duties shall be paid and where the goods shall be collected. Therefore I find it lawful for any persons to make payment of duties at the Custom House or at any other place where the Commissioner may direct and as long as there is a genuine receipt showing that the amount of duty has been paid then the goods whose duty is as shown in the receipt can be collected from any place they are at. The question relating to who should be given information or who should be allowed to deal or have information or documents relating to the business of the importer was raised on the basis that there are so many other government servants who are not provided for or empowered under the Customs & Excise Act to perform the functions thereby interfering with the functions of the enforcement of the Act and the said interference is causing delay in releasing the goods thereby creating a conducive ground for corruption. In the circumstances, it is proper to say that matters relating to Customs & Excise are connected to business activities and should therefore be dealt with the most confidentiality and in my view that is why Sections 7(1) (c) and 8(a) of the Act were enacted which provide that

7. (1) An Officer who -

(c) discloses, except for the purposes of this Act or when required to do so as a witness in a court or with the approval of the Minister, information acquired by him in the performance of his duties relating to a person, firm or business of any kind, Shall be guilty of an offence and liable to imprisonment for a term not exceeding three years .

8. Notwithstanding any other provisions of this Act, the Commissioner may -

(a) disclose information to a person in the service of the Government in a revenue or statistical department where the information is needed for the purposes of the official duties of that person solely for revenue or statistical purposes; and

From the foregoing Sections of the Act it is clear that the information touching on importation documents or information is restricted even to other persons in the service of the government except to those persons employed in revenue or statistical departments and that information shall not be for any other purpose other than where it is needed for the official duties of that person solely for revenue or statistical purposes.

Information related to customs or goods should only be made available to the persons in government service related to revenue and statistics. It is my view that a Police Officer is not a Proper Officer to perform the functions under the Customs & Excise Act and is not entitled to perform the functions under the Act, handle and/or process documents. The legislators were of this view when they gave all the powers, rights and privileges of a Police Officer to the Proper Officers under the Customs & Excise Act. Further, a Police Officer who has not taken the oath prescribed under the 10th Schedule of the Customs & Excise Act is not competent to perform the functions or to handle or to be in any way involved with the Customs formalities under the Act.

The Customs and Excise laws are very clear that all imported goods and goods for export shall be held in a Customs Area and shall be dealt with under the direction and control of the Proper Officer meaning that these functions are the exclusivity of the Proper Officers and can only be dealt with by the Customs and Excise Act. It is an offence for any other person including the Proper Officer to give or provide information acquired by him/her in performance of their duties relating to a person, firm or business of any kind. This position is clearly laid down by Section 7(1)(c) above quoted. It is improper for other government agencies or public officers to engage or purport to perform the duties provided for under the

Customs & Excise Act while they are not officers appointed under such an Act e.g. it has been submitted that certain officers like the Efficiency Monitoring Unit, MAST, Intelligence Agencies, CID, SWIPCO and the Kenya Bureau of Standards are such government agencies engaged in activities within the Customs Area. Such officers are not authorised under the Customs & Excise Act to handle or deal with any information related to any person, firm or business of any kind. It is a fact that such involvement will not only create unnecessary bureaucracy but will create a conflict of interest thereby interfering with the efficiency and expediency of the importation process. The importation process should be simple so as to encourage the importers.

A perusal of the Customs & Excise Act reveals that the functions of the commissioner and proper officers include discretionary powers which cannot be reassigned to the other government agencies mentioned herein before and in particular the Commissioner has powers to compound offences when a person has committed an offence under this Act.

The Commissioner or Proper Officer is empowered but the Act to constitute a court and to deal with matters as he deems fit i.e. he can impose a fine or cause the goods to be forfeited and all the taxes to be paid or he can cause the goods to be released to the importer.

The proper officer is further empowered to release goods provisionally without fail or proper documentation or to release goods temporary without duties having been paid on terms and conditions that he may impose.

These discretionary powers are meant to facilitate trade and to encourage commerce and cannot be exercised by other government agencies other than the officers appointed under the Customs & Excise Act.

It is therefore my view that all other government agencies other than those provided for under the Act are prohibited from purporting to perform the duties provided for under the Customs & Excise Act including any attempt to acquire any information relating to any person or business unless it is for the purposes clearly provided for under the Customs & Excise Act.

I have heard and considered the submissions by learned counsels for the Plaintiffs and the Respondents and I find that in the light of the facts of this case, the Plaintiffs' container No. TEXU 5269049 was not liable to be held or detained by the Respondents at Mombasa.

- Containers under PEPE Manifest are only to be verified at the PEPE Inland Port and Regulation 24 only comes into operation once PEPE takes over the Cargo and before it is discharged at the Port, therefore movement of cargo to PEPE Inland Port is not to be subjected to any other procedure save for the PEPE Manifest. On this finding orders 2-4 are granted.

- The 1st Defendant is a public body corporate and the 2nd Defendant is a public servant both who are empowered to perform public duties/services fairly and without discrimination whatsoever meaning that all cargo dealt with by the Defendants has to be given equal treatment. It is not disputed by the Defendants that all cargo to the other ports, other than to PEPE is not verified or held by the Defendants at the Port of Mombasa. The Defendants also admitted that Cargo to the Kenya Ports Authority operated Inland Ports is never verified at the Port of Mombasa.

- The Defendants being persons performing public duties are obliged to give reasons in writing as to why they have withheld cargo that they are not entitled to hold without reason.

- All imported goods are kept within a Customs Area and the law is quite clear that the Customs Area is under the control of the Proper Officer and not other person is entitled to enter or no person is empowered to deal with the goods or customs documentation other than the Proper Officer. Section 2 of the Act defines a Proper Officer as:-

“an officer whose right or duty it is to require the performance of, or to perform, the

act referred to.”

- A proper officer before engaging in the performance of his duties under the Act must first of all take the Oath of his office as prescribed by the Act under the 10th Schedule thereof. Any person who has not taken the said oath of office and is not a proper officer cannot perform any of the duties under the Customs and Excise Act and it does not matter whether he is a police officer or otherwise. Therefore the proper officer in performance of his duties under the Act is not subject to the direction or control of any other person or authority save for the Commissioner or the Minister.
- The Defendants’ duty under the Act is in the main to collect revenue, which revenue is paid in legal tender, that is to say in Kenya Shillings and in my view, any importer is entitled to pay import duties in the said Kenya Shillings without limitation. The agreement by the Defendants that they are entitled to limit the amount of duty payable in cash due to insecurity is without merit as they are a government establishment and should be able to make adequate arrangements to protect its cash.
- The issue as to where an importer should pay duty and where he should collect the cargo was highly contested. I will take an example from the Income Tax Department which is extremely efficient in that it has structured itself in such a manner that one need not go to their offices to pay for their income tax as they have given the tax payer the freedom to assess himself and can either pay the tax amount at the offices of the Income Tax or at their account at the Central Bank of Kenya or at any of their bank accounts in any local bank or branch. Similarly, in this age of computerization the Customs & Excise Department should also be able to receive duties in any of their offices and an official receipt should be prima facie evidence of such payment. It was argued by the Counsel for the Plaintiffs that at present duty for goods entering through Lunga Lungu, duty has to be paid in Mombasa and this being the case, I am in agreement with the Counsel for the Defendants that duties should be paid at the places designated by the Commissioner in case of small border entry points which are not or cannot be economically computerized. The duties should be paid at places designated by the Commissioner. However for the bigger stations, I am of the opinion that the importer is entitled to pay duties at Mombasa or Nairobi or Kisumu and be able to collect his goods from any of these places. I see no reason or complication as to why duty cannot be paid in Mombasa and the goods verified and released by the Proper Officer at Nairobi or PEPE after a valid customs receipt of payment has been produced.

I have had opportunity to go through the relevant provisions of the Act, which I find to be precise and unambiguous.

In addition the Act gives the proper officer very wide discretionary power which when exercised as required by the Act are meant to make the work of both the importer and the importing climate palatable and this ought to be encouraged. Having determined all the issues raised in this application I grant all the order sought by the applicant.

These are the orders of this court.

Dated at Nairobi this 10th day of May, 2001.

J.L.A OSIEMO

JUDGE