REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Appli 383 of 1995

ROYAL MEDIA SERVICES (LTD)……..…….. PLAINTIFF

V E R S U S

COMMISSIONER OF CUSTOMS & EXCISE …… DEFENDANT

R U L I N G

There are some undisputed or undisputable facts of this matter. It shall be advantageous to enumerate them at the outset.

In the year 1990 various Television and Radio electronic broadcasting equipments were imported in the name of Kenya Television Network (referred to as 'KTN' hereinafter). The imported goods were stored vide various warehouse entries. KTN applied for exemption/remission of payment of duty. Pending the formalisation of exemption application one Jared Benson Kangwana a former chairman of KTN sued KTN claiming ownership of the imported goods. The cases filed by him were H.C.C.S Nos 4517 of 1994 and 4529 of 1994. Although I do not have the details and nature of Kangwana's claims made in those suits, he obtained an order of release of those goods in H.C.C.C.S No. 4529 of 1994.

Thereafter the present applicant Royal Media Services Ltd (referred to as 'Royal Media 'hereinafter') came into picture in 1994. Kangwana entered into a sale agreement with Royal Media agreeing to sell some of the imported goods at an agreed purchase price. The goods sold were 53 packages and were later released to Royal Media contained in Ex- Warehouse for home use Custom Entries Nos, 0675, 0676, 0677, 0678, o680, and 0683.

The new twist followed in this Saga when KTN sued first Kangwana and later Royal Media in H.C.C. S. No. 1058 of 1995.

The three parties were represented in the said case. But at several stages the Advocates not on record intervened and exchanged correspondence.

On 20th March, 1997 M/S Kilonzo & Co. Advocates representing KTN and M/S Makhecha & Co. Advocates representing Kangwana recorded and filed a consent in H.C.C.S No. 1058/95. The consent order was to the effect that the parties have settled the matter with no order as to costs. Royal Media was not a party to the said consent. That is the reason M/S Kiplagat and Associates who represented KTN in Receivership tried to file a triparte consent order in that case. Because of the different firms of Advocates on record the said consent was not signed by all the three parties. However, M/S Kamau, Kuria & Kiraitu Advocates did sign that consent letter. Unfortunately, the said consent letter is not before me in this matter.

However, a letter dated 21st October, 1999 enclosing the said consent order addressed by M/S

Kiplagat & Associates Advocates to M/S Kamau Kuria & Kiraitu Advocates for Royal Media is before me. I shall revert to the implication of its contents as all the parties rely on them in support of their diametrically opposed contentions.

In any event, pursuant to the consent order filed in H.C.C.S. No. 1058 of 1995, several correspondences were exchanged focusing on the release of the goods. Kangwana wrote a letter on 24th March, 1995 confirming the sale to Royal Media and delivery of the goods to him which were cleared on 3rd March, 1995 and subsequently delivered to Royal Media. Thereafter the Commissioner of Customs and excise was asked to collect whole of the duty on the imported goods by a letter from Treasury of 6th March, 1995. Immediately on its receipt on 9th March, 1995 a notice of seizure was issued to Kangwana and fifty five packages were seized pursuant to the said notice from the godowns situate at Kikuyu Town. The goods were kept there on instructions by Royal Media.

Nothing is before me to show any prior notice of demand of rates either to Kangwana or Royal Media from the Department of Customs & Excise. Royal Media were restrained from asking for release of goods by court orders and subsequent demand of rates from it was made on the whole consignment. By a letter of 8th May, 2000 the Commissioner demanded a duty of whooping Kshs.256,146,955/= within 14 days failing which the goods were threatened to be sold.

The above in short are the facts which are uncontroverted. I may also add here that at an advanced stage of the hearing of these proceedings KTN filed an application (under Order 1 rule 10 of Civil Procedure Rules) to be enjoined in this suit as Defendant (sic) claiming to be the legal owner of subject matter of this cause. The application was contested and argued on several legal and factual issues. However, at the fague end of the hearing of the said application Dr.Kiplagat specifically submitted that KTN is not interested in claiming or furthering its claim on the goods. What KTN intends is to place before the court all the material facts and documents by way of that application. That intention also was confirmed by KTN's lack of representation in further hearing of these proceedings.

Dr. Kuria also conceded that in view of the observation made by Dr. Kiplagat an appropriate ruling be made by me in this main ruling. I am thus justified in finding that KTN is allowed to place the materials before me by way of the said application even though filed at a late stage and supporting affidavit of Andrew Gregory sworn on 19th February, 2001 along with its annexures and I also find that by so doing KTN is not furthering its claim on the subject matter of this cause i.e. goods claimed to be owned by Royal Media.

In the backdrop of the above facts Royal Media has filed these proceedings. The pleadings whereof include:-

(1) Originating Motion dated 12th April, 1995.

(2) Grounds of opposition to the above application dated 25th April, 2000.

(3) Notice of Motion dated 17th May, 2000.

(4) Replying affidavit of G.M. Kitenga sworn on 14th June, 2000.

(5) Further affidavit of S. K. Macharia sworn on 23rd June, 2000.

(6) Chamber summons filed by KTN with affidavit and its annexures of 19th February, 2001.

(7) Replying affidavit of S.K. Macharia sworn on 15th March, 2001.

It is apparent that the first application of 12th April, 1995 was filed pursuant to the sale agreement between Kangwana & Royal Media, subsequent suit being H.C.C.S No. 1058/1995 and seizure of goods delivered to Royal Media by Kangwana on 9th March, 1995 under the notice of seizure by the Commissioner of Customs & Excise the Respondent herein. At the time of filing this application it

emerges that Royal Media was not joined as a Defendant in the said suit. However, the exparte injunction order was made against it. Anyway later on Royal Media was made a party to the said suit. The negotiations culminated in consent orders as specified hereinbefore.

Thereafter several correspondence were exchanged between the concerned parties with the Commissioner but the Commissioner did not change its position of seeking payment of duties on the whole consignments plus penalty and storage charges from Royal Media before the seized goods could be released to Royal Media. KTN's letter of 21st October, 1999 was relied upon by Royal Media to ask for release. The pleas of Royal Media not to charge penalty and storage charges in view of the order of the court, trespass committed by the Commissioner by unlawfully seizing the goods as well as the fact that only a part of consignment was purchased by Royal Media were not heeded by the Commissioner.

I must add here that the reference of the payment of duty made by KTN in its aforesaid letter cannot deter Royal Media to make its claims which are made by these applications. Consequently, the application dated 17th May, 2000 was filed for interim reliefs which is for determination before me. The real issues before me so far as that application is concerned are whether the seizure of goods lying in custody of Royal Media on 9th March, 1995 was lawful and whether the injunction can be issued by me against the Respondent as prayed in the application.

Dr. Kuria formulated his submissions in support of the application by urging that the goods seized were the property of Royal Media on 9th March, 1995. The seizure was in pursuance of Notice of Seizure issued under customs and Excise Act. It is annexed to the replying affidavit of G. M. Kitenga as G.KM. 8. The ground for such seizure was stated and it was contended that the seized goods were uncustomed goods contrary to section 185 and liable to forfeiture as read with Section 196 of the Act (Cap. 472).

No prior notice that duty is payable or of its demand is given either to Kangwana or Royal Media. Since the seizure the goods are held by the Commissioner pending finalization of the payment of claimed duties.

Dr. Kuria stresses that such seizure is unlawful as it offends the provisions of section 75 of the Constitution. He admits that sub-section (6) (a) (i) of section 75 of the constitution does authorize taking possession of or acquisition of property "in satisfaction of any tax duty, rate, cess or other impost" but he urges that taking of possession or acquisition of property should be reasonably justifiable in a democratic society. Dr. Kuria took me through authorities to substantiate unjustification of seizure and demand for payment on the whole consignment from Royal Media with penalty and charges.

Mr. Ontweka outlined the facts by going through several correspondences. According to him Demand was made by letter of 8th May, 2000 and that demand was on the whole consignment. According to him seized goods became uncustomed on cancellation of exemption by KTN. Once KTN had shown its inability to pay the duties goods were abandoned and were liable to be sold. In the said letter a sum of Kshs.256,146,955/= is demanded which includes the charges contested by Royal Media.

Mrs Madahana urged that before this court proceeds to grant prohibitory and mandatory injunctions prayed for in this case it should satisfy itself that:-

(1) The legal right is in existence and

(2) That right is infringed by the commissioner.

She also raised an issue as to competence of the application. She submitted that because Royal Media is a Limited Liability company, it is trite law a resolution should be passed to authorize the counsel to represent it before this court. No such resolution is before this court. Relying on the authority of Bugerere Coffee Growers Ltd. V. Sebaduka and another (1970) E.A. U. 147, she urged me to dismiss the application. With respect to her, I am unable to agree with her submissions. The case relied by her is not pertinent or relevant to this cause. In the said case, a specific point was raised in the defence that the Advocate on the record has no authority to conduct the case. Obviously in the face of the specific issue

raised in the defence, the Advocates for the plaintiff had that burden to discharge. There is no such specific issue raised by the Respondent either in Grounds of objections or in replying affidavit. No such objection was pointed out to me by her. I shall be making a very serious inroads in the legal procedure if I allow a random contention to strike out the substantive suit without appropriate application. I therefore at the outset disallow that objection.

Similarly I should also reject her contention that Royal Media is not active in getting these proceedings heard since 1995. I think she is begging a question. The Commissioner objected to the filing of Originating Summons by Royal Media being immature pending determination of H.C.C.S 1058/95. The bulk of correspondences placed on record by all the three parties do suggest at least one thing and that is Royal Media tried its best to reach a settlement or conclude this matter outside the court by all the means at its disposal. Royal Media filed this application for interim orders only after it downed upon it that the Commissioner is not going to see its part of the case. Thus there is no delay which shall make Royal Media unworthy of equitable remedies sought by it.

The above observations leave me with substantial issues namely whether the court has jurisdiction to grant injunction against the Government or the Commissioner as prayed by Royal Media and if so whether Royal media has established its right and its infringement by the Commissioner to enable this court to issue the orders as prayed.

I should have first endeavoured to deal with the first issue. However, as I shall be chartering across untrodden path, it would be advisable for me to take up the second issue first i.e. whether Royal Media has established its right over the property and whether the commissioner has infringed that right.

The facts narrated hereinbefore and the correspondence and documents placed on record of this suit do suggest undisputably that Kangwana was delivered the Exwarehouse goods held in custom warehouses and that some duties were paid before such release. However, as KTN, because of the fact of pending litigation, indicated that it is not pursuing further its application for partial exemption of duties, there was direction by the Treasury to the Commissioner to levy full duties on 6th March, 1995. Those goods delivered to Kangwana on 3rd March, 1995 were placed in possession of Royal Media in pursuance to the sale agreement made earlier. When they were so held by Royal Media, on 9th March, 1995 they were seized by the Commissioner under a Notice of seizure addressed to Kangwana.

Thereafter the saga of negotiations amongst KTN, Kangwana & Royal Media commenced. The short and long of that saga is that Royal Media was asked to pay the duties, charges and penalties on the whole consignment. The Notice of demand for the duty is issued to Royal Media and notice to sell the goods contained in those 53 packages is also issued to Royal media, KTN, although made an application to be joined in as a party based on its legal right, withdrew its claim of any further right through its counsel during hearing of that application. Kangwana has not shown any interest except to write a letter to the commissioner after the seizure that the goods were sold to Royal media and were in its possession on the date of seizure.

It does not require a great acumen legal or otherwise to find that Royal Media has prima facie proved its right over the goods which were seized and are now being threatened to be sold in failure of the payment of the duties demanded.

Let us now revisit the manner in which the goods which prima facie belonged to Royal Media were seized.

Mrs Madahana while submitting that procedure of the Act should be followed relied on the provision of section 158 of the Custom and Excise Act. That section deals with the procedure to be followed in case of short levy of duty or refund of excess payment. It is, in my mind, undisputable that in actual terms the goods were seized on the ground that they were short levied, as the application for partial exemption was withdrawn by KTN. The letter dated 6th March, 1995 does state about the release of goods on duty reduced basis and thus confirms the payment of some duty on those released goods. The goods were released to Kangwana on his assertion to be their legal owner. On 8th March, 1995 a letter

was written on behalf of the Commissioner to the Manager of Transami who released the goods to Kangwana. The Commissioner by that letter was seeking the delivery of documents concerning those release. The said company responded to the said letter by its letter of 14th March, 1995 enclosing those documents. But in the meantime the goods were already seized on 9th March, 1995 under the notice of seizure. These facts irresistibly point to the fact that no investigation was really carried out as contended by the Commissioner. The officers of customs Department just pounced on those goods and seized them.

I need not comment on the reasons for such speedy action which to any reasonable person seem to be obvious.

Let us come back to the provisions of section 158. Section 158 (1) specifically provides for the demand by the proper officer to pay the amount short levied.

Sub-section 2 of the said section provides remedy for such non-payment after the demand. No such procedure was followed in this case.

Furthermore no averment is before me to show that the disposal of the goods by Kangwana to Royal Media was in a manner inconsistent with the purpose for which they are granted relief from duty. {(See section 155 (1)} to make them uncustomed and liable for forfeiture. (See Section 155 (4)). Royal Media in any event has shown that Kangwana declared to it that the duties are paid on the goods sold. Mrs Madahana's contention that if there is a dispute as to what duties are payable Royal Media should pay first and then seek intervention of the court cannot hold water in view of the clear wordings of section 159 of the Act which only speak of the dispute before the delivery of goods from custom control. Royal Media was already delivered goods by Kangwana after they were released or delivered to him by the custom. Even if my above observations are found not to be appropriate or right, and it can be said that the seizure of the goods were as per provisions of section 185 and 196, the Commissioner has not even followed the procedure laid down by the Act after such forefeiture. It is not contended that the goods were seized in the presence of Kangwana or in the presence of any representative of Royal Media. If so, the Commissioner has not followed the procedure provided under Section 200 of the Act to give either of them opportunity to follow their respective claims. It is also apparent that the Commissioner has not charged either of them as per the provisions of the Act. (See section 185) The letter of 24th March, 1995 by Kangwana do confirm the above observation.

With these facts before me I can safely say that the right of Royal Media is infringed. It is to be determined whether such infringement was as per the aspirations of the maker of the Constitution as envisaged in its Sections 75, 76, 77 and 84 (2).

The Constitution itself gives power to the Commissioner to take possession of or acquisition of property in satisfaction of any tax, duty, rate, cess or other impost. However there is a proviso to the exercise of that right to the effect that the provision of Law or the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society. Similar provisions are made in respect of power to search or entry in the premises of a person. (See. Sections 75 & 76).

Both the counsel have elaborately submitted to substantiate their respective stands and have cited many authorities.

Mrs Madahana relied on section 16 of the Government Proceedings Act (Cap 40) and Sections 155, 158, 185 & 196 of the Customs & Excise Act (Cap 472). She submitted simply that as Section 76 (2) (c) & (d) of the Constitution permits the Commissioner to take possession of the goods, this court cannot go into the question of duties and is duty bound to accept the quantum and demand thereof. None of the counsel representing the Commissioner has commented on the constitutionality or legality of the action of seizure by the Commissioner.

They have taken shelter behind the provisions of the two Acts without justifying the same against the specific provisions relied by Dr. Kuria. I have also specified that the Commissioner has also not followed the provision of Custom & Excise Act. They want this court to declare them as sacrosanct per se. Mrs

Madahana also tried to show that the Constitution has concurred with the provisions of Section 16 of the Government Proceedings Act by relying on Act No. 21 of 1966 which amended several provisions of laws but did not amend the said section. The authorities cited by Mrs Madahana – specially in the case of Rwigara Assinpol v. Commissioner of Customs & Excise H.C.C.S. No. 2786/92 and Nemu Investment Limited V. Jacob Matipei H.C.C.S. No. 1275 of 1999 (both unreported) do not help me as the facts in those cases are clearly distinguishable and the points raised before me were not before the learned Judges who decided those applications. Royal Media is seeking declaratory remedies against the Commissioner on the seizure of goods on 9th March, 1995. The suit filed by Originating Summons is still to be determined.

As I have specified hereinbefore Royal Media has shown a prima facie case that its proprietory rights are infringed using wrong procedure and that in the meantime while the issue is to be determined by the court the powers conferred under the Custom & Excise Act are being enforced in a discriminatory and undemocratic manner by the Commissioner. In Metalinga's case (1972) E.A. K. after finding that there is no justifiable dispute the court observed that mandatory injunction cannot be granted against the government. In nutshell Royal Media is threatened with the sale of its goods, unless the payment of duties on the whole consignment as against 53 packages purchased by Royal Media) along with the storage charges and penalty on the said duties are paid.

Does this court sanction this action by the Commissioner and is this court absolutely helpless or powerless against the clear arbitrary action taken by the Commissioner?. Mrs Madahana tell me that is so.

Dr. Kuria urges that it is not so. He contends that our Constitution is developing. In any event our Constitution has under its section 3 recognised or proclaimed its supremacy over all the Acts of Parliament in so far as they are inconsistent with the constitutional provisions. After declaring the Bill of rights (See Section 70 to 83). the constitution has provided remedy for any infringement thereof under Section 84 and its sub-section 2 thereof gives power to the court "to make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70 to 83 inclusive"

I entirely agree with Dr. Kuria and state that any judiciary worth its salt should grasp and uphold the letters and spirit of the Constitution of its country and stand as a strong wall against any action of the officials of the Government which is irrational, capricious or arbitrary and term the same as unconstitutional. I shall whole heartedly agree with what Justice Suba Rao warned that "official arbitrariness is more subversive of the doctrine of equality then statutory discrimination. In respect of a statutory discrimination one knows where he stands, but the wand of official arbitrariness can be waved in all directions indiscriminately."

I shall echo the firm stand taken by Hon. Chief Justice Mr. Bernard Chunga in the case of Peter Mwangi Githibwa V. In the matter of the Chief Magistrate, Nairobi Misc. Criminal Application No. 877/2000 (Unreported) when he said:

> ***"I want to stress, once again in this ruling, that the courts in this country are going to be firm, strong and fearless in the discharge of their Judicial duties in accordance with the Constitution and the Judicial Oath of office. I want to stress also that the courts in this country will never, on any occasion, implement or give effect to any law which is in conflict with the Constitution. Interpretation of the Constitution and other laws as well as protection of fundamental or Constitutional rights, are functions of the Courts, given to us by Sections 67 and 84 of the Constitution of Kenya. The courts will discharge those functions firmly and vigorously no matter the ridicule, derisions and invectives needlessly thrown in their faces. "***

Thus in my humble view, section 16 of the Government Proceedings Act which is an Act of Parliament cannot prevent me from granting appropriate order in appropriate cases

Does those words of the Constitution empower me to grant interim injunction against the

Commissioner under appropriate circumstances and are the circumstances of this case appropriate to grant such order?. Mrs Madahana relied on the case of Jaundoo V. A. G. of Guyana (1971) A. C. 972 to submit I cannot . Dr Kuria also relied on the said case, and in my view rightly so. The dictum and subsequent provisions made to the effect that injunction cannot be issued against the Government were based upon the reason that the court exercises it authority on behalf of the crown and accordingly it shall be incongruous that the Government should give orders to itself. In my view it begs the question. However in the same case it has been recognized that similar injunction- can be given against an official of the Government, and I quote a passage on page 985 of that case.

> ***A declaration of rights unlike an injunction, however, is not a suitable form of interim relief pending final determination of the landowner's application. But if the matter were urgent, it would have been open to the land owner to add, as an additional party to the motion, the Director of Works or the Minister in whom the powers of the Director of Works under Roads Ordinance are now vested, and to claim an injunction against him. This would give the court jurisdiction to grant the interim injunction if the urgency of the matter so required. This was the course adopted in the Canadian Case of Carlic V. The Queen and Minister of Manpower and Immigration (1968) 65 D.L.R.. (2d) 633, although their Lordships do not accept as correct that the interim injunction granted in that case should have been expressed to be against both defendants instead of against the Minister to the exclusion of the Quee*n.**

The case of M. V/S. Home Office and another (1993) 3 ALL. E.R. 537 definitely makes a clear distinction between the Government and its officials and recognizes the power of the court to grant interim orders as well. Section 206 of the Customs & Excise Act makes the Commissioner a representative of all the officers of his Department. I am aware that the said case was determined on an application for Judicial review similar to Order LIII of Civil Procedure Rules. However in M/S case powers of the court was enlarged and injunction which was granted by a Judge prior to leave to apply for judicial review was upheld by the House of Lords.

On pages 563 & 565 of the said case it was observed and I quote:-

> **"The power of the court to grant interim injunctions is linked to the power of the court to grant final injunctions**
>
> " (In this case the injunction is prayed by way of declarations.)
>
> *and*
>
> ***"In the case of Civil proceedings, there is recognition of the Jurisdiction of the court to grant interim injunction before the issue of write, e.t.c. (see order 29 to 1 (3) and in an appropriate case (emphasis mine) there should be taken to be a similar jurisdiction to grant interim injunctions now under order 53."***

By a letter of 19th July, 2001 addressed by Dr. Kamau to the Registrar of this court, I have been asked to consider a recent privy council case Gairy V. Attorney General of Granada. The gist of this case is that historic common law doctrines restricting the liability of the crown or its amenability to suit could not stand in the way of effective protection of fundamental rights guaranteed by the state's Constitution. The Judges in that case gave mandatory orders against the state.

Mrs Madahana responded to the above authority by contending that where other adequate remedy to wit an order of prohibition under Judicial Review is available, provisions of Section 76 (2) (c) of the Constitution and Government Proceedings Act are not inconsistent with the Constitution. I am not sure whether the applicant who has already filed a Constitutional cause should be asked to file another proceedings under Order LIII when the Constitution Cause is pending hearing. Multiplicity of proceedings cannot definitely be envisaged as an appropriate remedy or under the policy of this court

when the Constitution itself has granted a remedy to the affected or aggrieved party. I do not think Gairy's case stipulates that proposition. I am also of an opinion that if under Order LIII of Civil Procedure Rules this court can grant leave operating as stay of any threatened action of the authority this court can do the same in the case filed under the Constitution.

Mrs Madahana lastly made an attempt to thwart the application by submitting that as none of the provisions of the Acts aforesaid are prayed to be declared unconstitutional, the application cannot be granted. I do not agree with her on two fronts. Firstly, this is an interlocutory application in the matter and secondly the provisions of Section 84. (2) are very clear. I, therefore, am of an humble opinion that I cannot be stopped from granting the prayers on that ground.

Over and above the above propositions more importantly this court has been given power to make any order which is appropriate under the constitution. I may also observe that most of the cases referred to me by Mrs Madahana involved the issuance of mandatory injunction.

Be that as it may, I am not persuaded that because of the provisions of the Acts pointed out to me, this court is barred to issue appropriate interlocutory orders. To uphold that would be an affront to the provisions of the Constitution, the rule of law, due process and the powers of this court to check and restrain abuse of the process of this court.

I am however not persuaded by Dr. Kuria that Royal Media has made out a case for mandatory injunction by directing the release of goods seized since 1995. No specific averment as to the damages suffered by Royal Media is before me. In any event it has done away without the goods since 1995 although in pursuance of the actions of the Commissioner.

The upshot of all the above is that I am satisfied that Royal Media has made a case to enable me make an interlocutory order directing the Commissioner, his agent and/or servant not to sell to any person the radio and Televisions equipment described in schedule A. of Exhibit SKM 3 annexed to the supporting affidavit of Mr. Samuel Kamau Macharia sworn on 12th April, 1995 until this case is heard and determined. I shall reserve the order on costs pending determination of the suit.

Orders accordingly.

At the end of this ruling, I shall like to express my sincere gratitude to all the counsel for their valuable assistance.

Dated and delivered at Nairobi this 18th day of July, 2001.

K. H. RAWAL

J U D G E