



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION NO.114 OF 2001**

**REPUBLIC.....APPLICANT**

**V E R S U S**

**1.COMMISSIONER OF CUSTOMS & EXCISE.....RESPONDENT**

**2.EX-PARTE: MUCHIRI NDIRANGU t/a FRANK FREIGHTERS**

**R U L I N G**

The applicant is the General Manager of FRANCH FREIGHTERS LTD., a firm duly licenced by the Commissioner of Customs and Excise to carry out business of Clearing and Forwarding. On the 7th May, 2001 in the course of his duties he lodged import duty documents with the Customs Longroom Mombasa which were processed duly assessed and passed and he paid all the required duties and taxes. The respondent refused to release the cargo and on the 6th June, 2001, he received a demand order requiring him to make a second payment for the same goods alleging evasion of duty. This prompted the applicant to come to court with this application for orders of certiorari and prohibition to correct or arrest the double payment of duties and taxes. In his application the applicant seeks the following orders:

- 1. That the applicant be granted leave to apply for an order of certiorary to remove to the High Court for purposes of quashing the decision made by the respondent contained and effected in the letter dated 6th June, 2001 demanding or requiring double extraneous, unwarranted and unreasonable payments on import entries whose duties and taxes had been paid for in full by the applicant.
2. That the applicant be granted leave to apply for orders of prohibition restraining and prohibiting the respondent from demanding double payments of duties and taxes on import entries whose duties and taxes have already been paid for in full by the applicant.
3. That the applicant be granted leave to apply for an order of prohibition prohibiting the respondent from revoking the applicant's Clearing and Forwarding licence or in any manner whatsoever and howsoever from preventing the applicant carrying on with his trade out of him for not making payments of the double extraneous, unwarranted and unreasonable payments of duties and taxes that the applicant has already lawfully paid and has already taken delivery of the cargo.
4. That the grant of leave for the above orders of prohibition and certiorari do operate as a stay of any further proceedings or actions by the respondent to demand or require double extraneous duties and taxes of previously paid for import cargo by the applicant.

Before this application was heard the applicant was served with more demands for double payments of duties and taxes. Those later demands were admitted by consent and now will be considered along with the previous demand which is the genesis of this application. They are the following:-

Import entry No.1602 of 10th May, 2001.

Import Entry No.1591 and No.1592 of 10th May, 2001.

Import Entry No.1626 of 10th May, 2001.

For the above Import Entries, the cheque used to clear the goods

was Cheque No.014407 of 23rd April, 2001 belonging to KOBIL OIL KENYA LIMITED and the amounts were Kshs.569,873.00, Kshs.3,032,382.00 and Kshs.141,315.00.

The applicant further told the court in his evidence that since the filing of this case, he has received further demands from the respondent in respect of the following cheques:-

Cheque No.26549

Cheque No.413355

Cheque No.013170

Cheque No.013173

Cheque No.26117

Cheque No.03860

Cheque No.012075

Cheque No.012093

Cheque No.413139

Cheque No.413684 and

Cheque No.26549 whose amounts were not disclosed involving the following companies:-

KTAM AND CREATIVE INNOVATIONS, MEGINA HOLDINGS, BRAND IMPORTS/SHAH DILPUN.

As I have said earlier it was alleged by the respondent that the applicant had evaded duty in all the above transactions. Tax evasion occurs where duty has not been paid

There is no allegation of stolen cheques.

The first question is whether the bank honoured the cheques and if the cheques were honoured, then the duty was paid and there is no evasion of duty. As I understand the Commissioner of Customs does not receive personal cheques or un-guaranteed cheques meaning that if the cheque paying duty is dishonoured, the Commissioner does not revert to the importer but to the guarantor. However, from the pleadings herein this is not the case.

A casual perusal of the Customs & Excise Act reveals that the Commissioner is not liable to accept customs entries presented by the importer or a Clearing Agent. He has the discretion to accept or reject

the documents.

The Respondent's case as demonstrated by its pleadings is that Messrs. Kobil Petroleum Limited had 82,365,275 metric tons of crude oil attracting import declaration fees and duty amounting to Kshs.37,474,949/- which was paid to the Commissioner of Customs & Excise by cheque number 014407 belonging to the said Messrs. Kobil Petroleum Limited.

By the Affidavit of James Mwanthi Nguli filed on 5th July 2001 and sworn on the same date on behalf of the Respondent he admits that the said cheque number 014407 was given and accepted by the Respondent as payment of Import Declaration Fees and duty amounting to Kshs.37,474,949/- by Messrs. Kobil Petroleum Limited. The Respondent seems to be saying that once its cashier received the said cheque, the cheque was not banked but was stolen or the said cheque was banked and stolen from the Respondent's bank.

The Respondent goes further to aver that the same cheque was used by the Applicant to make payment for duty on or about the 7th May, 2001 for Michelin Tyres on behalf of Kingsway Tyres Limited duty amounting to Kshs.1,069,247/- where the Respondent issued receipts Numbers 360348 and 360349 in respect of entries numbers 1591 and 1592 of 10th May 2001 and Numbers 022 and 023 respectively.

The Respondent admits as a fact that it received the cheque number 014407 paid to it and therefore I hold that there is no evasion of duty in respect of the said cheque.

There is no allegation or proof of theft of the said cheque No.014407 from either the Respondent or its bankers or from Kobil Petroleum Limited. In my view therefore this eliminates any possibility of either double usage or banking by the Applicant.

It is alleged that the Applicant used a cheque of Kshs.37,474,949/- belonging to Messrs. Kobil Petroleum Limited to make payments of Kshs.1,069,247/- on behalf of Messrs. Kingsway Tyres Limited. In my view it is not possible for the Respondent to accept a cheque of Kshs.37,474,949/- to only pay for Kshs.1,069,247/-. The Respondent does not explain what happened to the balance of the money and why it accepted a cheque belonging to one company as payment of duty for another company and for quite different goods.

It has been a common ground that the payments of petroleum products are made at Kilindini Harbour where there is a fully fledged cash office manned by qualified cashiers and other related personnel; while payments for the other goods are made at the Customs Long room in Mombasa, a distance which is estimated to be 5 kilometres. I find no evidence that the cash office at Kilindini lost any cheques.

The Customs Department is manned by responsible and well trained officers whose duty is to enforce the Act. They are trained up to the competence of scrutinizing and ascertaining that the Customs Entries and the payments it receives from the importers are proper and in accordance with the Customs Act.

The importers are ordinary people who are under the control of and are liable to the Commissioner of Customs direction.

As stated earlier the Commissioner of Customs does not accept any customs entries, documents or entries that are in contravention of the Customs and Excise Act. I hold that if an importer or his agent presents documents to the Commissioner and the Commissioner accepts those documents as proper and valid, he is therefore estopped from questioning the importer or his agent on the same. Even where there is underpayment due to the negligence on the part of the Respondent, the Respondent is estopped from making any further claim from the importer.

This is based on the fact that a trader or an importer sells his goods at a price which includes all the costs; that is to say the cost of the goods, transportation, government taxes, profit margins and any other related costs to those goods. This determines the price the consumer pays.

Therefore in the event that the Commissioner of Customs is negligent or careless in the examination of the customs entries or in receipt of the payments, unless he can show that he accepted the documents through intimidation, inducement or threat, he would be estopped from making future claims against the importer or the trader as there will be no room for a chain reaction for the Respondent to claim for the importer and the importer from the wholesaler or distributor and the wholesaler from the retailer and the retailer from the customer or end user whose whereabouts he may not be aware of.

Therefore the Commissioner is not empowered to act negligently, carelessly or inefficiently to the detriment of the Importer or the Applicant. Where the Commissioner has confirmed the correctness of documents, accepted them and imposed the duty payable and the duty that he has imposed has been paid and he has accepted, he is then estopped from coming back in future after the goods have been cleared and removed from the customs area to make any other further claims against the importer or trader.

The Customs and Excise Act Cap.472 in its Section 208 states that:- “208. In proceedings under this Act

*(e) the production of a document purporting to be signed or issued by the commissioner in the service of the Government shall be prima facie evidence that the document was so signed or issued;*

*(g) any information, communication, certificate, official report or other document purporting to originate from or to be certified under the hand and seal or stamp of office of a principal officer of customs and excise and produced by the Commissioner shall be receivable in evidence and shall be prima facie evidence of the matters communicated or recorded therein;”*

Further Section 221 states that:-

*“221. Where a person requires a receipt for money paid and brought to account in respect of an entry then that person shall furnish the proper officer with an additional copy, marked as such, of the entry and the additional copy duly signed by the proper officer and acknowledging receipt of the money shall be given to that person and shall constitute the receipt for the payment”.*

Under Regulation 269 of the Customs & Excise Regulations it is stated that:-

*“269. An officer may refuse to accept or to act upon any form or other document submitted to him unless the requirements of the Act and these Regulations in relation thereto have been observed”.*

From the provisions of Regulation 269 of the Customs & Excise Regulations, it is clear that once the Applicant presented the Customs importation documents to the Respondent and they were accepted, it is clear then that the documents and the payment were proper as the Respondent is not entitled in law to accept documents that are improper. Further, it is clear from the above quoted provisions of the Act that any valid document issued by the Respondent is conclusive prima facie evidence. In this particular case, the Applicant presented to the Respondent valid customs entries, made payments and was issued with a valid official receipt.

In my view, the Respondent therefore has no legal power or duty to follow the Applicant or any other person in similar circumstances demanding further payment and/or purporting that there is evasion of duty.

In relation to acts of negligence by the Commissioner the spirit of the Act is clearly spelt out in Section 13 of the Customs & Excise Act where it provides that:-

*“13. Where loss or damage is occasioned to goods subject to customs control or to plant in a factory through the willful or negligent act of an officer, then an action shall lie against the Commissioner or that officer in respect thereof.”*

From this Section it is correctly so and fair that the acts of negligence by the Respondent can only be attributed to itself and not to any other person. It would be improper, unfair and unconstitutional in these circumstances to attribute the Respondent's negligence to any other person.

From the foregoing it is quite clear that the Respondent is not entitled to impose double taxation on import entries whose duties have already been received and acknowledged. An order of certiorari is hereby granted and any decisions or demands for further payment from the Respondents are hereby quashed, and an order of prohibition barring the Respondent from making any further demands for payment from the Applicant and further prohibiting the Respondent from revoking and/or interfering with the Applicant's Clearing & Forwarding licence in any manner whatsoever, and/or preventing the Applicant from carrying on with his trade are hereby granted.

I further hold that although under Regulation 262 of the Customs & Excise Regulations the Commissioner is empowered to revoke an agent's Clearing & Forwarding licence, that decision is a discretionary power vested only to the Commissioner and not to officers subordinate to him.

It is trite law that discretionary powers are powers to be exercised only for public good and not to be used on personal whims. Administrative discretionary powers due to their consequences that may affect individuals or a person's right are seriously guarded and should be exercised sparingly. Although the regulation states that the Commissioner may revoke or suspend any licence without assigning any reason, such power should not be exercised unreasonably or arbitrarily or against the rule of natural justice. The Commissioner may act within the apparent limits of his statutory power but if he acts for wrong motives or on irrelevant considerations or arbitrarily or unreasonably, the court may step in to arrest the situation and keep him within his legal bounds so as to protect the citizens against abuse of such powers. This is a case which attracts such intervention and I order that the Commissioner is not entitled to revoke or suspend the Licence of the Applicant herein nor to make double demand of any duties contrary to the Act, therefore the Applicants' Application succeeds. Orders granted as prayed and I so order.

**Dated at Mombasa this ..... day of October, 2001.**

**J.L.A. OSIEMO**

**J U D G E**

26.10.2001

COURT:

The clerical mistake apparent on the Ruling delivered on 8th October, 2001 corrected and Ruling delivered in the presence of Mr. Gikandi for the Applicant and Mr. Matuku for Ontweka for the Respondent.

**J.L.A. OSIEMO**

**J U D G E**

**26.10.2001**