



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSTITUTIONAL PETITION NO. 11 OF 2020

IN THE MATTER OF ARTICLES 40, 47, 48 & 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF TAX PROCEDURES ACT, 2015

AND

IN THE MATTER OF EXCISE DUTY ACT, 2015

BETWEEN

NEW YAKO SUPERMARKET LIMITED.....PETITIONER

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **4 June 2020**. It was filed herein contemporaneously with the Petition pursuant to **Articles 23, 40, 47, 48 and 50** of the **Constitution of Kenya**; **Sections 5 and 6** of the **Excise Duty Act, 2015**; **Sections 1A, 1B, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; as well as **Order 40 Rules 1, 2 and Order 51** of the **Civil Procedure Rules, 2010**. As prayers 1, 2 and 3 are spent, the application seeks orders that:

[a] pending the hearing and determination of the Petition, there be stay of the implementation of the respondent's decision contained in the Order for Settlement dated **14 May 2020** requiring the petitioner to make payment in the sum of **Kenya Shillings Five Million (Kshs. 5,000,000/=)** as penalty.

[b] pending the hearing and determination of the Petition, there be temporary order of injunction restraining the respondent from harassing, threatening and/or demanding payment of **Kenya Shillings Five Million (Kshs. 5,000,000/=)** as penalty or any other sum thereof from the petitioner.

[2] The grounds upon which the application was premised are that, on **5 May 2020**, the respondent, through its officers, seized 156 cartons of assorted alcoholic products from the petitioner's warehouse at **Rupa** in Eldoret Town, on the ground that the products had been affixed with counterfeit excise stamps, contrary to **Section 28** of the **Excise Duty Act, 2015**; yet the petitioner is neither a manufacturer nor importer. It was further the contention of the petitioner that the respondent then summoned its director, **Mr. Anilkumar Khimji Haria**, to its officers on **14 May 2020** and ordered him to pay a penalty in the sum of **Kshs. 5,000,000/=** in spite of the evidence presented by **Mr. Haria** that the petitioner was not the manufacturer of the impounded products.

[3] The petitioner has accordingly approached this Court vide its Petition dated **4 June 2020**, contending that the respondent's actions are in contravention of the **Constitution of Kenya**, and more specifically **Articles 40** (on protection of right to property), **Article 47** (on fair

administrative action), **Article 48** (on access to justice) and **Article 50** (on fair hearing). Thus, it is the petitioner's prayer that, pending the hearing and determination of the Petition, there be stay and an order of temporary injunction to restrain the respondent from recovering the penalty amount of **Kshs. 5,000,000/=**.

[4] In support of the application, the petitioner relied on the affidavit filed therewith, sworn by **Anilkumar Khimji Haria** on **4 June 2020** in which it was averred that the duty to affix excise duty stamps on products is that of the manufacturer, importer or distributor; and that there is no legal requirement on the part of the petitioner, as a mere retailer, to verify the genuineness of the excise duty stamps affixed on the products purchased by it from licensed manufacturers, importers and/or distributors.

[5] **Mr. Haria** further deposed that, despite the petitioner presenting evidence to the respondent to demonstrate that it is neither a manufacturer nor an importer, the respondent went ahead and ordered the petitioner to make payment of **Kshs. 5,000,000/=** as penalty for alleged contravention of **Section 28** of the **Excise Duty Act**. He annexed a copy of the Order for Settlement of Case as **Annexure "AKH9"** to the Supporting Affidavit, along with other documents, to demonstrate that the respondent's actions contravened **Articles 40, 47, 48 and 50** of the **Constitution**; and therefore that there is no justification for the petitioner to pay the penalty sum of **Kshs. 5,000,000/=** to the respondent.

[6] In response to the application, the respondent relied on the Replying Affidavit sworn by **CI Joseph Indeke**, in which it was averred that, on **4 May 2020**, a team from South Rift Valley Region Domestic taxes enforcement department visited the petitioner's supermarket and carried out a mock purchase of three cartons of alcoholic drinks known as African Spear and upon checking the excise duty stamps thereon using a scan machine, they found all of them to be counterfeit excise duty stamps.

[7] A formal visit was then made to the supermarket on **5 May 2020** by the said team in the company of officers from the Revenue Protection Services for a detailed fact-finding mission; and that, after scanning the excisable products, it was discovered that the petitioner had many more alcoholic products bearing the counterfeit excise duty stamps; which were accordingly seized. Photographs of the seized products as well as a copy of the seizure notice were annexed to the Replying Affidavit and marked **Annexures JI 1 and JI 2**. The petitioner's director was consequently summoned to appear before a compounding committee for settlement of the case, pursuant to **Section 109** of the **Tax Procedures Act**; whereupon the petitioner was penalized to pay **Kshs. 5,000,000/=** pursuant to **Section 41** of the **Excise Duty Act**.

[8] It was therefore the assertion of **CI Indeke** that due diligence was undertaken in the process leading up to the imposition of the penalty; and that the petitioner's allegations of bias and harassment are entirely unfounded. At paragraphs 29 and 30 of the Replying Affidavit, it was averred that, should the Court be inclined to grant the stay orders sought, then it should consider doing so on terms, since the respondent is a reputable government agency and is capable of making refunds and paying damages, in the event of an ultimate adverse ruling. **CI Indeke** concluded his averments by stating that it is in the interest of the public that taxes and penalties due under the applicable fiscal laws be recovered by the respondent for purposes of funding the nation's budget.

[9] The respondent filed a Further Affidavit sworn by **CI Indeke** on **8 October 2020** to state that the petitioner was charged and arraigned before court in **Eldoret Chief Magistrate's Criminal Cases No. 1273 of 2018** and **1274 of 2018**; which cases were withdrawn on **14 June 2019** and **19 July 2019**, respectively; and the seized goods released to the petitioner. **CI Indeke** averred, therefore, that it was misleading for the petitioner to claim that the seized goods have been withheld by the respondent. He annexed copies of the proceedings of the two criminal cases as well as an extract of the Occurrence Book as **Annexures JI 5, J6 and JI 7** to his Further Replying Affidavit.

[10] **CI Indeke** reiterated his averment that the petitioner willingly consented to the compounding of the offences and that the settlement order is a legally binding agreement between the parties which cannot be set aside or varied unless it is proved that it was obtained by fraud, collusion or coercion. He also averred that the applicant ought to have exhausted the remedies available under the **Tax Appeals Tribunal Act** before filing the present application.

[11] Pursuant to the directions given herein on **9 February 2021** that the application be canvassed by way of written submissions, the petitioner's written submissions were filed herein on **23 March 2021**. There is however no indication of compliance on the part of the respondent. **Mr. Mukhabani**, learned counsel for the petitioner urged the position that, since the petitioner is a mere retailer that purchases goods from various licenced manufacturers, distributors and suppliers, it is not liable to pay excise duty. He further submitted that the obligation to affix excise duty stamps on commodities and/or goods is the sole prerogative of manufacturers, importers and/or distributors and not retailers.

[12] **Mr. Mukhabani** relied on **Section 5** of the **Excise Duty Act** as well as **Regulations 6 and 11** of the **Customs and Excise (Excise Duty Stamps) Regulations, 2008** in urging the Court to find that the petitioner has made out a *prima facie* case with a probability of success. In addition, counsel for the petitioner relied on **Giella vs. Cassman Brown Co. Ltd** [1973] EA 358, **Mrao Limited vs. First American Bank of Kenya & 3 Others** [2003] KLR 125.

[13] This being a constitutional petition, it was expected that interim relief be sought by way of a conservatory order, pursuant to **Rules 23 and 24** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. Nevertheless, it is the duty of the Court to consider the application in the spirit of **Article 159(2)(d)** of the **Constitution** with a view of determining whether the orders prayed for are warranted; granted that proof of a *prima facie* case is pertinent in respect of applications for temporary injunction as well as for purposes of conservatory orders. In so doing, I find apposite the caution expressed by **Hon. Ibrahim, J.** (as he then was) in the **Muslim for Human Rights & 2 Others vs. Attorney General & 2 Others** [2011] eKLR that:

"The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters..."

[14] Hence, in Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others vs. Attorney General, the view was expressed that:

“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

[15] Expressing itself on the matter of conservatory orders, the Supreme Court, in the case of Gatirau Peter Munya vs. Dickson Mwenda Githinji & 2 Others, offered the following viewpoint:

“Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the Applicant’s case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases.”

[16] Hence, it is now settled that an applicant for conservatory orders for purposes of **Articles 22 and 23(3)(c)** of the **Constitution** must satisfy the Court as to the following three considerations:

- [a] That he/she has a *prima facie* case with a high likelihood of success;
- [b] That the Petition will be rendered nugatory;
- [c] That public interest weighs in his/her favour.

[17] There appears to be no controversy that the penalty of **Kshs. 5,000,000/=** was imposed pursuant to **Section 109** of the **Tax Procedures Act**; which provides that:

(1) The Commissioner may, where he is satisfied that a person has committed an offence under a tax law in respect of which a penalty of a fine is provided, or in respect of which anything is liable to forfeiture, compound the offence and may order that person to pay such sum of money, not exceeding the amount of the fine to which he or she would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may think fit and the Commissioner may order anything liable to forfeiture in connection therewith to be condemned:

Provided that the Commissioner shall not exercise his or her powers under this section unless the person admits in writing that he or she has committed the offence and requests the Commissioner to deal with the offence under this section.

(2) For the purposes of subsection (1), the Commissioner shall constitute a committee of not less than three officers to consider applications for the compounding of offences.

(3) An order by the Commissioner in accordance with this section shall—

- (a) be in writing under the hand of the Commissioner and the offender, and witnessed by an officer;**
 - (b) specify the name of the offender, the offence committed, the sum of money ordered by the Commissioner to be paid, and the date or dates on which payment is to be made;**
 - (c) have a copy of the written admission referred to under subsection (2) attached;**
 - (d) be served on the offender;**
 - (e) be final and not be subject to appeal; and**
 - (f) on production in any court, be treated as proof of the conviction of the offender for the offence specified, and may be enforced in the same manner as a decree of a court for the payment of the amount stated therein.**
- (4) If the Commissioner compounds an offence under this section, the offender shall not be liable for prosecution or penalty in respect of same act or omission, the subject of the compounded offence except with the express consent of the Director of Public Prosecutions.**

[18] The petitioner has vehemently denied that it committed any offence and while that issue may not specifically fall for determination in this matter, a valid issue is whether or not the proper procedure for compounding offences for purposes of **Section 109** of the **Tax Procedures Act** was followed. Accordingly, the question as to whether the petitioner made a written admission of guilt for purposes of the proviso to **Section 109(1)** of the **Tax Procedures Act** is germane to the Petition; noting that one of the reliefs sought therein is an order of judicial review in the nature of certiorari to quash the settlement order dated **14 May 2020**.

[19] In the same vein, the Court has to bear in mind the public interest aspect of this matter; and the duty of the respondent to ensure compliance with the relevant fiscal laws for the benefit of all. It is in that light that I find reasonable the proposal by the respondent, at paragraph 30 of the Replying Affidavit, that appropriate conditions be imposed, should the court be inclined to grant the prayer for stay. Given the slant taken herein, the prayer for temporary injunction is untenable and is accordingly declined.

[20] In the result, the orders that commend themselves to me in respect of the application dated **4 June 2020**, and which I hereby grant, are as hereunder:

[a] That pending the hearing and determination of the Petition, there be stay of the implementation of the respondent's decision contained in the Order for Settlement dated **14 May 2020** requiring the petitioner to make payment in the sum of **Kenya Shillings Five Million (Kshs. 5,000,000/=)** as penalty on condition that the petitioner furnishes a bank guarantee for the said sum of **Kshs. 5,000,000/=** within 15 days from the date hereof.

[b] Costs to be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 15TH DAY OF SEPTEMBER, 2021

OLGA SEWE

JUDGE