



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 82 OF 2020

IN THE MATTER OF AN APPLICATION FOR LEAVE FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

BETWEEN

OCEAN ENERGY LIMITED.....APPLICANT

VERSUS

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

NATIONAL BANK OF KENYA.....2ND RESPONDENT

RULING

The Application

1. Ocean Energy Limited, (hereinafter “the Applicant”) is a limited liability company incorporated under the Companies Act of Kenya, and states that it carries on the business of selling supplying and distributing petrol and petroleum products. The Applicant is aggrieved by a decision made on 5th March 2020 by an officer of the Kenya Revenue Authority (hereinafter “the 1st Respondent”), instructing the National Bank of Kenya (hereinafter “the 2nd Respondent”), to liquidate the Applicant’s Transit Security Bond of Kshs 6,592,964/=, on the ground of alleged contravention of conditions on which the said security bond was given.

2. The 1st Respondent is a statutory body established under the Kenya Revenue Authority Act, and charged with the duty and responsibility of collection of all Government revenue, while the 2nd Respondent is a company carrying on the business of commercial banking.

3. The Applicant consequently moved this Court by way of an application by way of Chamber Summons dated 16th April 2020, seeking orders that the said application be certified urgent, and for leave to apply for the following orders:

a. An order of certiorari to remove into this Court and to quash all the findings and directives issued vide the letter dated 5th March 2020;

b. An order of prohibition directed to the 1st and 2nd Respondents prohibiting them from issuing or giving effect to any directives and orders without following due process, and specifically:

i. notifying the Applicant in writing of any adverse findings information or evidence upon which the Respondents are considering making a decision, and

ii. giving the Applicant an opportunity to respond to the allegations or a hearing to respond to the issues raised.

4. The Applicant also seeks orders that the said leave operate as a stay of implementation of the findings and directives made in respect of the Applicant in the impugned letter dated 5th March 2020, and also seeks further directions for the expedited filing and hearing of the attendant Notice of Motion. Lastly, the Applicant asks that the costs of the application be provided for.

5. The main grounds for the application are stated in the Applicant’s Statutory Statement dated 16th April 2020, and a verifying affidavit

sworn on the same date by Farhan Dirie, the Applicant's Manager and authorized representative. In summary, the Applicant alleges that the impugned letter dated 5th March 2020 is founded on an "oblique" ground of the East African Community Customs Management Act (EACCMA) and is a nullity in law, and it expounds on various sections of the ACCMA it alleges that the 1st Respondent has not complied with.

6. Further, that the Applicant's Transit Security Bond was discharged by the 1st Respondent on 5th February 2020 after compliance by the Applicant of all requirements of discharge. Therefore that the 1st Respondent's letter of 5th March 2020 is inconsistent with the Applicant's legitimate expectation, is irrational and unreasonable, and is in breach of the rule of natural justice, procedural fairness, due process and the rule of law.

7. I have perused the impugned letter dated 5th March 2020, a copy of which the Applicant annexed to its verifying affidavit, and note that it is written on behalf of the Commissioner of Customs and Border Control, and addressed to the Managing Director of the 2nd Respondent. Furthermore, the direction by the Commissioner to the 2nd Respondent to make good the guarantee for the Applicant's Transit Security Bond is stated as being made pursuant to section 109 and Regulation 34 of the EACCMA 2004 and regulations thereof. Lastly I also note that the Applicant annexed a letter it has since written to the said Commissioner dated 30th March 2020, confirming delivery of, and seeking consideration of certain documents it was requested to provide in relation to the said liquidation.

8. While I am satisfied that the Applicant has demonstrated that the matter is urgent, and that the same ought to be heard on a priority basis as a result of the pending liquidation of its Transit Security Bond, I note that sections 229 and 230 of the EACCMA provides for a procedure to be followed in the event that a person is aggrieved by any decision made by the Commissioner of Customs and Border Control under the Act, and within certain timelines. In particular, an aggrieved person is required to the Commissioner of Customs for review of the decision within thirty days, and the Commissioner is required to give a decision within thirty days of receipt of the application. If still aggrieved, the person is required to appeal to Tax Appeals tribunal within forty five days.

9. This Court therefore needs to confirm compliance if any, with the provisions of section 229 and 230 of EACCMA before it can grant any leave to commence judicial review proceedings, and particularly so in light of the provisions of Article 159 (2)(c) of the Constitution and section 9(2) (3) and (4) of the Fair Administrative Action Act that require parties to first exhaust alternative remedies before seeking judicial review. Section 9(2) (3) and (4) of the Fair Administrative Action Act provides as follows in this regard:

"(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

The Orders

10. In light of the foregoing observations and findings, the Applicant's Chamber Summons dated 16th April 2020 is allowed only to the extent of the following orders:

I. The Chamber Summons application dated 16th April 2020 be and is hereby certified as urgent, and that the same is hereby admitted for hearing on a priority basis.

II. The Applicant shall serve the 1st and 2nd Respondents with the said Chamber Summons, and skeletal submissions thereon, together with a copy of this ruling, within ten (10) days from today's date for *inter partes* hearing.

III. Upon being served with the said pleadings and documents, the 1st and 2nd Respondents shall be required to file and serve their reply to the said Chamber Summons and skeletal submissions thereon within ten (10) days from the date of service.

IV. In view of the Ministry of Health directives on the safeguards to be observed to stem the spread of the current COVID-19 pandemic, this Court shall hear and determine the Applicant's Chamber Summons dated 16th April 2020 on the basis of the electronic copies of the pleadings and submissions filed.

V. The electronic copies of pleadings and documents sent by the parties shall be clearly and correctly titled to indicate the J.R Case Number, the name of the Party sending it (that is whether the *Ex Parte* Applicant, Respondent or Interested Party), and the nature of the pleadings or document.

VI. Service of pleadings and documents directed by the Court shall be by way of personal service and electronic mail, and in the case of service by way of electronic mail, the parties shall also send a copy of documents so served to the Deputy Registrar of this Court at milimani.judicialreview@court.go.ke with copies to ceciliakithinji@yahoo.co.uk and asunachristine51@gmail.com.

VII. The Deputy Registrar of this Court shall send a copy of this ruling and the extracted orders to the Applicant by electronic mail by close of business today.

VIII. The Deputy Registrar of this Court shall bring the file to the attention of the duty Judge for further directions on 13th May 2020.

IX. Parties shall be at liberty to apply.

11. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF APRIL 2020

P. NYAMWEYA

JUDGE