



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO.E216 OF 2019

ROCKLAND KENYA LIMITEDAPPLICANT

-VERSUS-

THE COMMISSIONER GENERAL OF THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE KENYA BUREAU OF STANDARDS.....2ND RESPONDENT

RULING

1. This ruling relates to two applications dated 4th June 2019 and 26th November 2019 applicant seeks orders for the release of its property indicated in the 1st respondents C17B form with respect to Entry No. 2019 JKA 4312162 dated 5th March 2019 while in the subsequent application dated 26th November 2019 the applicant seeks orders that the respondents be directed to release to its property upon payment, in court, of kshs 261,054/=. Both applications are supported by the affidavits of the applicant's General Manager, **Mr. Wilson Mwaniki Ngumbi**, and are premised in the grounds that:-

A. That the applicant being a Kenyan company employing numerous Kenyans in its core business being in the mining industry did at great costs cause to have imported into this country certain items indicated in the 1st respondent's C.17B form with respect to Entry No. 2019 JKA 4312162 dated 5th March 2019 which items are crucial to the applicant's business.

B. That despite paying all the requisite duties and taxes for reasons unknown and not explained to the applicant by the respondents the respondents have failed and/or refused to release into the custody of the applicant the applicant's goods as indicated in the 1st respondent's C.17B form with respect to Entry No. 2019 JKA 4312162 dated 5th March 2019 which failure to explain to the applicant the reason for the refusal is in complete contravention of the applicant's rights of Fair Administrative Action as provided for in Article 47(1) of the Constitution of Kenya and better defined in Section 4 of the Fair Administrative Action Act 2015.

C. That despite the applicant's request the failure to provide the applicant with a concise written explanation for the refusal to release the goods divest the applicant from an avenue of appeal as provided for under Sections 229 and 230 of the East African Community Customs Management Act 2004.

D. That being divested from an avenue of appeal the applicant has thus no other avenue open save for this court to have its rights enforced.

E. That this court under the provisions of Article 50(1) of the Constitution and Section 63 (e) of the Civil Procedure Act has the jurisdiction to entertain this application and grant the orders sought by the applicant.

F. That the unwarranted and unreasonable delay by the respondents to release to the applicant its property has caused and continues to cause the applicant to suffer a great loss and damage for the applicant who is unable to conduct its business without the parts indicated on the 1st respondent's C.17B form with respect to Entry No. 2019 JKA 4312162 dated 5th March 2019 therefore causing the applicant to suffer a great loss and damage.

G. That the applicant is further prejudiced by the refusal by the respondents to release its goods to the extent that the applicant is divested from the provisions of Part III of the Fair Administration Action Act for the applicant is unaware of the reasons of the refusal by the respondents to release the applicant's goods to it.

H. That the continued deprivation of the applicant's property is contrary to the applicant's rights as allowed under the provision of Article 40(2) of the Constitution of Kenya.

I. That the actions of the respondents are unreasonable and procedurally unfair are in contravention of the applicant's right for there is no valid reason as to why the respondents should continue to deprive the applicant of its property.

2. The 2nd respondent opposed the application through the Notice of Preliminary Objection filed on 18th September 2019 wherein it set out the following grounds of objection:-

1. That the application herein is incurably defective, incompetent and bad in law.

2. The applicants seek substantive orders in a Miscellaneous Application which is not founded upon by any substantive pleading, whether, judicial review, constitution petition, and if any special jurisdiction of the court is being sought, it is not specified.

3. The reliefs sought in the application are substantive in nature and as such cannot be granted by way of a miscellaneous application.

4. The application be accordingly dismissed with costs.

3. The 1st respondent opposed the application through the replying affidavit of its officer, **Mr. Joackim Mwawasi**, who avers that on 5th March 2019, the applicant entered the consignment that is the subject matter of this suit as Entry Declaration Number 2019JKA4312162 and presented the same for verification by the Customs Department but that the importer had declared only one item under its code classification 8514.90.00 which describes part of industrial laboratory electric furnaces and ovens. He states that under the Kenyan Tax System that is based on self assessment model, the applicants self assessment on import duty was then calculated at kshs 439,092 which the applicant paid but that a further verification of the imported goods by the 1st defendants officers revealed that at least five items had been declared as one item. The five items were listed as follows:-

a. Kenthal Super Heating Element, Lu280, Le250 50mm, 4pcs.

b. 2. Al23 Tubes (C799), Open Both Ends, 25pcs, (Alumina Cermonic Tubes).

c. Al23 Disks, 25Pcs (Alumina Cermonic Tubes).

d. Ceramic Bricks, 25pcs

e. Kerathin 1800, 10kgs, Adhesive.

4. He further avers that the goods, as declared by the importer, did not meet the requirements of Harmonized System Tariff Classification (HS Code) as set out in the East African Community Common Tariff 2017 that is used for classification of imported goods which means that there was mis-declaration that led to a further assessment and payment of extra Import Duty and Value Added Tax (VAT). He states that as a result of the mis-declaration, it was noted that the applicant still needed to pay extra taxes for import duty and VAT amounting to kshs 261,055.

5. He states that the applicant was, if dissatisfied with the verification, required to lodge a review request with the head verification officer which option the applicant did not pursue. It is therefore the 1st defendants case that the applicant has not come to this court with clean hands having failed to invoke its rights and exhaust the dispute resolution mechanism provided for under the Act.

6. It is the 1st respondents case that the 1st respondent acted within its rights to administer and enforce all the provisions of the Kenyan Revenue Authority Act and that the applicant is under serving of the orders sought in the application.

7. Parties canvassed the applications by way of written submissions which I have carefully considered.

8. The main issued for determination are:

a. Whether the instant application is incurably defective having been filed without a substantive pleading.

b. Whether the applicant has made out a case for the granting of the orders sought in the applications.

9. The 2nd respondents position was that the relief sought in the applications are substantive thus requiring a substantive pleading yet the matter was instituted by way of a Miscellaneous Application. It is not in dispute that the orders sought in the applications are substantive in nature as they seek the release of goods held by the respondents.

10. Order 3 Rule 1 of the Civil Procedure Rules stipulates that a suit may be commenced by way of a plaint, a petition/or originating summons. The instant proceedings were instituted by way of Miscellaneous Application which, I note, may not offer the parties an opportunity to be heard on the substance of the suit.

11. A perusal of the 1st respondent's replying affidavit reveals that the applicants goods are held by the 1st respondent for mis-declaration of the taxes due which according to the 1st respondent was reassessed and stand at kshs 261,055. In the 2nd application, the applicant seeks the release of its goods subject to the payment of the sum of Kshs 262,005 in court. This then be raises the question of how the case will be eventually heard in the event the goods are released to the applicant when the subject matter of the suit, have already been released to the applicant thus settling the matter with finality.

12. Courts have taken the position that substantive orders cannot be issued in Miscellaneous Applications. This is the position that was adopted by Limo J. in **Witmore Investment Limited V County Government of Kirinyaga & 3 Others** [2016] eKLR wherein it was held:-

“So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law.”

13. Similarly in **Nairobi West Hospital Limited V Joseph Kariha & Another** [2018]eKLR it was held:-

“.....In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the Civil Procedure Rules will reveal hat suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral scelorsis and still admitted in the Intensive Care Unit of the applicant's hospital is strenuously opposed....Consequently, the preliminary objection is upheld and this suit is ordered struck out.”

14. In **Anastacia Wagiciengo v Ezekiel Wafula** [2018] eKLR, the court held that an order in the nature of a mandatory injunction must be supported by a substantive relief in the main pleading.

15. Applying the principle adopted in the above cited cases to the present application I find that the preliminary objection raised by the 2nd respondent to the effect that the instant application is incurably defective is merited and I therefore allow it and strike out the two applications with no orders as to costs.

16. Having found that the application is defective I need not venture into determining the other issues that arise from the application.

Dated, signed and delivered via Microsoft Teams at Nairobi this 11th day of June 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties.

Court Assistant: Sylvia