



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS JR APPLICATION NO. 45 OF 2019

IN THE MATTER OF: AN APPLICATION BY SPART FREIGHT LOGISTICS LTD FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION.

AND

IN THE MATTER OF: THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA

AND

IN THE MATTER OF: THE LAW REFORM ACT CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: THE CUSTOMS & EXCISE ACT CAP 472 LAWS OF KENYA

AND

IN THE MATTER OF: THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT REGULATIONS

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010 AND SECTIONS 8 & 9 OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

BETWEEN

SPART FREIGHT LOGISTICS LIMITED..... EX-PARTE APPLICANT

AND

THE COMMISSIONER CUSTOMS & BORDER CONTROL,

KENYA REVENUE AUTHORITYRESPONDENT

AND

VDL BUS CHASSIS HOEVENWEG.....1ST INTERESTED PARTY

WILHELMSSEN SHIPS SERVICE LIMITED.....2ND INTERESTED PARTY

SEASHORE INTERNATIONAL LIMITED.....3RD INTERESTED PARTY

BENAIRES LOGISTICS LIMITED 4TH INTERESTED PARTY

AWANAD ENTERPRISES LIMITED5TH INTERESTED PARTY

RULING

1. The 3rd Interested Party (applicant) filed an application on 8th October, 2019 under the provisions of Sections 1A, 1B, 3, 3A of the Civil Procedure Act, Order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the law. The applicant seeks the following orders:-

(i) Spent;

(ii) Spent;

(iii) That this court does lift or set aside the order granted on 3rd October, 2019 for leave to operate as a stay or to be substituted with an order that appropriate guarantee or security for the sum of Kshs. 2,202,600/= be deposited in this Honourable court in order to facilitate the re-export of 12 VDL Buses illegally or irregularly imported in the country; and

(iv) That the costs of this application be in the cause.

2. The application is premised on the grounds in support of it and the affidavit sworn by David Wassambo, the Operations Manager of the applicant, sworn on 8th October, 2019.

3. The respondent filed grounds of opposition on 9th October, 2019 to the following effect:-

(i) That Order 53 of the Civil Procedure Rules, 2010 as read with Sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya prescribes a procedure *sui generis*, a mixed grill of both civil and criminal processes and does not envisage the kind of application mooted by the applicants herein;

(ii) What should commend itself as the best way forward would be for the applicants herein to seek an early date for hearing of the substantive motion rather than circumvent the ends of justice by misleading the court to have the subject motor vehicles re-exported and after depositing the amount billed then use their new position to delay payment of a just claim;

(iii) That the application does not meet the threshold requirements for grant of orders sought and the ends of justice shall not be met by grant of any of the orders sought in the instant application; and

(iv) That this application is therefore misconceived and wholly unmerited and ought to be dismissed with costs.

4. In arguing the application, Mr. Wafula submitted that the *ex parte* applicant (respondent) was given some work to do by the 3rd Interested party herein to re-ship 12VDL buses to the Netherlands. He stated that the issue is the sum of Kshs. 2,202,600/= being claimed by the respondent. He thus prayed for the said amount to be deposited in court.

5. He stated that port charges in the sum of US\$1,781.76 were being paid daily for the buses. He further stated that the respondent was not claiming any interest in the buses.

6. Mr. Wafula further stated that the respondent had not participated in any other claim save for the sum of Kshs. 2,202,600/= and that the respondent stood to suffer no prejudice at all. He submitted that if the court did not agree with them, the respondent should pay for storage charges.

7. Mr. Muinde submitted that there was no need to reship the 12 buses. He stated that the waiver for payment of warehouse charges elapsed on 9th October, 2019 and it was the respondent which had obtained the said waiver for the applicant herein.

8. It was argued that the Judge who granted the orders for leave to the respondent to apply for judicial review was the one who could set aside his own orders. Mr. Muinde prayed for an early date for the hearing of the substantive application. He stated that a money award cannot be made in a Judicial Review matter.

9. Mr. Wafula in response to the foregoing submissions argued that the applicant had not prayed for an order to set aside the leave that was granted to the respondent, which was to operate as a stay, in order to protect the re-shipment of the buses. He submitted that parties were bound by their pleadings.

ANALYSIS AND DETERMINATION

The issue for determination is if this court can lift or set aside the order granted for leave to operate a stay pending the hearing of the application seeking an order of prohibition or in the alternative to order for the sum of Kshs. 2,202,600/= to be deposited in court.

10. In the Chamber Summons dated 3rd October, 2019, the respondent's prayer in paragraph 3 reads as follows:-

“That the grant of leave do operate as a stay of execution, enforcement and/or processing by the 3rd and 4th Interested parties of the said customs entry Nos. 2018MSA7071737, 2018MSA7071826, 2018MSA7071827, 2018MSA7071915, 2018MSA7071898,

2018MSA7071897, 2018MSA7071899, 2018MSA7071831, 2018MSA7071913, 2018MSA7071910, 2018MSA7071915 AND 2018MSA7071915 (sic) which will affect the rights of the ex parte applicant (being the one who pursued the said waivers) until the substantive review application is heard and determined.”

11. The above prayer was granted by Judge P.J. Otieno on 3rd October, 2019. In this court's understanding, order given specifically forbid the 3rd and 4th Interested Parties from any further dealings with the motor vehicles in issue until the substantive application seeking the order of prohibition was heard and determined.

12. I do concur with Mr. Muinde Advocate that the respondent through his application of 8th October, 2019 seeks to upset the status quo pertaining to the re-shipment of the 12 buses in issue, to the Netherlands. The offer to deposit the sum of KShs. 2,206,600/= in court was aimed at having the buses re-shipped awaiting the hearing and determination of the Judicial Review application. If this court was to grant any of the orders sought, it would defeat the purpose of the substantive Judicial Review application which seeks an order of prohibition.

13. In this court's view, the most appropriate court to hear the said application should have been the one that granted the order for leave to operate as a stay pending the hearing of the substantive application.

14. In **R.H. Ashforth Hospital Authority** [2003] WLR 127 at 138, Lord Dyson LY stated as follows:-

“The purpose of stay in Judicial Review proceedings is to suspend the proceedings that are under challenge pending determination of the challenge. It preserves the status quo. This will and the judicial process and make it more effective. It will ensure that so far as possible if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success.....The administrative court routinely grants stay to prevent the implementation of a decision that has been made but not yet carried out in effect or fully carried into effect.”

15. In the circumstances of this application, it is my view that the parties herein should proceed on with the hearing of the substantive Judicial Review application before Judge P.J. Otieno on a priority basis. Since the application by the applicant was brought for hearing before me due to the absence of Judge P.J. Otieno from the Mombasa High Court, the said Judge is now back and available to hear the Judicial Review application.

16. I direct that this file be placed before the said Judge on 22nd October, 2019 for him to give the most convenient date for the hearing of the Judicial Review application.

17. I dismiss the application dated 8th October, 2019. The costs of the said application are awarded to the *ex parte* applicant/respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of October, 2019.

NJOKI MWANGI

JUDGE

In the presence of

Mr. Awino holding brief for Mr. Wafula for the 3rd Interested Party/applicant

Ms Mwashushe holding brief for Mr. Apollo Muinde for the *ex parte* applicant/respondent

Mr. Oliver Musundi – Court Assistant