REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

J.R. CIVIL APPLICATION NO. 570 OF 2016

IN THE MATTER OF THE APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

IN THE MATTER OF THE EAST AFRICA COMMUNITY CUSTOMS MANAGEMENT ACT, 2004

REPUBLIC ……..……..APPLICANT

-VERSUS-

COMMISSIONER FOR CUSTOMS –BORDER

CONTROL SERVICES KENYA REVENUE AUTHORITY...…..RESPONDENT

-AND-

EX-PARTE

LAMBVAL LOGISTICS LIMITED…….....INTERESTED PARTY

JUDGEMENT

1. By an amended Notice of Motion dated 21st November, 2016, the *ex parte* applicant herein, **Lambval Logistics Limited,** wrongly described as the interested party sought the following orders:

> **1. THAT this Court do issue an Order of Certiorari quashing the decision of the Respondent issued on 20th August, 2016 suspending the Interested Party's Password on license Number COS /0717240/16 from the clearing House.**
>
> **2. THAT an order of Mandamus do issue compelling the Respondent to lift the suspension of the Interested party's password on license Number COS /0717240/16.**
>
> **3. THAT an order of Prohibition do issue to the Respondent, its servants and/ or agent from obstructing the Applicant or its Agents and Servant from accessing the Customs Simba Clearing System through its Password on license Number COS/0717240/16.**

Ex Parte Applicant's Case

2. According to the ex parte applicant, it was incorporated on 17th August, 2012, got a clearing License in the year 2014 and started operations in 2015. However, its password was suspended on 20th August, 2016 without notice to it and on following up was informed that it had been involved in fraudulent clearing of transit goods.

3. The ex parte applicant disclosed that the said suspension was done orally and is not listed as one of the Agents suspended from operations. It was further averred by the ex parte applicant that on 30th August, 2016, it recorded a statement with the Police and explained the circumstances under which its license was used to lodge the documents.

4. The ex parte applicant reiterated that without it being heard, the Respondent suspended its Password thus crippling its operations. It was disclosed that indeed upon conclusion of its investigations One **Levis Ludovico Juma** was charged in Mombasa Chief Magistrates Criminal Case No. 1865 of 2016 with

i. Diversion of goods in transit C/S 85(3) ***East Africa Community Custom Management Act 2014***.

ii. Interfering with Customs Gear C/S 205 of the ***East Africa Community Customs Management Act 2014***.

iii. Removing Customs Seals from a vehicles C/S 195 of ***East Africa Community Customs Management Act 2014***.

iv. Knowingly being concerned with fraudulent evasion of payment of duty C/S 283 (e) of the ***East Africa Community Customs Management Act 2014***.

5. The ex parte applicant however contended that in the said case pending in Court its Managing Director was purely a witness for the prosecution, hence there was no reason for suspending its password. However the ex parte applicant's efforts to have the Respondent to lift the said suspension were not fruitful.

Respondent's Case

6. The application was opposed by the Respondent.

7. According to the Respondent, Order 53 of the ***Civil Procedure Rules 2010***, provides that "*No application for an order of Mandamus, Prohibition or Certiorari shall be made unless leave therefor has been granted in accordance with this rule*." In this case, it was averred that since the Ex-parte Applicant according the Statement of Facts dated 21st November 2016 only sought leave to apply for an order of Certiorari to bring up the Commissioner of Customs-Boarder Control decision issued on 20th August 2016 to the High Court for the Purposes of being quashed, prayers 2 and 3 in the Ex-parte Applicant's Motion cannot therefore issue on the ground that the Ex-Parte Applicant did not obtain leave to seek the said prayers.

8. It was further contended that the Order of Certiorari sought by the Ex-Parte Applicant as prayer 1 in her Notice of Motion Application dated 21st November 2016 cannot similarly issue due to the reasons stated hereunder.

9. According to the Respondent, on or about 19th July 2016, Kenya Revenue Authority investigation office, western region received information indicating that some Electronic tracking seals used to secure transit motor vehicles were sent from Mombasa by bus and transported as parcels to Malaba. Pursuant to the foregoing investigation on the same was commenced and indeed the said gadgets which had been sent to Malaba by bus as parcels were recovered and the recovered Electronic tracking seals numbers **0000008173** and **0000008198** were traced to entry numbers **2016MSA6072010** and **2016MSA6070871**

respectively both of which entries were lodged by Lambval Logistics Ltd, the Ex-Parte Applicant herein.

10. It was averred that entry number **2016MSA6072010** was a transit entry for one unit used Range Rover Sport consigned to **Mary Ateng Deng** of Bujumbura, Burundi while entry **2016MSA6070871** was for one unit used Toyota Premio consigned to **Pius Petre Deng** of Juba, South Sudan. It was further contended that investigation confirmed that both units did not exit through the designated border point and were diverted into the local market. The Range Rover was impounded at Mikindani area in Mombasa and is currently detained at Forodha House Mombasa while the Toyota Premio is yet to be recovered. Going by the above findings and while further investigations were still underway, a decision was arrived at by the Commissioner that the clearing agent's licence be suspended.

11. It was further averred that investigations were conducted and it was established that the range rover was cleared and released from Unifreight cargo handling Limited and that the unit was released to the clearing agent Lambval Logistics Limited Branch's manager one **Levis Ludovico Juma** who was identified by the KPA pass obtained from the CFS identifies as the Branch Manager of **Lambval Logistics Limited,** the Ex-parte Applicant herein. It was revealed that the Toyota Premio was also released to the said Branch Manager of **Lambval Logistics Limited** on the same date from Autoport CFS. However, on the 23rd September, 2016 the said **Levis Ludivico Juma** was taken to court and charged with offences of diversion of transit goods and fraudulent evasion of taxes under the ***East African Community Custom Management Act*** (EACCMA). It was however averred that the other parties involved in the evasion scheme are still at large and are being sought while investigations are still on-going to also recover the Toyota Premio.

12. The Respondent averred that section 145(3) of the ***EACCMA, 2004*** gives the commissioner powers to suspend, revoke or refuse to renew a customs agent's licence under certain conditions and that from the wording of the section the Commissioner may order suspension of password ***for any other reason that he may deem fit.***

13. It was the Respondent's case that the suspension of the Ex-Parte Applicant's password on 19th August was informed by the above case involving the diversion of transit goods and that this action was taken to forestall further abuse of the agent's password which might jeopardise further investigations.

14. According to the Respondent, section 145 (3) of the ***EACCMA 2004*** does not specifically require the commissioner to notify in writing. Indeed the Ex Parte Applicant concedes in her pleadings that she was notified orally that her password was suspended and the reasons for the same. It was therefore averred that it was untrue for the Ex-parte Applicant to allege that she was not afforded a hearing while same was granted to the Ex-parte Applicant before she was orally informed that the password was suspended and the reasons for the suspension. The Respondent contended that if at all it were true as alleged by the Ex-parte Applicant that it was not given a hearing nor informed of the reasons for the suspension of its password then the Ex-parte Applicant ought to have written to the Commissioner to inquire for the reasons for the suspension or demand to be heard.

15. The Respondent disclosed that on the 30th August 2016, one **Julius Nyerere Opiyo** presented and introduced himself as the Managing Director of **Lambval Logistics Limited** to the investigating officers in Kisumu and he recorded a statement regarding the two units in which he conceded that one **Levis Ludovico Juma** was his branch manager in Mombasa and that it is him who had handled the clearing of the units. It was averred the said **Levis Ludovico Juma** in a statement recorded on 22nd September 2016 describes himself as the **Branch manager of Lambval Logistics Limited** hence the assertion by the Ex-Parte Applicant that neither her nor her employees were involved in the fraud that is subject of a court case is untrue since the accused in the said suit was its branch manager at the time of the offence. The Respondent denied that the Ex-Parte Applicant's Managing Director one **Julius Nyerere Opiyo** is a witness in the case against **Levis Juma** as he claimed.

16. The Respondent asserted that the claim that the Ex Parte Applicant was informed that the suspension of his password shall remain pending conclusion of the Mombasa Chief Magistrate Criminal Case No.1865 of 2016 - ***Republic vs. Levis Ludovico Juma*** was false and that upon bringing charges in the

above matter, the investigating team on or about 5th October, 2016 recommended that the suspension of the Ex-Parte Applicant's password be lifted pending finalisation of the investigations. It was averred that while the same was still under consideration, Customs Malaba advised the licencing office on 14th November 2016 to suspend the licence in relation to offences of diversion of transit goods (vehicles cleared as transit by the agent but found to be irregularly registered in Kenya) a matter that is now under investigation jointly between Investigation & Enforcement and Ethics & Integrity.

17. The position taken by the Respondent was that even if the suspension of 19th August 2016 was lifted; the company's password would still be suspended on account of the latter investigation. It was therefore contended that the lifting of the suspension is not solely pegged on the conclusion of the criminal case no.1865 of 2016. In the Respondent's case, the Ex Parte Applicant is reckless in the manner it handles its password is a habitual offender by allowing friends to use its Simba access password hence the Applicants application is unmeritorious and ought to be dismissed.

Determinations

18. I have considered the application, the verifying affidavit, the replying affidavit and the submissions made herein.

19. By a Chamber Summons dated 15th November, 2016, the ex parte applicant herein sought leave of the Court to apply for an order of certiorari to quash the decision of the Respondent of 20th August, 2016 blocking/suspending the ex parte applicant's Customs Clearance Password on licence number COS/0717240/16. It also applied for directions in the nature of stay. This was also the relief mentioned in the statement.

20. However as is stated at the beginning of this judgement, the Motion filed pursuant to the said leave seeks apart from the said order of certiorari, orders of prohibition and *mandamus*. Order 53 rule 1(1) and (2) of the ***Civil Procedure Rules*** provides:

> ***(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule.***
>
> ***(2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.***

21. It is therefore clear that for an applicant to apply for judicial review the applicant is enjoined to apply for leave to do so. In my view, without leave being sought and obtained the Court has no jurisdiction to grant judicial review orders under sections 8 and 9 of the ***Law Reform Act*** as read with Order 53 of the ***Civil Procedure Rules***. Accordingly, Order 53 rule 4(1) of the said Rules provides that:

> ***Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.***

22. It must be emphasised that the statement referred to in the above rule is required to be filed with the application for leave. Where therefore the relief intended to be sought is not set out in the statement, the applicant cannot in his subsequent Motion seek the same. In my view, once leave is granted, save for an amendment, the applicant cannot go back to the application for leave and seek orders which he did not seek in the first instance. Similarly, the applicant cannot purport to substitute an application for leave and seek to replace the orders which were granted at leave stage by way of a subsequent application. In other words once permission to commence judicial review proceedings is granted the applicant must proceed to

institute the Motion in accordance with the leave granted save for the limited avenue of amendment. Where the applicant feels that the permission granted nolonger covers what he seeks and that an amendment may not cure the defect, the only option is to go back to the drawing board and commence the process *de novo* vide a fresh application.

23. It is therefore my view and I so hold that the orders of prohibition and *mandamus* cannot be granted in these proceedings.

24. The question to be determined is whether in arriving at its decision the due process of the law was adhered to.

25. Article 47 of the same Constitution provides:

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

26. Pursuant to Article 47(3) Parliament enacted the ***Fair Administrative Action Act***. Section 4(1), (2) and (3) thereof provides:

> ***(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***
>
> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
>
> ***(b) an opportunity to be heard and to make representations in that regard;***
>
> ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
>
> ***(d) a statement of reasons pursuant to section 6;***
>
> ***(e) notice of the right to legal representation, where applicable;***
>
> ***(f) notice of the right to cross-examine or where applicable; or***
>
> ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

27. Under section 2 of the said Act "administrative action" is expressed to include:

> ***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
>
> ***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.***

28. It is therefore my view that before the Respondent can suspend a password of a licensee, he is duty bound to make all the necessary inquiries to satisfy himself that the circumstances warrant the taking of

such adverse action and once he has satisfied himself on this fact, he has to give the person concerned the reasons therefor in writing.

29. Since it is a requirement that an administrative action must be fair, it follows that the rules of natural justice will be presumed to apply. In other words, the process must be procedurally fair and the person concerned should have had a reasonable opportunity of presenting his case. As was held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...Denial of the right to be heard renders any decision made null and void ab initio."**

30. In **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**, **Lord Mustill** held:

> **"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."**

31. Similarly, in **Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E** it was held that the commissioners:

> **"…must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."**

32. It is stated by **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007:

> **"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".**

33. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

> **"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."**

34. It is however appreciated that in exceptional circumstances, a prior notice and a hearing may defeat the purpose for which the law was enacted and this was appreciated in **R vs. Aga Khan Education Services *ex parte* Ali Sele& 20 Others High Court Misc. Application No. 12 of 2002**, where it was held *inter alia* as follows:

> **"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each scale must be put on the scales by the**

court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition indecision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

35. Therefore as was appreciated in **Russel vs. Duke of Norfork [1949] 1 All ER at 118**:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

36. Where such an opportunity is availed the caution in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009** ought to be taken. In that case it was held that:

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

37. It follows that as was held in **Pearlberg vs. Varty (Inspector of Taxes) [1972] 1 WLR 534**:

"Fairness does not necessarily require a plurality of hearings or representations and counter representations. If there were too much elaboration of procedural safeguards nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too easily sacrificed."

38. In this case however, the applicant contends that the decision was taken orally without a hearing. In my view both the Constitution and the ***Fair Administrative Action Act*** do not contemplate oral decisions. A party against whom a decision is taken is entitled to know in writing the reasons for such a decision. Whereas the Respondent contended in the submissions as opposed to evidence on oath that the applicant was afforded an opportunity of being heard, there is no such evidence on record.

39. This Court appreciates that on occasions the administrative body may well be entitled to take a preservatory decision so as to forestall the removal of the subject matter from the jurisdiction. However such a decision can only be an interim or temporary decision pending compliance with the law and such a decision or reasons therefore must be in writing. In this case, the Respondent has no exhibited any evidence that the decision was temporary and that the applicant was given written reasons as required under the Constitution. Nothing would have been easier than for the respondent to exhibit copies of the documents showing that the applicant was notified of the same. Section 109 of the ***Evidence Act*** provides:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

40. The burden was therefore on the respondent to prove that it did actually give the said written notification. Since it is a Constitutional obligation on the part of the Respondent to do so, it was incumbent upon the respondent in light of the denial by the applicant that they were notified of the intended action, to prove that that was in fact not the case. For a hearing to be said to be fair not only

should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."**

41. Mere information that a decision has been made cannot in my view amount to fair administrative action process though a fair administrative process ought not to be equated to judicial hearing.

42. Having considered the issues raised herein the decision I come to is that the Respondent's action against the applicant was tainted with procedural impropriety.

Order

43. Consequently I hereby issue an Order of Certiorari removing into this Court and quashing the decision of the Respondent issued on 20th August, 2016 suspending the Applicant's Password on license Number COS /0717240/16 from the clearing House.

44. As not all the orders sought have been granted and as the applicant seems to have mixed up the applicant and interested party, each party will bear own costs of these proceedings.

45. Orders accordingly.

Dated at Nairobi this 25th day of January, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mukwaya for the ex parte applicant

Miss Chinga for Mr Lemiso for the Respondent