



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

JUDICIAL REVIEW NO. 74 OF 2016

D. CHANDULAL K VORA & CO. LTD.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

R U L I N G

Introduction

1. This matter was initiated on the 27.9.2016 when the *ex parte* applicant filed the *ex parte* chamber summons dated the same day. The file was placed before the judge on the 28/9/2016 when the leave was granted to the applicant to file the substantive motion within 21 days.

2. Pursuant to the said order, a Notice of Motion dated 4/10/2016 was filed on the 5/10/2016 and fixed for hearing on the 31/10/2016. The facts giving rise to this matter and fairly clear and straight toward as put by both sides.

The Case of *Ex parte* applicant

3. According the statement of facts, Affidavit of verification and the documents annexed thereto, there was staged a public auction by the Respondent on the 25/8/2016 after there had been a gazette on the 17/6/2016, gazette notice no. 4557. During that public auction the *ex parte* applicant bided and was declared the purchaser for suit goods described as Lot Nos. 1829/16, 1830/16 and 1831/16 at a price of Kshs.5,410,000.00. At the auction 25% of the purchase price was paid at the fall of the harmer and the balance of 75% was only paid after an alleged intervention by Kenya Bureau of Standards by letters dated 31/8/2016 and 6/9/2016. Equally exhibited are gate passes issued by custodians of the goods. With all the documents the *ex parte* applicant contends that the Respondents actions in withholding the goods is highhanded, oppressive, excessive, unlawful and amount to an abuse of statutory duty, public office and authority and, it is then contended that the *ex parte* applicant is a victim of an unfair administrative action. Unfair administrative action geared and calculated at achieving wrongful, irrational, unlawful and unjust enrichment from the *ex parte* applicant and therefore to the applicant, mandamus should issue to remedy the wrongs visited upon the *ex parte* applicant.

The Respondants Cause

4. The application did not pass unchallenged. The Respondent filed a replying affidavit sworn by one Collins Bosire, an appointed officer under section 13 of Kenya Revenue Authority Act and deployed at Customs Services & Boarder Control Department at Mombasa. The deponent asserts that as a creature of

statute, the Respondent is tasked with the duty to collect taxes and to administer and enforce all provisions of the written law set under part 1 & 2 of the first schedule to Cap 469. It is conceded that the goods were indeed imported by one Richardson and David Ltd, who failed to facilitate their release in time hence the Respondent deposited the goods at a customs container Freight Station. To the deponent one of the statutes to be administered and enforced by the Respondent is the **East African Community Customs Management Act** which decree that goods imported into the partner states and are still under the customs control, may be re-exported from the partner state; destroyed or abandoned. That a joint verification requested by the importer was conducted on the 1/10/2015 and that the ministry of Health and Kenya Bureau of Standards both recommended that the goods be destroyed. That the same verdict is equally recited by the National Environmental Management Authority by their letter of 19/11/2015 (*I have however read that letter and note that it makes no finding on the need to destroy the goods but only recommends the mode of destruction*).

5. The deponent proceeds to assert that pursuant to the said decisions the destruction was scheduled for the 26/11/2015 but that day was gazetted a public holiday hence the goods were never destroyed and that by some inadvertence the same goods were advertised for sale by public auction at which the *exparte* applicant bought the same. The inadvertence is regretted and the Respondent contends that it is working to ensure that the applicant is refunded the purchase price so that the goods are not released. What is not revealed however is the work being done to effect the refund.

6. On 6/12/2016 when this matter came up for hearing this court ordered that the concerned agencies, KEBS, Port Health Services, Nema, Kephis and EACC be served to attend court as interested parties. Service was indeed effected and come the 6/12/2016 other than the *exparte* applicant and the Respondent being represented by their advocates on record, the said agencies were represented and made representations as follows:

EACC – Mr. Bii Advocate, we were served and we don't intend to file any papers.

NEMA - Mr. Omondi Advocate, we have filed a response and propose to dispose the application by way of written submissions.

KEPHIS- Mr. Kiduyo, Chief Laboratory Technician; Kephis did not participate at the verification and will be of no assistance to the court.

PORT HEALTH SERVICES - Mrs. Beatrice Kivunga, the Public Health Officer attached to the Port; The goods were inspected and recommended for destruction subject to the decision of the destruction committee.

KEBS - No appearance, but was duly served.

The foregoing is the state of pleadings and positions taken by the parties to this litigation.

Submissions by the parties

7. At the hearing Mr. Khagram appeared for the *exparte* applicant while Mr Lemiso appeared for the Respondent with Mr. Bii being present for EACC. However, only the *exparte* applicant and the Respondent offered submissions.

8. On behalf of the *exparte* applicant Mr. Khagramm, reiterated the grounds of the application, the principles applicant to an application for orders of mandamus and stressed that by statute, it is only KEBS mandated to enforce, determine and administer standards of good, entering the country. He pointed out that the subject goods are plastic pellets and not perishable goods and that the Respondent having advertised the goods and received purchase price from the *exparte* applicant, it was an action that was irrational, unreasonable, illegal and un-procedural to withhold the goods after sale. He contends that none of the agencies have assigned any reason for the condemnation of goods hence it begs the reason for such condemnation to destruction. He lastly lays emphasis that KEBS as the statutory body charged with

establishment and maintenance of standards of goods did put it down in writing in its letter dated 6/9/2016 and confirmed having recommended the goods for sale only subject to legal charges to the government being met. To the *ex parte* applicant the cloth of public interest was being used to perpetuate intentions ignoble and against the expectations of a public officer and state agency. For those reasons Mr. Khagram urged the court to allow the application and grant the orders of mandamus with costs.

9. For the Respondent, Mr Lemiso opposed the application on the foot and strength of the affidavit of COLLINS BOSIRE. He relied on section 42 of EACCMA and stressed that the Respondent is by statute empowered to auction the abandoned goods or have them destroyed. He largely reiterated the contentions in the Replying affidavit and cited the decisions in Republic, *ex parte Uhuru Muigai Kenyatta vs Kenya National Commission on Human Rights, [2010]eKLR* for the proposition that at times private rights must bow to public interests, *Mahat Kuno Roble and Others vs Permanent Secretary defence & Another [2016] eKLR* for the proposition that where a party establishes a right to property, it requires justification or rebuttal that such title is non-existent or else has the right under Article 40 shall have been infringed and the decision in *Peris Onduso Omondi vs Tectura International Ltd & Anor[2012] eKLR* which is a decision on a personal injury claim and whose relevance to the matter at hand has been difficult from me to fathom.

10. In his rejoinder to the Respondents' submissions, Mr. Khagram pointed out the fact that if there was to be any condemnation, there ought to have been scientific tests and that the documents produced and in particular the document marked CB9 in Mr. Bosires affidavit that the samples were extracted on the 7/12/2016 well after date scheduled for destruction but no findings have been exhibited.

Analysis of the law facts and determination

11. The application before court for determination seeks the order of judicial review in the nature of mandamus. The purpose of mandamus and when it will issue is well enunciated by judicial pronouncements. In *Kenya National Examination Council vs Republic, ex parte Geoffrey Gathenyi Njoroge & 9 Others [19a] eKLR the Court of Appeal*, in one of most cited decisions in the area of law, said:-

“The Order of mandamus is of a most extensive remedial nature and is in form, a command issuing from the High Court of justice, directed at any person, corporation or interior tribunal requiring him or them to do some particular thing specified therein which pertains to his or their office and is in the nature of public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is specific legal right and no specific legal remedy for enforcing that right; and it may issue in case where, although there is an alternative legal remedy, yet that mode of redress, is less convenient beneficial or effectual.....

What do those principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed”.

12. The extent to which an order of mandamus would issue is at times confusing when limitation are mounted and expressed to the effect that it is alternative and supplemental remedy where none conventional remedy is available. However it has now been established that mandamus intervenes where there is inadequacy of remedies or where the existing remedies are inefficacious. BOWEN LJ in RE: NATHAN [1884] 12 OB, said of the boundaries to be observed:-

“Writ of mandams, as everybody knows is a high prerogative writ, invented for the purpose of supplementing defects of justice. By magna carta, the crown is bound neither to deny justice to anybody, nor delay anybody obtaining justice. If, therefore there is no other means of obtaining justice, the writ of mandamus is granted to enable justice to be done. The proceedings however, by mandamus is most cumbrous and most expensive, and from time

immemorial. Accordingly the courts have never granted the writ of mandamus where there was another more convenient or feasible remedy within reach of the subject”.

13. I understand the above quote to say that mandamus will issue to compel statutory duty everytime except where there is a more feasible, convenient more efficacious and robust remedy.

14. In the matter before the court, the Respondent is undeniably a statutory creature and therefore a state organ to which the National values as well as values and principles of public service apply. Those values and principles mandate that a state organ in undertaking its functions must among other things embrace the rule of law, transparency, accountability and integrity geared toward prompt, responsive, effective and impartial service delivery, accountability for administrative Acts and timely provision of information to the public it serves.

15. It is not in dispute that the suit goods were sold by public auction and the property therein passed to the *exparte* applicant upon sale. The applicant is therefore justified to expect that the Respondent would be guided by the rule of law in dealing with that property as the same is guaranteed under Article 40 of the constitution. It is not, to this court, enough that the Respondent would merely say that the goods have been condemned and must be destroyed. That to this court would amount to an arbitrary deprivation of property and therefore violation of a constitutional right.

16. This invites a higher calling on the Respondent beyond its statutory duty to that of a constitutional duty. I am convinced that wherever it appears to any court that a right, be it statutory or constitutional, is threatened with violation, it behoves that court to forestall the threat and preserve the right. The applicant in this matter is calling out that his property in the goods is due for loss by destruction and will be so destroyed unless the Respondent is ordered and compelled to release the same. To deny the prayer would be to expose the applicant to the otherwise uneven and highhandedness that affronts the public expectation of the Respondent. To this court an argument that the applicant can sue for damage after destruction can never be supportable unless one says that money is enough compensation for breach of a right even where the threatened breach can be forestalled. It is equally insufficient for the respondent to merely say that it is working on a refund without one. It would be different if the refund had been tendered prior to filing this matter. What we have is deprivation by withholding since August 2016 which is not justifiable at all.

17. This court is alive to the task before it; to review the administrative action of the Respondent in refusing to release the property. Had I to go to the merits of the actions, other due process, I would have asked to see the report by the joint verification team. None has been exhibited. Instead, the Kenya Bureau of Standards, itself a statutory state organ mandated to set and administer standards in its latest communication has clarified that it had recommended the goods for sale. The letter says:-

“...we wish to confirm to you that the goods contained in lot 1829/16, 1830/16 and 1831/16 containing High density polythene (HDPE) were among the goods which through our letter dated 23/8/2016 Ref KEBS/COR/KLD/IWS/AG/20/(13) were recommended for sale. This was done under no objection to sale conditions”.

18. It must be noted that this letter is dated 6/9/2016 almost a year after the alleged joint verification was done allegedly with its participation, and many months after samples were drawn according to annexure CB9. The totality of my finding is that the actions by the Respondent appear to the court to be irrational, unreasonable and procedurally deficient of the transparent and accountable actions expected of the Respondent.

19. The justice of the case demands that I grant to the *exparte* applicant the order of mandamus sought. Let an order of mandamus therefore issue and directed at the Respondent to forthwith release the suit good, to the *exparte* applicant.

20. I award to the costs of this application to the applicant.

Dated at Mombasa this **15th** day of **February 2017**.

P.J.O. OTIENO

JUDGE