



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 120 OF 2009 [O.S]

IN THE MATTER OF AN INTERPLEADER APPLICATION

PANYAC LTD. APPLICANT

VERSUS

KENYA REVENUE AUTHORITY 1ST RESPONDENT

SONY SUGAR CO. LTD. 2ND RESPONDENT

RULING

The applicant herein and the 2nd Respondent were involved in a transaction for sale of sugar ostensibly for export to South Sudan. That sale attracted a Value Added Tax of Kshs.13,229,442/99 which the 1st Respondent required the 2nd Respondent to collect from the applicant and which was then refundable upon proof that the sugar had left the country. According to paragraph 4 of the affidavit sworn by Said Shaban Derow in support of the application this was to ensure that there was no dumping of export sugar. Upon export of the sugar the export documentations were allegedly verified by both respondents whereupon the applicant sought a refund of the Value Added Tax. Following interpleader proceedings this Court by a judgment of Aroni J dated 4th May 2012 ordered the 2nd Respondent to pay that sum to the 1st Respondent from who the applicant would then seek a refund.

It is the applicant's contention that its claim for a refund was rejected on the ground that it did not have a Personal Identification Number. It has therefore approached this Court vide a Notice of Motion dated 25th May 2015 wherein it seeks orders:-

"(a) That the Honourable Court be pleased to order and direct the sum of Kshs.13,229,442/99 forwarded and transmitted to the 1st Respondent by the 2nd Respondent under the order of the Court dated 4th May 2012 be processed by the 1st Respondent and be paid/released to the applicant.

(b) That in the alternative to prayer (a) herein the Honourable Court be pleased to order and direct Sony Sugar Company Limited to pay the applicant the sum of Kshs.13,229,442/99 and thereafter lodge Refund claims with the 1st Respondent since the 2nd Respondent is a Value Added Tax Certificate Holder and as the exporter.

(c) That the costs of the application be in the cause."

As I have stated the application is supported by the affidavit of Said Shaban Derow sworn on 25th May 2015 and to which he has annexed several documents, including that detailing the reasons for rejection of the claim.

The application is vehemently opposed with the 1st Respondent vide an affidavit sworn by Lukar Chepng'ar stating inter alia that not all the alleged exports were verified by it and a letter raising a query was written to the applicants; that the 1st Respondent was the only entity mandated to verify the entries and evidence of exports provided by an exporter and further that the reasons for the rejection of the claim was explained in a letter dated 3rd December 2013 to the applicant's lawyers D.O.E. Anyul & Company Advocates (see paragraph 13 of the affidavit). At paragraphs 8, 9 and 10 he casts doubt as to whether the 2nd Respondent ever paid the money to the 1st Respondent as ordered by the Court in the interpleader proceedings.

On its part the 2nd Respondent filed grounds of opposition in which it is stated that the application is bad in law, frivolous, vexatious, misplaced and constitutes an abuse of the Court process; that the 2nd Respondent pursuant to the order of the Court released the money to the 1st Respondent and does not therefore have anything to refund to the applicant. It therefore opposes prayers 4 and 5 of the application and prays that the same be dismissed with costs.

Directions given on 23rd September 2015 were that the application would be canvassed by way of written submissions and these were duly received.

I have now had ample time to peruse the affidavits, the grounds of opposition and annexures and to consider them alongside the submissions of the Advocates for the parties.

The applicant has come to this Court because he is aggrieved by the rejection of his claim for a refund by the 1st Respondent. Such a refund is sought pursuant to Section 24 of the Value Added Tax Act which provides as follows:-

"where -

a) taxable goods have been manufactured in or imported into Kenya and tax has been paid in respect of those goods and before being used, those goods have been subsequently exported under customs control; or

b) any tax has been paid in error or

c) in the opinion of the Minister, it is in the public interest to do so, the Commissioner shall, except as otherwise provided by the regulations, refund the tax which has been paid in respect of those goods: Provided that no refund shall be made under paragraph (b) of this section unless the claim in respect thereof is lodged within twelve months from the date the tax became due and payable under Section 13."

The procedure for making a claim for a refund is provided for under Rule 11 of the Value Added Tax Regulations 1994 which provides as follows:

"An application for tax refund under Sections 11(2), 24(a), (b) or (c) and 24A shall be made in Form VAT 4."

From the evidence of the parties the sum the subject of this application was indeed collected as Value Added Tax from the applicant by the 2nd Respondent who upon interpleader proceedings was ordered by Aroni J to remit the money to the 1st Respondent. Whereas the 1st Respondent disputes or casts doubt that the money was ever paid to her as ordered, Counsel for the Respondent has by his submissions brought to this Court's attention an "admission" by the 1st Respondent that the money was paid. That "admission" is contained in annexure "LC2" to the 1st Respondent's replying affidavit. Specific mention of the letter is made at paragraph 12 of the affidavit and the deponent is referring to it as giving the

reasons for rejection of the claim. In that letter which the 1st Respondent concedes is theirs at paragraph 12, the writer Karen K. Nginda Deputy Commissioner – Tax Payer Services writing for the Commissioner, Large Tax Payers Office states:-

"The Court ruled on 4th May 2012 that Sony Sugar Company Limited should remit the VAT charged to KRA and any refunds be processed as per the laid down law. Sony Sugar Company Limited did indeed remit on 28th May 2012, Kshs.13,229,442/95 to the Commissioner of Domestic Taxes, KRA." (underlining mine).

Nevertheless it is my finding that the 2nd Respondent shall suffer no prejudice if he provides proof of actual payment as this involves a colossal amount of tax payers money and the payment is denied. Be that as it may we have seen that applications for refund are required to be made in Form VAT 4. The Form VAT 4 made in respect of this claim is contained at annexure "SSD9" of the applicant's supporting affidavit and accompanies annexure "LC2" of the 1st Respondent's replying affidavit. According to Form VAT 405 and the letter by Karen K. Nginda both of which form part of annexure "LC2" among the reasons the claim was rejected was that the VAT 4 was not completed on both sides and signed by the claimant, copy of VAT 3 previously submitted was not attached, Auditors certificate where a claim is over one million Kenya Shillings not attached and further that the claimant had no Personal Identification Number and the claim could not be processed. At the bottom the form states "**please attach or provide certified copies of documents/information required as applicable and resubmit the claim for our action.**" It is clear therefore that the lack of Personal Identification Number was not the sole reason for the rejection.

It is indeed true that the Form VAT 4 herein was not completed on both sides and signed by the applicant. The applicant has made reference and annexed very many documents which I have looked at carefully. Nowhere do I find evidence that the applicant complied and resubmitted the claim. Moreover it is not very clear from the evidence availed by the applicant as to who between her and the 2nd Respondent was the exporter. In the applicant's annexure "SSD 4(a)" – a letter by her to the Ag. Senior Assistant Commissioner Kenya Revenue Authority dated 15th May 2008 she refers to the applicant and another entity as the exporters whereas at paragraph 3 of the supporting affidavit the applicant deposes that it was Sony Sugar Company Limited itself that exported the sugar to her. Clarification on this issue is crucial because it will determine which of the two is entitled or obligated to claim the refund.

Regulation 13A of the Value Added Tax Regulations 1994 requires that every application for tax refund of an amount exceeding one million shillings shall be accompanied by an auditor's certificate that the application or claim is true and that the amount is properly refundable under the Act. This is the certificate indicated as missing in the applicant's Form VAT 4. Nowhere is such an auditor's report exhibited and indeed the applicant does not state that he submitted that report. That regulation is couched in mandatory terms. Clearly therefore the application for refund by the applicant does not meet the requirements of the law as it was incomplete and as such this Court is not able to rule in her favour as against any of the respondents. The application dated 25th May 2015 is therefore dismissed but given the circumstances of the case I shall order that each party bear its own costs.

Signed, dated and delivered at Kisumu this3rd... day of ..February... 2016

E. N. MAINA

JUDGE

In the presence of:

Mr. Anyul for Applicant

N/A for 1st Respondent

Mr. Ogenjo for Aron for 2nd Respondent