



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI LAW COURT, NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. JR 200 OF 2011

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF JUDICIAL REVIEW BY WAY OF PROHIBITION MANDAMUS AND CERTIORARI DIRECTED AT THE KENYA REVENUE AUTHORITY AND THE COMMISSIONER GENERAL

AND

IN THE MATTER OF EAST AFRICA COMMUNITY CUSTOM MANAGEMENT ACT

AND

IN THE MATTER OF THE VALUE ADDED TAX ACT

REPUBLIC APPLICANT

VS.

KENYA REVENUE AUTHORITY 1ST RESPONDENT

THE COMMISSIONER GENERAL.....2ND RESPONDENT

AND

JASPA LOGISTICS1ST INTERESTED PARTY

EX-PARTE:

REDINGTON (KENYA LTD

JUDGEMENT

Introduction

1. By a Notice of Motion dated 24th August, 2011, the *ex parte* applicant herein, **Redington (Kenya Ltd**, seeks the following orders:

1. **THAT an order of Certiorari do issue to remove to this court and quash the decision by the**

- Kenya Revenue Authority (commissioner of Investigation and Enforcement) or any other Commissioner to demand the disputed Import Duties and Value Added Tax from the Applicant in their letter of 23rd May, 2011 or any other letter or demand notice.**
- 2. THAT an order of Prohibition do issue to prohibit the Kenya Revenue Authority (Commissioner of Investigation and Enforcement) and the Commissioner General or any other Commissioner from issuing any agency notice and serving the same upon the Applicant's bankers as agents of the Applicant on account of the disputed payment of Import Duties and Value Added Tax.**
 - 3. THAT an order of Prohibition do issue to prohibit the Kenya Revenue Authority (Commissioner of Investigation and Enforcement) and the Commissioner General or any other Commissioner from commencing, instituting or proceeding with any other enforcement actions against the Applicant in relation to and/or an account of the disputed payment of Import Duties and Value Added Tax.**
 - 4. THAT an order of Mandamus do issue to compel the Kenya Revenue Authority and the Commissioner General or any other competent commissioner to investigate the conduct of the Interested Party as a Licenced Clearing Agent of the Kenya Revenue Authority and thereafter cause criminal proceedings to be launched against it as appropriate.**
 - 5. THAT an order of Mandamus do issue to compel the Kenya Revenue Authority (Investigation and Enforcement) and the Commissioner General or any other competent Commissioner to collect the outstanding Import Duties, Value Added Tax, the penalties and interests thereon from the Interested Party to whom reimbursement was made after the payment of the duties and taxes impugned by the Kenya Revenue Authority.**
 - 6. THAT an order for costs of this application**

Ex Parte Applicant's Case

1. The application was supported by an affidavit sworn by **Kadiyala Thyagarajulu**, the Applicant's Financial Controller on 23rd August, 2011.
2. According to the deponent, the company is duly registered in Kenya and it *inter alia* undertakes business of import and distribution of electronic products in which business it has engaged, as is required under the ***East African Community Customs Management Act***, (hereinafter referred to as the Act) an agent (the Interested Party) to undertake clearing of its goods. According to the deponent, the Interested Party is licensed to undertake the clearing business by the Respondents after undergoing vetting process. The said Interested Party was appointed by the Applicant to undertake the clearing of the Applicant's goods at the Ports of entry and make payment of all Duty and Value Added Tax (VAT) as levied by the Respondents.
3. According to the deponent, in the aforesaid process, the Applicant hands over all the imports documents to the Interested Party for purposes of clearing the goods and upon assessment and verification of the goods for purposes of duty and VAT by the Respondent, necessary documents would be generated and handed over by the Respondent to the Interested Party for purposes of payment after which the Interested Party would effect the necessary payment, receive the necessary authorization from the Respondent for the release of goods which are thereafter handed over to the Applicant. Upon receipt of the goods and necessary Invoice raised by the Interested Party, the Applicant will then reimburse the Interested Party, the payments made and its fees for the process.
4. Pursuant thereto, it was deposed that in 8 instances, upon production of the requisite receipts and release of the imported goods the Interested Party was reimbursed and in the exercise above, the Applicant believes that the Interested Party and the Respondents acted in strict compliance with the provisions of the Act.
5. However, by a letter dated 23rd May 2011, the Respondents demanded outstanding import Duty amounting to Kshs. 13,212,122/= and alleged that the company has been involved in tax evasion and forgery despite the fact that the Respondents were given the aforesaid documents as given to the Applicant by the Interested Party. The Respondent, however, alleged that the Applicant had forged Form F 147, the National Bank Transaction Vouchers to secure the release of goods an allegation which the Applicant denied.
6. According to the deponent, since the Respondents did not respond within the period of 30 days as

- required under the Act, they were deemed to have accepted our objection.
7. In their letter dated 18th July, 2011, the Respondents further alleged that payment of taxes on imported goods should be made directly to the Respondents and not through third parties an allegation which the deponent contended did not affect the Applicant since it is the Respondent who licensed the Interested Party and notified the public to pay to the National Bank of Kenya account of the Respondents.
 8. He averred that despite co-operating with the Respondents and giving the Respondents all the relevant documentation and evidence of payment, the Respondents have not made any attempt to proceed against the Interested Party yet it is important to note that the Respondent have allowed the Interested Party access into their "Simba System" which they alone are able to monitor and control. To generate Form F147 the Interested Party has to liaise and receive authorization from the Respondents. The Applicant, on the other hand, is never involved in any of the process, and does not have access into the said system. Therefore in the deponent's view, to undertake the exercise until the goods are released to the Applicant, the Interested Party must at all instances either conspire or work with employees of the Respondents since it is not possible for the goods of the Applicants to be released if the Respondents are not involved in the given the stringent and elaborate procedure, controls and checks at the Respondents' offices. To him, the Applicant is being penalized for undertaking its part of the process and for effecting payments as required under the regulations set out by the Respondents by effecting full payment for the consignment in question. He reiterated that the Applicant did not in any way collude, connive, or offer any assistance to the Interested Party or any of the employees of the Respondent to perpetrate the alleged fraud, forgery or any crime.
 9. There was a supplementary affidavit sworn by the same deponent on 2th November, 2012 in which he deposed that following the application brought against the Respondents and the Interested Party for Judicial Review, the Interested Party engaged the Applicant for the payment of the amount of Kshs. 13,212,122/= and on the 28th March 2012 the Interested Party through his Advocate wrote a letter confirming they deposited an amount of Kshs 6,200,000/= in favour of the Applicant herein. On the 14th May 2012 the position was confirmed in court that a partial payment of Kshs. 6,200,000/= had been made on the Account of the Applicant and the Court gave directions that the matter be mentioned on the 18th July 2012 to confirm full settlement. Since then there has been a further payment of Kshs. 1,000,000/= to the Applicant making a total of Kshs. 7,200,000/= though there is still an outstanding balance of around Kshs 6,212,122/= which is due but not yet paid.
 10. It was therefore deposed that the suit against the Respondents has been compromised by the Payment of Kshs 7,200,000/= and the Applicant is therefore entitled to the orders prayed in the application dated 24th August, 2011.
 11. In the submissions filed on behalf of the Applicant the foregoing were reiterated and in support of its case the Applicant relied on **North Reef Limited vs. Attorney General & Another [2001] eKLR; Niaz Mohamed Jan Mohamed vs. Commissioner for Lands & 4 Others [1996] eKLR; and Ocean View Plaza Ltd vs. AG [2002] 2 KLR 275.**

Respondent's Case

12. On behalf of the Respondent a replying affidavit was on 21st February, 2012 filed sworn by **Joseph Kipngeno Tonui**, an officer appointed under and in accordance with Section 13 of the Kenya Revenue Authority Act, Cap 469 of Kenya under which the *East African Community Customs Management Act* is administered.
13. According to him, an analysis of the import documents registered by the ex-parte Applicant which was done in January, 2011 revealed that correct taxes had not been paid by the ex parte Applicant in respect of certain goods through their clearing Agents, the Interested Party and that contrary to Section 203(e) of the Act, the ex parte Applicant's said Agents had forged the Respondents' payment authorization slip (Form F147) and also forged the National Bank transaction Vouchers to show that taxes were paid while in actual fact no such payment of taxes were made and/or received by the Bank. Arising from the said anomaly, the Respondent by a letter dated 22nd May 2011 informed the ex parte Applicant of the same and required the ex parte Applicant to make

- payments for the taxes and in response to the Respondent's said enquiry, the ex parte Applicant by a letter dated 7th June 2011, sought for more time to respond to the issues raised in the said Respondents' letter on the basis that they were still investigating the matter. By a letter dated 9th June 2011, the ex parte Applicant acknowledged that the said documents were forgeries but declined to make the payment for the taxes as demanded by the Respondents principally on the basis that they were not responsible for the acts of their Agents and cited Section 147 of the Act in support thereof. The Respondent's position, however, was that under Section 17 and 148 of the Act, the ex parte Applicant was by law required to ensure that the correct Applicant's taxes are paid in respect of all goods imported by them hence they were liable for the acts of their Agents.
14. It is only when the ex parte Applicant declined to make payments for the taxes as demanded that the Respondents by a Notice dated 19th August 2011 and in exercise of its powers under Section 130 of the Act, detained the ex parte Applicants imported goods hence this application. It was clarified that the Respondent's letter of 18th July 2011 merely reminded the ex parte Applicants that the Respondent had by a Public Notice advised all importers that taxes on imported goods shall be paid directly to the Commissioner of Customs directly and not through third parties such as clearing agents. The deponent reiterated that the ex parte Applicant had on several occasions been informed of the non-payment of the taxes in respect of the goods the subject of these proceedings and to date, no payments have been received in respect of the same.
 15. Based on advice from the Respondent's Advocate on record he deposed that the allegation by the ex-parte Applicant that the Respondent ought only to have pursued the Interested Party, for the taxes due hereunder is not legally tenable since Section 148 of the Act is absolute in its provisions. Further, even if the Respondent's officers connived with the ex parte Applicant's Agents, a fact which is denied, as a matter of public policy, government revenue is due and must be paid in full.
 16. In his view the instant application is premature as the ex parte Applicant has failed to exhaust the appellate procedures as provided under the Act by referring the matter to the Customs Tribunal as provided under the Customs law.
 17. To him, having bestowed trust on the Interested Party, and held them out to all, in particular the Respondent herein to be having authority to clear their goods under the Customs law the ex parte Applicant is liable for the actions of the Interested Party.
 18. He deposed that in a Judicial Review application, the Court would be concerned not with reviewing the merits of the decisions in respect of which the application for judicial review is made, but by the decision making process itself and given the fact that the Act empowers the Respondent to demand taxes owed as it did, and based on the circumstances of this case, the Respondent cannot be said to have acted unreasonably. What a Judicial Review Court would be examining in arriving in its decision is whether the process leading to the assessment and actual demand was fair or not but not to adjudicate on the liability or otherwise of the ex parte applicant on the actions of its agent. Therefore, the motion discloses no reasonable cause of action and is totally unfounded and ought to be dismissed.
 19. It was submitted on behalf of the Respondent that the mere fact that the Interested Party offered to pay, and actually paid part of the taxes in dispute, does not absolve the ex parte applicant from liability under section 147 and 148 of the Act.
 20. While conceding that the Respondent licenses customs clearing agents, it does not dictate to the importers who to engage as their agents for the purposes of clearance of good through the customs and therefore the Respondent's role is merely to register and allow access to the customs clearance system to those who meet the conditions for licensing.
 21. It was submitted based on **Republic vs. Judicial Service Commission ex parte Pareno Nairobi Misc. Application No. 1025 of 2003** that the Court in judicial review proceeding is only concerned with the fairness of the process leading to the assessment and actual demand, and not to adjudicate on the issue of vicarious liability of the ex parte applicant on the actions of its agent.
 22. It was submitted that sections 147 and 148 of the Act empowers the Commissioner to demand taxes from both the principal and the agent where there is breach of the Act. It was therefore submitted that the Respondent was empowered to demand the payment of taxes from the ex parte applicant and the mere fact that the Interested Party had offered to pay and did actual make part payment does not absolve the ex parte applicant from liability. In support of the submissions the Respondent relied on ***John Murphy (Street on Torts)***, 11th Edition pg 642 and **Uxbridge Permanent Benefit Building Society vs. Pickard [1939] 2 KB 248.**

23. Based on **Republic vs. Commissioner of Lands Ex Parte Somken Petroleum Company Limited [2005] KLR**, it was submitted that public policy dictates that the government revenue must be paid as and when they are due. The Court was therefore urged to dismiss the application with costs.

Interested Party's Case

24. On the part of the Interested Party, a replying affidavit was filed sworn by **Alice Katitilu Kitavi**, its Managing Director on 18th October, 2011.
25. According to her, the Interested Party did at all material times act as the agent of the Applicant and duly discharged its duties as such hence the Interested Party is unaware of any improprieties or irregularities and has never received any complaints from the Applicant or the Respondent prior to this case and was surprised by the allegations made by the Applicant.
26. She asserted that the Interested Party is not aware and neither was it party to any fraudulent activities alleged by the Applicant.

Determination

27. Section 147 of the Act provides as follows:

A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.

28. Section 148 of the same Act, on the other hand provides *inter alia* as follows:

An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence.

29. It is clear that under the said sections both the owner of the goods and its agent are liable under the acts under the Act.
30. In this case, it is clear that the interested party did not remit the taxes due to the Respondent and has in fact repaid part thereof. The Applicant's position is that the Respondent ought to recover the same from the Interested Party.
31. The facts in this case have striking similarities to **Republic vs. Kenya Revenue Authority ex parte African Boot Company Limited Nairobi Misc. Cause No. 54 of 2010** in which **Korir, J** expressed himself with respect to sections 145, 146, 147 and 148 of the Act as follows:

“A look at the above quoted Part XI of the Act clearly shows that the Commissioner of Customs only licences customs agents. The agents however act on behalf of the importers of goods. The person who appoints the agents to carry out a particular transaction is the importer. That means the customs agent becomes the agent of the importer and not the Commissioner of Customs. The respondent therefore does not foist a particular customs agent on a taxpayer. The tax payer is the one who goes out to look for a particular agent to clear goods on his behalf...When a Customs agent engages in fraudulent activities, the importer cannot ask the respondent for compensation. The importer has to bear the loss with fortitude and find a way of recovering the money misappropriated from the customs agent.”

32. Similar circumstances arose in Republic vs. Kenya Revenue Authority ex parte Alltex EPZ Limited Nairobi High Court Judicial Review Application No. 709 of 2008 in which Majanja, J held:

“The language of the statute leaves no doubt that the legislature intended that for purposes of collection of duty, the owner of the goods would be liable for the actions of the agent whatever the circumstances.”

33. In Mombasa Court of Appeal Civil Appeal No. 157 of 2007 – The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel, the Court of Appeal held that if the process of verification would ultimately result in the applicant being required to pay duty and taxes, the Respondent would not lawfully be estopped from exercising its statutory duty and recovering the duty imposed by the law which should have been paid but for the fraud of the importers and that it would be contrary to public policy to shield the applicant through judicial review from operation of the law and allow him to retain unaccustomed goods contrary to the law.
34. In Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 it was held *inter alia* as follows:

“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...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 to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a 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 a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and 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. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

35. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** it was held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety are when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

36. In this case it is now clear that the Respondent acted within its jurisdiction in demanding for taxes due in respect of the Applicant's goods. It could choose to seek the same either from the Applicant or from the Interested Party. That was its sole discretion. This Court cannot direct it on how to exercise that discretion unless the same was being abused. In this case I am not satisfied that in seeking payment from the Applicant and not the Interested Party, the Respondent abused its discretion. Similarly, the Applicant has not shown that the Respondent is under a legal obligation to investigate the conduct of the Interested Party. If the Applicant so wishes it is at liberty to lodge a complaint with the police for the necessary action. I therefore have not found any evidence of illegality, irrationality or procedural impropriety to justify the grant of the orders sought.

37. With respect to the purported disputed Import Duties and Value Added Tax this Court exercising its judicial review jurisdiction is not the right forum for the ventilation of such disputes as the same goes to the merit rather than to the process. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

Order

38. It follows that the Notice of Motion dated 24th August, 2011 fails and is dismissed with costs to the Respondent.

Dated at Nairobi this 13th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyangoro for Mr Mogeni for the Applicant

Mr Mirugi for Mr Ado for the Respondent

Cc Kevin