



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 39 OF 2013

MAKUPA TRANSIT SHADE LIMITED PETITIONER

VERSUS

KENYA REVENUE AUTHORITY RESPONDENT

RULING

1. The petitioner who claimed to be licensed and gazetted by the Respondent to operate a Container Freight Station (CFS) on a parcel of land outside the gazetted port of Mombasa under an agreement with Kenya Ports Authority (KPA), sued the respondent challenging an audit allegedly ordered by the respondent pursuant to sections 235 and 236 of the East African Community Customs Management Act (EACCMA). The Petitioner considers the audit a ruse to justify a decision already made to close down the petitioner's operations of the CFS.

2. The petitioner's Petition dated 3rd July 2013 pleaded infringement, among others, of the petitioner's constitutional right to property and sought the following specific orders:

1. *THAT a conservatory order do issue staying the decisions of the respondent to withdraw officers or other facilities from the Petitioners premises or in any other manner interfering with the operation and conduct of business by the Petitioner at Makupa Transit Shade CFS pending the hearing of the Petition.*
2. *A declaration that the said demand by the Respondent for audit of a general nature is malicious and motivated by ulterior factors thus unlawful and in violation of the Petitioner's fundamental rights and freedoms enshrined in the constitution.*
3. *A declaration that the threatened closure by the Respondent of the Petitioner's business of a Container Freight Station at Plot No. 437 and 438 Section 1 Mombasa Island is arbitrary, capricious and oppressive and in violation of the Petitioners fundamental rights and freedoms enshrined in the constitution.*
4. *An Order directed to the Respondent restraining it from closing down or interfering with the Petitioners business by withdrawing customs officers or services from the Petitioner's premises or in any other manner interfering with the petitioner's conduct of its business.*
5. *That this Honourable Court do grant any other appropriate relief and do make such further or other orders and to give such further or other directions as this Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of Articles 10, 19, 20, 21, 22, 23, 27, 35, 40 and 47 of the Constitution and any other Articles of the Constitution in relation to the petitioner in this Petition.*

6. *That the Respondents pay the costs of this Petition.*

3. Upon an application for conservatory orders pending the hearing of the petition, the petitioner on 3rd July 2013 obtained an ex parte order pending hearing *inter partes* of the application for conservatory orders in the following terms:

“A conservatory order be and is hereby issued staying the decision of the respondent to withdraw officers or other facilities from the petitioner’s premises or in any other manner interfering with the operation and conduct of business by the petitioner at Makupa Transit Shade CFS pending *inter partes* hearing of the application.”

4. Pursuant to leave granted on the 4th September 2013, the petitioner filed a Notice of Motion for contempt of court against the respondent seeking orders as follows:

1. *THAT the Assistant Commissioner of customs, E.B. Khaemba, the Respondent herein be summoned before this Honourable Court to show cause why he should not be committed to civil jail for blatantly refusing, neglecting and or failing to comply with the orders issued by this Honourable Court on the 4th of July 2013.*
2. *THAT on failing to show necessary cause and in the alternative, the Assistant Commissioner of Customs, E.B. Khaemba, the respondent herein be committed to prison for a maximum period of six (6) months for contempt of this Honourable Court's Orders issued on the 4th of July 2013.*
3. *THAT the Assistant Commissioner of Customs, E.B. Khaemba, the Respondent herein and the named contemnor be barred from addressing this Honourable Court in this matter unless and until he shall have purged himself of the contempt.*
4. *Any other or further orders as this Honourable Court deems fit and appropriate.*
5. *THAT the costs of these contempt proceedings be borne by the Respondent.*

5. The grounds of the application were set out on the application as follows:

1. *THAT this Honourable Court issued ex parte conservatory Orders on 4th July 2013 including the following terms: -*

“A conservatory order be and is hereby issued staying the decision of the respondent to withdraw officers or other facilities from the petitioner’s premises or in any other manner interfering with the operation and conduct of business by the petitioner at Makupa Transit shade CFS pending the interparties hearing of the application”

2. *THAT the said order, duly endorsed with a notice of penal consequences, was subsequently extracted and served upon the Respondent Commissioner of Customs in Mombasa on 5th July 2013 and in Nairobi on 9th July 2013.*
3. *THAT despite personal service of the Court orders as set out herein above, the contemnor has blatantly and contemptuously failed and/or refused to comply with the said orders.*
4. *THAT the contemnor has rejected the enhanced bond issued by Phoenix Insurance company without notifying the applicant.*
5. *THAT the contemnor's action is intended to circumvent the court order and render it superfluous.*
6. *THAT the contemnor's failure to comply with the said Orders is a deliberate act of disobedience of valid Court Orders and is calculated to undermine the rule of the Court and is aimed at defeating the ends of justice.*

6. In supporting its claim to the application for committal, the petitioner relied on an affidavit sworn by one of its directors, Twalib Hatayan, on the 4th of September 2013 in support of the application for leave to commence contempt proceedings. In the affidavit, the petitioner complained that the respondent had refused to accept its enhanced bonds – a new requirement by the respondent for all CFS operators - from its insurer Phoenix of East Africa Assurance Company Ltd and by letter dated 1st August 2013, the respondent through its officer herein cited for contempt, advised the insurers that the bonds had been

rejected and would only be accepted once the petitioner relocated out of the Port. The petitioner interprets this refusal and the condition for its acceptance as a means of achieving the respondent's alleged objective to close down the petitioner's CFS in spite of the conservatory order of the court.

7. The respondent filed a replying affidavit and a further replying affidavit, sworn respectively on the 7th October 2013 and 29th November 2013, by the officer cited for contempt, Senior Assistant Commissioner Eliud Khaemba who is the respondent's officer in charge of vetting Custom Security Bond applications. The respondent's defence to the application for contempt of court is principally that the court order did not authorise exemption of the petitioner from the statutory provisions of section 12 the Act and regulations made thereunder (with stakeholder participation in accordance with Article 10 of the Constitution) which empowered the commissioner to set conditions for approval, inspection and gazettement of transit sheds, and that the petitioner had refused to comply with the conditions formulated by Respondent under the Act. The respondent's position is clearly set out in paragraphs 17 – 24 of the Replying Affidavit as follows: -

17. **THAT** it is patently clear that in exercise of her statutory mandate under Section 12 of the EACCMA and under the guidance of the Article 10 of the Constitution of Kenya, the Commissioner of Customs engaged the operators of Container Freight stations (transit sheds) who agreed that all Container Freight Stations handling Transit cargo had to make a normal application, be inspected and then gazetted by the Commissioner of Customs
18. **THAT** I am aware that the Petitioner has refused, failed or neglected to make an application for the renewal of the license to operate as a Transit Shed and as a result it has not been inspected and gazetted by the Commissioner of customs to operate as a transit Shed in accordance with the resolutions adopted on 23rd August 2012 and 20th June 2013.
19. **THAT** I am aware that the renewal of the bond is subject to a successful application where an inspection of the transit shed has been carried out and the transit shed has been gazetted by the Commissioner of Customs.
20. **THAT** I am aware that licensing of transit sheds is a very sensitive matter and of great public interest and all requirements for licensing must be fulfilled before licensing because transit sheds act as an additional entry and exit points to the country and contraband goods, such as ivory, narcotic drugs, fire arms ecetera, might be imported or exported through such facilities.
21. **THAT** the Petitioner herein alleges that the Respondent is in contempt of the Court Order for rejecting the Petitioner's security bond dated 2nd July 2013. The Court Order stated that, "**That a conservatory order be and is hereby issued staying the decisions of the Respondent to withdraw officers or other facilities from the Petitioner's premises or in any other manner interfering with the operating and conduct of business by the Petitioner at Makupa Transit shade CFS pending interparties hearing of the application.**"
22. **THAT** I am informed by the Respondent's Counsel on record, which information I verily believe to be true, that a plain reading of the Court Order does not exempt the Petitioner from applying for renewal of the license in the normal manner like all the other Container Freight Stations. As a result, the Petitioner's security bond cannot be renewed as a matter of course without meeting the requisite requirements.
23. **THAT** I am informed by the Respondent's Counsel on record, which information I verily believe to be true, that the Petitioner has to be treated fairly and equitably but should not be exempted from the provisions of the law and conditions set by the Commissioner of Customs and adopted by the Container Freight Stations Association the umbrella body that protects the interests of the Petitioner.
24. **THAT** I am informed by the Respondent's Counsel on record, which information I verily believe to be true, that this Honourable Court cannot issue Orders to defeat express statutory provisions.

8. The counsel for the parties – Mr Abed for the petitioner and Mr. Nyaga for the respondent – made submissions and ruling was reserved.

9. The issues for determination are –

1. Whether the application for contempt is competent; and

2. Whether the respondent officer cited in the application is guilty of contempt of court.

10. As noted by the Court of Appeal in **Christine Wangari Gachege v. Elizabeth Wanjiru Evans and 11 Ors.** C.A. Civ. Appl. No. 233 of 2007 (2014) eKLR of 14th February 2014, leave is not necessary before filing an application for committal with regard to disobedience of a judgment or order of the court since the coming into force of the English *Civil Procedure (Amendment No. 2) Rules, 2012* on the 1st October 2012, application to Kenya by virtue of section 5 of the Judicature Act. The court, in dismissing an application for leave in that case, observed that:

“Following the implementation of the famous Lord Woolf’s “Access to Justice Report, 1996”, The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. Recently, on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 81 thereof effectively replaced Order 52 RSC in its entirety. PART 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedures for four different forms of violations.

Rules 81.4 relates to committal for “breach of a judgment, order or undertaking to do or abstain from doing an act.”

Rule 81.11- Committal for “interference with the due administration of justice” (applicable only in criminal proceedings).

Rule 81.16 – Committal for contempt “in the face of the court”, and

Rule 81.17 - Committal for “making false statement of truth or disclosure statement.”

*An application under **Rule 81.4** (breach of judgment, order or undertaking) now referred to as “application notice” (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.*

*It is clear from this summary that leave, now called “permission” is not required where committal proceedings relate to a breach of a judgment, order or undertaking. That position must be contrasted with the requirement in **Rules 81.12** – committal “for interference with the due administration of justice” and **81.17** – Committal “for making a false statement of Truth or disclosure statement” where, in the former it is expressly provided that:-*

“The application for permission to make a committal application must be made by a part 8 claim form.....”

And in the case of the latter,

“A committal application in relation to a false statement of truth or disclosure statement in connection with proceedings in the High Court, a Divisional Court or the Court of Appeal, may be made only;

a) with the permission of the Court dealing with the proceedings in which the false statement or disclosure statement was made.....”

*We find on the basis of the new Civil Procedure Rules (of England) which are now contained in the **Second Supplement to the 2012 White Book** that no leave is required before bringing an*

application, like the one before us, for committal for contempt relating to breach of this court's order. The application is for that reason, incompetent and is struck out with costs."

11. The effect of the development in England is to bring the matter on equal footing with Order 40 rule 4 of the Civil Procedure Rules with regard to disobedience of injunction. The applicant herein did not require leave to file the application for contempt of court dated 20th September 2013 and the objection that the application for committal for contempt was filed outside 14 days after the grant of leave is therefore without merit.

12. I agree with view taken by Lenaola J., in the case of ***Basil Criticos v. Attorney general and 8 Ors.*** (2012) eKLR that where there is knowledge of a court order, a contemnor will be found guilty of contempt notwithstanding lack of personal service of the order on him. Indeed, even for the service of the application for committal for contempt, the new rules under the applicable English Civil Procedure Rules provide for other modes of service in place of personal service and even excuse service of the application in the discretion of the court. As noted by the Court of Appeal in the ***Gachege*** case, supra,

*"An application under **Rule 81.4 (breach of judgment, order or undertaking)** now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. **The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service.**"*

I therefore do not agree that the respondent's officer cited herein is excused from liability for contempt on the ground only that the order or the contempt of court application was not personally served upon him.

13. The more fundamental question in determining whether the cited officer of the respondent is guilty of contempt of court is whether the court order did, or could have stopped the respondent from exercising its statutory mandate by requiring the respondent to make an application for approval of its transit shed and the respondent to inspect, approve and gazette the same in accordance with its regulations.

14. There is evidence that the respondent, in exercise of its statutory mandate under section 12 (1) and (2) of the EACCMA to appoint Transit sheds subject to conditions as the commissioner deems fit and, with stakeholder participation by the Container Freight Stations operators, adopted resolutions for the improvement of the operations of the Port of Mombasa inter alia that approval of handling Transit cargo would depend on, among others, annual stock checks by KRA; that the transit area must be demarcated separately from the home use area with inspection before gazettelement is done; and that Handling of Transit Cargo at CFSs to be subject to the normal application, inspection of dedicated yard by customs officers and gazettelement by the Commissioner of Customs and successful application to present an additional Bond security of Ksh.200,000,000/- . There was also evidence that some applicants other than the petitioner had their applications refused on the grounds of failure to comply with the set conditions as to inspection of the facility and bond capacity.

15. Apart from the provisions on the withdrawal of officers which is clear and unambiguous, the rest of the terms of the order that –

"A conservatory order be and is hereby issued staying the decision of the respondent to withdraw officers or other facilities from the petitioner's premises or in any other manner interfering with the operation and conduct of business by the petitioner at Makupa Transit Shade CFS pending inter partes hearing of the application."

is vague and not capable of exact interpretation to determine breach thereof. If the petitioner sought to

stop the audit that it complained of, it should have sought an order specifically seeking to halt the threatened audit or inspection. The order having not been specific on what it restrained the respondent's officers cannot be held to be in contempt for exercising their functions which are not expressly prohibited by the order. Had the Petitioner sought the order for the suspension of the provisions of the Statute and regulations made hereunder, the court would have considered the specific request and expressly grant the order. But it cannot be supposed that the general order against interference could have the effect of suspending the statute.

16. The petitioner did not complain, as against the cited officer of the respondent, of disobedience of the express terms of the order against removal of respondent's officers. Indeed, the cited officer is only shown as having rejected the security bond by the petitioner's insurer. There cannot be any basis for punishing the cited officer for contempt for removal of officers even if this were shown to have been done.

17. There is merit in the respondent's submission that the court order cannot have been intended to stop the respondent from exercising its statutory mandate. If it had been so intended the court order would expressly have so provided. The reason for this is that, in accordance with the general principle, where a party has a statutory right of action, the court will not usually prevent that right from being exercised unless there is no basis for its exercise or it is being exercised oppressively, or in judicial review terminology unreasonably, unfairly and in bad faith. See *Nyaga v. HFCK CA Civil Appeal No. 134 of 1987* cited in *Morris and Co. Ltd v. Kenya Commercial Bank and Ors.* (2003) 2 EA 605. Without prejudging the merits of the petition and the application for conservatory order made there-under, which is a matter for the trial court, the respondent's requirements for the formal application, inspection and gazetting of CFSs and deposit of enhanced bond security were applied to all CFS operators including the petitioner.

18. Unless the court order said so expressly, the presumption is that the conservatory order did not suspend the powers of the respondent under the Statute. The order restrained apparently the respondent from interfering with the business of the petitioner as licensed and conducted in accordance with the provisions of the Act. There is no question that the respondent has statutory authority under the EACCMA for the appointment and regulation of CFSs. The court order may have, or may not have, intended to stop the application of the statute, regulations and rules made by the Commissioner under the statutory powers with respect to the Petitioner. This ambiguity in the order must, as in all criminal cases, be given to the benefit of the accused contemnor.

19. The Petitioner may seek clarification of the court order by settling of terms before the Judge who issued the order. Alternatively, the application for conservatory order may be fixed for hearing inter partes when an order on the merits may be made.

20. Accordingly, for the reasons set out above, the petitioner's Notice of Motion dated the 20th September 2013 is declined with costs to the Respondent.

Dated, signed and delivered this 16th day of July, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mohamed for the Petitioner

Mr. Nyaga for the Respondent

Ms Linda - Court Assistant