



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JR MISC. CIVIL APPL. NO. 57 OF 2012**

**REPUBLIC .....APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY .....RESPONDENT**

**EX PARTE APPLICANT .....LUMA HOLDINGS LIMITED**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 9<sup>th</sup> March, 2012, the *ex parte* applicant herein, **Luma Holdings Limited**, seeks the following orders:
1. **Certiorari to quash Notice Number 155247 of “NOTICE OF GOODS DEPOSITED IN THE CUSTOMS WAREHOUSE” issued on 1<sup>st</sup> December, 2011 and the impounding of Mercedes Benz Actros Truck Registration No. KBP 019T Trailer ZD 6409 with 1X40 Container Number PCIU-8421201 deposited at the Customs Warehouse, Jomo Kenyatta International Airport.**
2. **Mandamus directing the Respondent to restore or release back to the applicant Mercedes Benz Actros Truck Registration No. KBP 019T Trailer ZD 6409 with 1X40 Container Number PCIU-8421201.**
3. **Condemning the respondent to pay costs of the application for leave and costs of the substantive application.**

**Ex Parte Applicant’s Case**

2. The said application was grounded on the statement filed with the chamber summons seeking leave on 20<sup>th</sup> February, 2012 and supported by the verifying affidavit sworn by **Celestinus Lusweti Wose**, a Director of the Applicant on 27<sup>th</sup> February, 2012.
3. According to the applicant, the Applicant was incorporated on 21<sup>st</sup> July, 2010 and in July, 2011 with financing from National Industrial Credit Bank (hereinafter referred to as the Bank) bought a Mercedes Benz Actros Truck Registration No. KBP 019T, together with a Trailer Registration No. ZD 6409 (hereinafter referred to as the suit Truck) though the Logbook for the same had not yet been issued. According to the deponent, the Applicant was repaying the said Bank Kshs 125,000.00 per month.
4. However on 1<sup>st</sup> December, 2011 the respondent impounded the applicant’s said Truck and Container Number PCIU-8421201 and locked the same in its warehouse at the Jomo Kenyatta International Airport.

5. It was deposed that on 6<sup>th</sup> December, 2011, the applicant wrote to Techno Relief Service to admit liability for the loss of income due to impounding of the said Truck but the latter denied contracting the applicant's said Truck. On 27<sup>th</sup> December, 2011 four suspect were arraigned in court in Criminal Case No. 175 – **Republic vs. Michael Cyado Mwanzuya & Others** charged with stealing property of **Mathew Lino** from the applicant's Truck and the applicant sought from the respondent the release of the said Truck based on the said charges. By its reply dated February, 2012 the Respondent asked the applicant to await further communication on the issue and the applicant thereafter made several attempts to have the said Truck released.
6. In the deponent's view, the applicant, a young company with the Truck as its only asset has had its source of income paralysed by the said detention hence unable to generate the said monthly Bank repayments despite completion of investigations and the charging of the culprits and despite the police having taken the photographs of the Truck.
7. According to the deponent, the detention of the said Truck is irregular and unreasonable.

### **Respondent's Case**

8. In response to the application the Respondent filed a replying affidavit sworn by **Jacob A. Onyach**, its Principal Revenue Officer on 7<sup>th</sup> April, 2012. According to him, on or about 7<sup>th</sup> December, 2011 Techno Relief Services EPZ Limited reported to the Makadara CID Division the loss of goods in transit being 17010 pieces of fleece blankets being conveyed in the suit Truck destined for the importer's warehouse. However the Truck was found abandoned at a Shell Petrol Station along Lusaka Road, Industrial Area with the container in which the goods were being conveyed empty.
9. On receipt of the information, the Respondent's officer proceeded to the Petrol Station and deposited the said Truck vide notice No. 155247 pending clearance by the Respondent's Customs. According to him the lost goods had been imported from China by Techno Relief Services EPZ for use in their Factory hence no duties were payable thereon. In his view the Respondent concluded that the goods had been diverted into the local market without payment of duties and hence were unaccustomed goods pursuant to the provisions of the **East African Community Customs Management Act, 2005** (hereinafter referred to as the Act). The deponent however deposed that he was unaware of the contractual arrangement between the applicant and Techno Relief Service EPZ and that the applicant admitted that the Truck was at all material times in the custody of its duly appointed agent, **Patrick Wanyonyi Makunja**, who called on the Respondent's Office and requested for the settlement of the case pursuant to the provisions of the Act. Upon receipt of the request the Respondent compounded the offence pursuant to section 219 of the said Act and ordered the applicant to pay a fine of Kshs 50,000.00 together with accrued customs warehouse rent in the sum of Kshs 365,336.00 as it was found guilty of an offence under section 199(b)(iii) of the Act. However the applicant did not pay the same.
10. In the deponent's view, the Respondent was hence surprised when the applicant instituted these proceedings when at the same time pursuant a settlement and that the Respondent is not aware of and is not a party to the criminal proceedings. It was contended that the institution of these proceedings is therefore an abuse of the court process and the orders sought cannot issue as the Respondent acted *intra vires* its powers under the said Act.

### **Applicant's Rejoinder**

11. By way of a rejoinder the deponent of the verifying affidavit swore a further affidavit on 3<sup>rd</sup> May, 2012 in which he deposed that he received a notice dated 28<sup>th</sup> March, 2012 from the Respondent asking for payment of Kshs 365,336/= with a fine of 5000 US Dollars after the Court attendance of 19<sup>th</sup> March, 2012.

### **Applicant's Submissions**

12. On behalf of the Applicant it was submitted that whereas the reason for impounding of the Truck was purportedly pursuant to section 211(1) of the Act, later the Respondent alleged that the

- Applicant had committed an offence under section 199(b)(iii) of the Act and fined the Applicant Kshs 50,000.00 together with accrued rent of Kshs 365,336.00 without stating how it arrived at the conclusion that an offence thereunder had been committed. Despite informing the Respondent that **Patrick Wanyonyi** was just a turnboy with no authority to bind the applicant. It was submitted that in conveying the subject goods the applicants did not act contrary to law in order to warrant the invocation of section 199 aforesaid. It was further submitted that since the applicant's directors as well as the complainant are listed in the criminal case as witnesses the respondent cannot be said not to be aware of the police action.
13. It was submitted that it was unfair to impound the Truck and impose fine on the applicant cannot when the culprits have been arrested and arraigned in court hence respondent's action of finding the applicant guilty of an offence under section 199 of the Act was without investigation and factual basis hence unreasonable and not informed by the facts. The purported conviction, it was submitted was premised on a request for settlement by a mere labourer with no authority to bind the applicant.
  14. Whereas it was alleged that the goods were diverted to the local market, the responsibility for that was not attributed to the applicant as the police who investigated the matter arraigned the persons concerned. To the applicant the transportation of the goods was not an offence since the goods only became unaccustomed when they were stolen from the truck hence the truck referred to in section 199 of the Act could only be the one used to transport them from the Truck. It was further submitted that the Respondent's action was contrary to the applicant's legitimate expectations. It was further submitted that the action of the Respondent violated the principle of proportionality.
  15. According to the applicant, the respondent purporting to have unilateral powers to find one guilty and pass consequences was under duty to act judiciously, given that the action carried penal consequences.

### **Respondent's Submissions**

16. On behalf of the Respondent, it was submitted that the actions of the Respondent cannot be said to be unreasonable since the applicant's authorized agent had admitted the offence hence under section 219 of the Act the Commissioner acted *intra vires* its powers by imposing the fine.

### **Determinations**

17. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivaling submissions, this is the view I form of the matter.
18. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** and 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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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 is 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.”**

19. From the Notice the subject of these proceedings, it is clear on its face that the same was issued pursuant to section 211(1) of the Act.

20. Section 211 of the Act provides:

***(1) A vessel of less than two hundred and fifty tons register, and any vehicle, animal, or other thing, made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall itself be liable to forfeiture.***

***(2) An aircraft or any vessel of two hundred and fifty tons register or more made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall not itself be liable to forfeiture but the master of any such aircraft or vessel commits an offence and shall be liable to a fine not exceeding ten thousand dollars; and such aircraft or vessel may be seized and detained until the fine is paid or security given.***

***(3) Where any vessel, vehicle, animal, or other thing, is liable to forfeiture under this Act, then the tackle, apparel, furniture, and all other gear, used in connection therewith shall also be liable to forfeiture.***

21. It is therefore clear that for the provisions relied upon to apply the vessel must have been made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture. From the Respondents own affidavit, it is clear that when the goods which were on transit in the applicant's Truck left Mombasa they were not goods liable to forfeiture and they only became liable to forfeiture when they were purportedly diverted to local market. It would follow that before diversion, the applicant's Truck was similarly not liable to forfeiture. It has not been alleged that after the said diversion the goods in question were ever transported in the applicant's Truck in order for the said Truck to be liable to forfeiture. It follows that the provisions of Section 211(1) were clearly inapplicable.

22. It is therefore not surprising that the Respondent resorted to another section being section 219 of the said Act. The said section provides:

***(1) The Commissioner may, where he or she is satisfied that any person has committed an offence under this Act in respect of which a fine is provided or in respect of which any thing is liable to forfeiture, compound the offence and may order such person to pay a sum of money, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may deem fit; and the Commissioner may order any thing liable to forfeiture in connection with the offence to be condemned.***

***(2) The Commissioner shall not exercise his or her powers under subsection (1) unless the person admits in a prescribed form that he or she has committed the offence and requests the Commissioner to deal with such offence under this section.***

***(3) Where the Commissioner makes any order under this section—***

***(a) the order shall be put into writing and shall have attached to it the request of the person to the Commissioner to deal with the matter;***

***(b) the order shall specify the offence which the person committed and the penalty imposed by the Commissioner;***

***(c) a copy of the order shall be given to the person if he or she so requests;***

*(d) the person shall not be liable to any further prosecution in respect of the offence; and if any prosecution is brought it shall be a good defence for the person to prove that the offence with which he or she is charged has been compounded under this section; and*

*(e) the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court.*

23. Therefore before the Commissioner can compound the offence and order a person to pay a sum of money, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and convicted for the offence, he must be satisfied that the person has committed the offence in question. Secondly, the person must admit in a prescribed form that he or she has committed the offence and request the Commissioner to deal with such offence under the section. In this case, it is contended that the applicant's authorised agent, **Patrick Wanyonyi Makunja**, called on the Respondent's officers and requested for settlement of the case and in support of this contention the Respondent exhibited JAO-7. The said document however does not indicate that the said person was acting on behalf of the applicant. The applicant's position was that the said person was a mere turnboy who was not authorised to bind the applicant. In my view where an offence has been alleged to have been committed by a corporation, the Respondent is enjoined to ensure that any admission of liability of the commission is by an officer of the corporation and it must further be satisfied that the admission of the offence is clearly patent on the face of the admission that it is on behalf of the corporation. Therefore, it is my view that whereas the said person was properly within his rights to request for settlement of his liability, there is no evidence that he was empowered to make a similar request on behalf of the applicant.
24. While I agree with the decision of **Muriithi, J** in **Republic vs. Commissioner of Customs ex parte Abdi Gullet Olus Mombasa HCMA No. 48 of 2013**, that the Respondent was entitled to impound the suit Truck while conducting investigations, it is my view and I so find that the decision to impose fine by the Respondent was both unlawful and unreasonable.

### **Order**

25. In the result, I find the application merited and consequently I grant the following orders:

1. **Certiorari to remove into this Court for the purposes of being quashed Notice Number 155247 of "NOTICE OF GOODS DEPOSITED IN THE CUSTOMS WAREHOUSE" issued on 1<sup>st</sup> December, 2011 and the decision impounding of Mercedes Benz Actros Truck Registration No. KBP 019T Trailer ZD 6409 with 1X40 Container Number PCIU-8421201 deposited at the Customs Warehouse, Jomo Kenyatta International Airport, which decision is hereby quashed.**
2. **Mandamus compelling the Respondent to restore or release back to the applicant Mercedes Benz Actros Truck Registration No. KBP 019T Trailer ZD 6409 with 1X40 Container Number PCIU-8421201.**
3. **In light of my finding that the initial impounding of the Truck was warranted, each party will bear own costs.**

**Dated at Nairobi this 10<sup>th</sup> day of November, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Odhiambo for Wati for the Applicant***

***Mrs Nganga for Mrs Mwaniki for the Respondent***

