



IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPL. NO. 285 OF 2013

BETWEEN

REPUBLIC APPLICANT

AND

KENYA REVENUE AUTHORITY 1ST RESPONDENT

THE COMMISSIONER OF

CUSTOMS SERVICES 2ND RESPONDENT

EX-PARTE

BEAR AFRIC (K) LIMITED

JUDGMENT

Introduction

1. Bear Afric (K) Ltd (“Bear”), the *ex-parte* applicant, is the local agent and partner of Jiangsu Zhougshao Cable Corporation (“Jiangsu”), a Company based in Yixing City in China. The 1st respondent, Kenya Revenue Authority (“KRA”) is incorporated under the provisions of **section 3** of the ***Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)*** and is responsible for collection of taxes in the country. The 2nd respondent, the Commissioner of Customs Services (“the Commissioner”), is an officer of KRA and acts on its behalf. For purposes of this decision reference to Commissioner shall include the Assistant Commissioner and officers working under the said office.

Ex-parte applicant’s Case

2. Bear has brought a Notice of Motion dated 1st August 2013 in which it seeks the following orders;
 1. *That this Honourable Court be pleased to make an order of Certiorari directed at the Respondents purported quashing of the decision of the Minister of Finance to exempt the Applicants' goods from payment of duties to rescind the remission of duties on the applicant's goods whose bill of lading No. is 142200983395.*
 2. *That this Honourable Court be pleased to make an order of prohibition order prohibiting the respondents from impounding, auctioning, destroying or disposing of the consignment bill of lading number 142200983395 and from impounding the any documents from the Applicant offices in relation to the said consignment.*
 3. *That this Honourable Court be pleased to make an order of prohibition prohibiting the respondents from demanding tax from Kenya Power Lighting in charging any duty from the goods described in the said bill of lading or impounding the same.*
 4. *That this Honourable Court be pleased to make an order of Mandamus directed at the Commissioner of Customs requiring him to release the consignment bill of lading number 142200983395 forthwith.*
 5. *That this Honourable court do stay the respondent's decision to demand duty from the goods exempted by the Minister for Finance/Treasury and to withhold the said goods be released forthwith to the Applicant by the respondents.*
 6. *That costs of this application be borne by the respondents.*
3. According to the verifying affidavit sworn on 1st August 2013, by Eric Agbeko, a director of Bear, Jiangu entered into a contract with Kenya Power and Lighting Company Limited ("KPLC") for the supply of conductors according to a contract dated 19th January 2012. Bear was entrusted by Jiangu to appoint a cargo agent to transport the consignment under Bill of Lading No. 14220983395 from the Port of Mombasa to KPLC Warehouses in Nairobi.
4. Jiangu was obligated to clear the goods and pay all the requisite expenses including but not limited to transport and demurrage costs incurred in the clearing process until the goods were delivered to the KPLC warehouse. Bear states that it paid a total of Kshs 24,000,000/= in cash and cheques to the Commissioner in payment of outstanding dues but the money was not properly credited to its account. It therefore applied for exemption of custom duties.
5. Bear avers that as the obligation to pay duty was on Jiangu as the supplier and shortly after the goods arrived in the country, it wrote to the Ministry of Finance ("the Minister") to request a remission of duty on the goods. The Minister duly granted the request vide a letter dated 15th February 2013 addressed to the Commissioner of Customs servants as follows;

The Commissioner of Customs Services,

Kenya Revenue Authority

P O Box 40160-00100,

NAIROBI

RE: REMISSION OF DUTIES, VAT AND IDF FEES VARIOUS MATERIALS FOR IMPLEMENTATION OF RURAL ELECTRIFICATION PROJECT UNDER THE KENYA ELECTRIFICATION EXPANSION PROJECT (KEEP)

In accordance with the Provisions of Part A, Item 10 of the 5th Schedule to the EAC Customs Management Act and Section 23(1) and (3) (e) of the VAT Act, as read together with Legal Notice No. 67 of 12th June 2003 and Regulation 38A (7) of the Customs and Excise Act, the Minister for Finance, approved on June 7, 2012 the Remission of duties, VAT and IDF Fees payable in respect of material, being imported or purchased locally by M/s Seacon Kenya Limited on behalf of M/s Rural Electrification

Authority (REA) for the implementation of the above project. The Project is part of the Kenya Electricity Expansion Programme (KEEP).

This is an official donor funded project financed by the International Development Association (IDA). The commencement date of the project was June 1st 2010 and is due for completion on March 31st 2016.

The details of the equipment and materials are as follows.

DESCRIPTION	QTY	INVOICE NO.	B/L OR AWB	AMOUNT
Conductors	312,900	ZCP 12012061901	14220983395	\$514,175.00

In the event that the above mentioned materials are not utilised solely in the project, appropriate taxes shall become due and payable.

By a copy of this letter, the Permanent Secretary, Ministry of Energy and the Management of M/s Seacon Kenya Limited are requested to furnish you with the relevant documents to facilitate customs clearance.

WANYAMBURA K. MWAMBIA

For: PERMANENT SECRETARY/TREASURY

Commissioner General – KRA

Deputy Commissioner – Southern Region

MOMBASA

Deputy Commissioner – Central Region

NAIROBI

The Permanent Secretary

Ministry of Energy

NAIROBI

M/s Kenya Power & Lighting Company Limited

NAIROBI

M/s Seacon Kenya Limited

NAIROBI

6. The letter was followed by another letter dated 20th February 2013 whose effect was to amend the exemption letter on the following terms, “In order to facilitate customs clearance, our letter referred to above is hereby amended to confirm that M/s Seacon Kenya Limited is importing on behalf of the Kenya Power and Lighting Co. Limited and for the Bill of Lading No to read 142200983395 and invoice No to read ZCP12012032701 and not as earlier quoted. All other details in the letter remain the same.”

7. Despite the remission granted by the Minister, Bear could not clear the goods. According to the instructions were issued on 21st March 2013 and 18th April 2013 as evidenced by the Customs Services Department Investigation and Verification Report, the goods should not be cleared without permission from the Senior Assistant Commissioner of Investigation and Enforcement.
8. On or about 17th May 2013, Bear came to learn the KRA demanded the sum of Kshs 41,403,292.00 from KPLC on account of the imported conductors. By a letter dated 15th May 2013 addressed to KPLC, the Commissioner stated, in part that, *“We wish to inform you that after physical verification of the containers and supporting Import documents, (The contract, the notification of award and the official purchase order) provided by yourselves, it has been established that the consignment DOES NOT qualify for remissions, therefore duties and taxes ought to have been paid to the government. This is an offence under section 203 of the East African Community Customs Management Act, 2004 ...”*
9. Bear’s complaint is that the Minister has exclusive authority to grant remission of duty under the **section 23(1)** of the **Value Added Tax Act (Chapter 476 of the Laws of Kenya)** and that the respondent could not countermand this decision by refusal to clear the goods subject of the remission. Further, that under **section 4(1)** of the **Government Financial Management Act**, the 2nd respondent is obliged to obey all orders and or instructions from the Treasury.
10. The *ex-parte* applicant pointed to the fact that the 2nd respondent has never written to the Minister to question the authenticity of documents presented by it or indeed the authority for the remission issued by the Minister. Bear reads bad faith and malice in the action of the respondents and submits that it has been denied the right to fair administrative action.

Respondent’s Case

11. The respondents oppose the application on the basis of the replying affidavit sworn on 12th September 2013 by Sylvester Okello Ogello, an Investigation and Enforcement officer working with the 1st respondent. He depones that Jiangsu initially procured the services of Seacon Kenya Limited as the clearing agents. That Seacon initially prepared entries C400 regime for payment of duty but later cancelled them and made fresh import entries under C490 which is an exemption regime.
12. Mr Ogello further depones that Seacon then made an application to the Minister for remissions of duties on the imported goods and when the exemption letter was issued, KRA approved the same on the assumption that the goods being imported were liable to remission. It however realised that there were discrepancies in the letter and when the contract were examined, it was discovered that the terms of the contract were spelt out as Delivered Duty Paid (DDP) and the notification of award clearly enumerated the Duty and VAT payable and the value of goods and such the goods did not qualify for exemption hence the determination that the exemption letter was issued in error or was false.
13. As a result of the determination, the demand letter dated 15th May 2013 was issued to KPLC. In response to the demand letter, KPLC wrote to the Commissioner a letter dated 31st May 2013 titled, *“DEMAND FOR TAXES FOR 13x4FT CONTAINERS STC CONDUCTOR 300MM2/MSA/3963897”* in which it confirmed that it had been notified that a shipment had overstayed at the Port of Mombasa for non-payment of duties by them. It stated that, *“The contract we have with M/s Jiangsu Zhongchao Cable Corporation is on a Delivered Duty Paid terms whereby the responsibility of paying Import Duty, GoK and mssf levy is with the supplier while Kenya Power is supposed to pay customs VAT. The import Entry No. 2013/Ms/3963897 which is quoted in your letter has not been presented to us to facilitate payment of VAT.”* KPLC added that the supply of conductors under the contract did not qualify for tax exemption and that it had not sought any exemption. In the circumstances it confirmed that it had communicated to Jiangsu about the tax demand through their local representatives and that they responded by

- seeking an extension of the deadline for payment to 15th June 2013 when the goods could then be cleared.
14. The Commissioner responded to the KPLC letter dated 31st May 2013 by a letter dated 5th June 2013. In that letter the Commissioner granted KPLC's request for extension of payment of duties and other taxes up to 15th June 2013. The Commissioner noted that the customs documents submitted did not qualify for exemption and that the goods had been at the port since February 2013 without clearing agent or the importer making any effort to clear and pay the taxes. The Commissioner further emphasised that according to the documents submitted to it that the responsibility of paying duty and taxes lay with the importer KPLC.
15. After the exchange of several emails, KPLC thereafter wrote a letter to Jiangsu dated 8th July 2013 titled, "*UNDELIVERED CONDUCTORS – ORDER NO. 3000323918*" copied to the Commissioner and in which it noted that the tax exemption allegedly sought and granted by KRA was not genuine and that it was required to pay all taxes, duty and VAT to allow for clearing of the order. The letter concluded that, "***PLEASE NOTE** that we have received a demand from KRA that the goods are to be cleared by Friday 12th July 2013. You are hereby requested to clear the goods and pay **ALL** taxes by the said date failure to which you are to surrender the import documents to KPLC to facilitate clearance of the goods at the port. Should PLC clear the goods, we shall recover all costs incurred from the total value of the contract. Additionally, the Performance Bond shall now be attached due to non-performance of the said contract.*"
16. In response to the Bear's argument that it cannot countermand the Minister's decision to grant remission, the respondents aver that KRA cannot honour the exemption letter from the Minister if it is already clear upon examination the exemption was not intended for such goods. Further that bear cannot benefit from a tax exemption as the goods can only be utilised by KPLC which procured them on terms that all taxes would be paid and which has informed Bear's principal, Jiangsu, that taxes must be paid as demanded. In the circumstances, the goods cannot be allowed or released without payment of taxes.
17. The respondents also argued that the exemption letter is a forgery offends **Articles 209 and 210** of the Constitution as well as the provisions of the *East African Community Customs Management Act, 2004 (EACCMA)*.

Determination

18. The nature and scope of orders of judicial review is not in issue. In the case of *R v National Environmental Management Authority and Another [2006]eKLR*, Emukule J., stated as follows, "*The remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. In the case of Chief Constable of North Wales Police v Evan (1982) 1 WLR 155 p.1160 ... Lord Hailsham L.C. said "It is important to remember in every case that the purpose of (the remedy of judicial review) is to ensure that the individual is given fair treatment by the authority to which he has been subjected."*
19. Githua J., summarised the nature of orders of judicial review in *Republic v Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012[2012]eKLR* as follows; "*It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by*

either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates.”

20. It is not disputed that the Minister has power under the **Value Added Tax Act (Chapter 476 of the Laws of Kenya)** (now repealed) to exempt a taxpayer from paying taxes. The issue in this case is whether the conduct of the respondents, in failing to process the clearing of the goods in light of the exemption, is an *ultra vires* act as the ex-parte applicant contends.

21. As similar issues arose in the case of **R v Commissioner of Customs and Excise and the Attorney General ex-parte Mwalimu Digore Nairobi HC Misc. Appl. JR No. 62 of 2006 (Unreported)** where it was argued by the applicant that KRA had a duty to unconditionally give effect to the exemption granted by the Minister. In that case the applicant applied for an order of certiorari to quash a decision of the Commissioner purporting to cancel the remission of duties and Value Added Tax in respect of certain foodstuff which had been imported. In response to this argument, Wendoh J., after considering the arguments concluded as follows; *“The 1st Respondent [the Commissioner of Customs and Excise] being the technical expert in the administration of Cap 472, it is his duty to ensure that the Minister does not err in his duty and the Commissioner correctly sought directions from the Permanent Secretary as regards the anomalies and the irregular exemption. That would not be acting in excess of the Commissioner’s powers. It is the duty of the Commissioner to look at it, consider the exemption, and confirm that it complies with the provisions of the Act. The Commissioner cannot act blindly and authorize that which is illegal or unlawful even with the Ministers directive. Both the Minister and Commissioner have to act within the law ... there is no evidence of cancellation of remission and the Commissioner acted within his powers in halting the exemption to seek directions.”*

22. I agree with these sentiments and adopt them wholly. Whereas, KRA and the Commissioner have an obligation under **section 4** of the **Government Financial Management Act** to obey instructions from the Treasury, the obligation of the Commissioner to satisfy himself of the legality of instructions is not discharged by Act. In this case, the Commissioner detected several anomalies which indicated that exemption ought not to have been granted. Key to this anomaly is the fact that the importer KPLC affirmed that it had not applied and was not entitled to a tax remission under the subject contract as confirmed in its letters dated 8th July 2013 and 31st May 2013 which I have outlined at paragraphs 13 and 15 above.

23. I have considered the relevant law on exemption and I find and hold that it was KPLC that was obliged to pay taxes and therefore apply for remissions. In other words, the position taken by Bear is inconsistent with the law. Under **Section 6** of the **Value Added Tax Act**, tax on the importation of goods into Kenya shall be charged as if it were a duty of customs and shall be payable by the person who imports the goods, while tax on services imported into Kenya is payable by the person receiving the taxable service. The section reads as follows;

6. (1) Tax shall be charged on any supply of goods or services made or provided in Kenya where it is a taxable supply made by a taxable person in the course of or in furtherance of any business carried on by him.

(2) The rates of tax shall be those specified in the First Schedule.

(3) A person who makes or intends to make taxable supplies is a taxable person while he is, or is required to be, registered under the Sixth Schedule; and a taxable supply is a supply of taxable goods or services made or provided in Kenya.

(4) Tax on any supply of goods or services shall be a liability of the person making the supply and (subject to the provisions of this Act relating to accounting and payment) shall become due at the time of supply.

(5) Tax on the importation of goods into Kenya shall be charged as if it were a duty of customs and shall be payable by the person who imports the goods.

(6) Tax on services imported into Kenya shall be payable by the person receiving the taxable service.

(7) Notwithstanding the provisions of subsection (6), where the supplier of a service to which that subsection applies is normally resident outside Kenya, the Commissioner may, by notice in writing, appoint a person who is normally resident in Kenya, as an agent for collecting the tax payable on the service and remitting it to the Commissioner. [Emphasis mine]

24. This position is further supported by **section 130(1)** of **EACCMA** which provides that duty is payable by the owner of the goods. The section reads as follows, “Where any goods are liable to duty, then such duty shall constitute a civil debt due to a Partner State and be charged on the goods in respect of which the duty is payable; and such duty shall be payable by the owner of the goods and may, without prejudice to any other means of recovery, be recovered summarily by legal proceedings brought by the Partner State.”

25. The respondents’ position is further buttressed by the provisions of **section 23** of the **Value Added Tax Act** where the Minister is empowered to by order in the Gazette, remit wholly or partly tax payable in respect of any taxable goods or services, if he is satisfied that it is in the public interest to do so. Although the remission was granted on 15th February 2013, no Gazette Notice, which is the manner in which the remission is effected, has been shown to the court.

26. The evidence before the court is that on the one hand KPLC, the importer denies that it was not entitled to remission of taxes in respect of the contract under the law and on the other hand Bear claims that an exemption was issued. The Commissioner was right to halt the process of clearing of the goods pending investigation and payment of taxes. The decision of the Commissioner was not unreasonable, irrational or illegal.

27. Prayer 1 of the Notice of Motion seeks to quash a purported order of respondents quashing the decision of the Minister. This order cannot be granted and in this respect I would do no better than quote Wendoh J., in **R v Commissioner of Customs and Excise and the Attorney General ex-parte Mwalimu Digore (supra)** where she stated, “The prayer for an order of certiorari seeks to have the decision of the Respondent purporting to cancel the exemption of duty and VAT in respect of the ex-parte Applicants’ consignment granted on 27/10/04 quashed. Order 53 Rule 7 Civil Procedure Rules requires that a party seeking the quashing of an order, conviction or proceedings by an order of Certiorari, do lodge a copy of the order or proceedings with the Registrar failing which he should give a satisfactory account to the Court for failure to do so. In this case the Applicants seek to quash the decision of the 1st Respondent purporting to cancel the remission of duties and VAT granted to the ex-parte Applicant but no such decision has been exhibited and there is really nothing to quash.”

28. I have already found that the Commissioner was entitled to satisfy himself that the remission complied with legal provision hence in the circumstances, an order of prohibition and mandamus cannot be granted.

29. The order of prohibition sought in Prayer 3 of the Motion seeks to prohibit the respondents from demanding taxes for KPLC. As the evidence shows, KPLC has admitted that it is the taxpayer and has specifically disavowed Bear’s contention that it is entitled to remission of taxes on the subject contract. Moreover, as it is not a party to these proceedings, it would be improper for the court to issue an order that would affect its rights and obligations.

Disposition

30. From what I have stated, it must be apparent the Notice of Motion dated 8th August 2013 must fail. It is dismissed with costs to the respondent.

DELIVERED and DATED at NAIROBI this 4th day of October 2013

D.S. MAJANJA

JUDGE

Mr King'ara instructed by Gichuki King'ara and Company Advocates for the ex-parte applicant.

Mr Ontweka, Advocate, instructed by the Kenya Revenue Authority.