



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 94 of 2011

IN THE MATTER: AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS

AND

IN THE MATTER OF: THE CUSTOMS AND EXCISE LAWS OF KENYA AND PROVISION OF  
THE CUSTOMS AND EXCISE ACT CAP.472

BETWEEN

PAUL NJOROGE KIMANI.....APPLICANT

AND

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

J U D G M E N T

Pursuant to leave granted by this court on 24<sup>th</sup> April 2011, the Exparte Applicant herein Paul Njoroge Kimani (*hereinafter referred to as the Applicant*) commenced judicial review proceedings by way of a Notice of Motion filed on 17<sup>th</sup> May 2011 in which he sought the following orders:

- (a) *An order of certiorari to remove to this Honourable Court for purposes of being quashed the directive by the 1st respondent forcefully and in breach of the Law seizing the applicants goods from the applicants yard on the 31<sup>st</sup> March 2011 and taking them to unknown destination.*
- (b) *An order for prohibition prohibiting the 1st respondent from giving further directive in contravention of the Customs and Exercise Act and regulation with to seizure of the applicants goods that were seized and confiscated from the applicants yard on 31st March 2011.*
- (c) *THAT costs of this application be provided for.*

The Kenya Revenue Authority is named as the 1<sup>st</sup> respondent while the Hon. Attorney General is named as the 2<sup>nd</sup> respondent. On 21<sup>st</sup> March 2012, by consent of the parties, the Hon. Attorney General was removed from the proceedings.

The application is grounded on the facts stated in the statutory statement dated 18<sup>th</sup> April 2011, the verifying affidavit sworn by the applicant on the same date and on the grounds stated on the face of the Notice of Motion.

Briefly, the facts of this case which are generally agreed upon is that in March 2011, the applicant imported assorted goods from the United Arab Emirates which entered Kenya from Tanzania through the Namanga Border point. The goods were transported in a container aboard a lorry Reg. No. UAG 370X. It is common ground that the applicant processed and paid custom duty based the value of the goods as declared in the import declaration forms. **Exhibit marked PKN4** attached to the applicant's verifying affidavit shows that duty amounting to Kshs.309,900 was paid.

It is not disputed that the goods were cleared and entered Kenya through the Namanga border point on 31<sup>st</sup> March 2011 after the 1<sup>st</sup> respondent's officers were satisfied that requisite duty had been paid and all the documents regarding importation of the goods in question were in order.

However, on the same day in the evening when the goods arrived at the applicant's yard at Nairobi West and were in the process of being offloaded from the truck, officers of the 1<sup>st</sup> respondent arrived accompanied by two police officers and despite being shown the importation documents proceeded to confiscate the goods and according to the applicant, commandeered the lorry to an unknown destination.

The applicant's case is that the action of the 1<sup>st</sup> respondent through its officers of confiscating his goods despite having paid duty in full had no legal basis and it is therefore illegal and ultra vires the Customs and Excise Act.

The applicant also complains that the Respondent did not follow due process in confiscating his goods and that therefore the 1<sup>st</sup> respondent breached the rules of natural justice. The applicant urged the court to allow the application and grant the orders sought.

The 1<sup>st</sup> respondent opposed the Notice of Motion through the replying affidavit sworn on 20<sup>th</sup> March 2012 by Sylvester Okello Ogello a Senior Assistant Commissioner with the 1<sup>st</sup> respondent's Investigations and Enforcement Department.

The 1<sup>st</sup> respondent's case is that its officers detained the applicant's goods as alleged under Section 153 of the East African Community Customs Management Act (EACCMA) and transported them to their customs warehouse at the Jomo Kenyatta International Airport to facilitate verification and proper valuation of the goods. The 1<sup>st</sup> respondent averred that after such verification and valuation, it was discovered that the applicant through his Customs Agent had not declared part of the consignment found in the truck as some of the items were not manifested in the import entry with the result that the 1<sup>st</sup> respondent assessed extra taxes amounting to Kshs.253,003 which tax was duly demanded vide letter dated 14<sup>th</sup> April 2011.

The 1<sup>st</sup> respondent also contended that the detention of the said goods was within the law as they included unaccustomed goods (goods for which duty had not been paid or in respect of which false declarations had been made) which were liable to forfeiture under Section 210 of East African Community Customs Management Act (**herein after referred to as EACCMA**).

I have considered both the written and oral submissions made by Mr. Nyaencha, learned counsel for the applicant and Mr. Ado for the 1<sup>st</sup> respondent. I have looked at the applicant's pleadings and have noted that though the applicant seeks in prayer 1 an order of certiorari to quash the 1<sup>st</sup> respondent's directive to seize his goods on 31<sup>st</sup> March 2011, he has not disclosed whether the said directive was issued verbally or in writing. If the said directive had been issued in writing, the same or its copy was not annexed to the applicant's pleadings or availed to the court prior to the hearing of the Notice of Motion as required by Order 53 Rule 7(1) of the Civil Procedure Rules.

Order 53 Rule 7 (1) Civil Procedure Rules is in the following terms:

***“In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment,***

**conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court.**

**Where an order of certiorari is made in any such case as aforesaid, the order shall direct that the proceedings shall be quashed forthwith on their removal into the High Court”.**

It is worth noting that Order 53 Rule 7(1) is couched in mandatory terms. The applicant's failure to avail a copy of the said directive or to account for failure to do so means that the court cannot establish as a fact that such a directive actually existed. The applicant has not claimed that the directive referred to in his application had been issued verbally in which case he would have accounted for his failure to avail a copy of the directive to the court. In the circumstances, I find that the applicant has failed to prove that there was a directive issued by the 1<sup>st</sup> respondent on the basis of which his goods were seized by its officers. In the absence of proof that such a directive existed, a possibility exists that such a directive may not be in existence which in turn means that there may be nothing for this court to quash by orders of certiorari. And since the policy of the law is that courts should not issue orders in vain, it is my finding and decision that the remedy of certiorari is not available to the applicant in this case. I accordingly decline to grant the said order as sought in Prayer 1.

Turning to the prayer for an order of prohibition, I wish to state at the outset that an order of prohibition would issue for actions threatened to be done or decisions contemplated to be made in contravention of the law or in excess or without jurisdiction of a statutory or public body or in breach of the rules of natural justice - see the case of **Republic -Vs- Kenya National Examination Council Exparte Geoffrey Gathenji & 9 others Civil Appeal Case No.266 of 1996.**

The 1<sup>st</sup> respondent has maintained that its officers lawfully detained the applicant's goods under Section 153 of the EACCMA in order to facilitate their physical verification and to ascertain that the correct value of the goods had been declared for tax purposes. I think it is important at this juncture to reproduce Section 153 of the EACCMA in its entirety in order for us to appreciate its true meaning and effect.

Section 153 of the EACCMA states as follows:

- (1) “An officer may, if he or she has reasonable grounds to believe that any vehicle is conveying any uncustomed goods whether or not in transit, or being transferred from one Partner State to another, stop and search any vehicle; and for the purpose of that search, that officer may require any goods in that vehicle to be unloaded at the expense of the owner of the vehicle.**
- (2) An officer who is unable to obtain free access to any place or container in the course of a search of a vehicle under this section may open the place or container in such manner, including by force, as the officer may deem necessary.**
- (3) A person incharge of a vehicle who refuses to stop or to permit the vehicle to be searched in accordance with this section commits an offence.**
- (4) Where, on the search of any vehicle under this section, ny goods are found in relation to which any offence under this Act has been committed, such goods shall be liable to forfeiture.**
- (5) An officer shall not be liable to any legal proceedings for any action taken in good faith in accordance with this section.**

A casual perusal of this section shows clearly that where an officer of the 1<sup>st</sup> respondent suspects that any vehicle was conveying unaccustomed goods whether or not it was in transit, the officer has power to stop and search the vehicle and where necessary order that goods conveyed therein be offloaded at the expense of the owner for purposes of conducting a search. It is implicit from that section that the said search should be carried out at the place where the vehicle had been stopped.

The section does not give the 1<sup>st</sup> respondent or officers working under it power to detain a vehicle or to confiscate suspected unaccustomed goods conveyed therein.

By confiscating and detaining the applicant's goods on grounds that they were suspected to be unaccustomed goods, the 1<sup>st</sup> respondent's officers clearly acted in excess of their jurisdiction under Section 153 of the EACCMA.

It is important to note that in order to justify its continued detention of the said goods, the 1<sup>st</sup> respondent has claimed that owing to undervaluation and mis-declaration of the goods, extra taxes in the sum of Kshs.253,003 had been assessed and demanded from the applicant which duty had not been paid by the time the instant proceedings were commenced.

However, no document was tendered in evidence by the 1<sup>st</sup> respondent including the alleged demand letter dated 14<sup>th</sup> April 2011 to prove that any such assessment was actually done and that a demand was ever made addressed to the applicant for payment of extra taxes in respect of the confiscated goods. There is therefore no evidence to prove that the seized goods were in fact unaccustomed goods in which case the Commissioner would have been mandated under Section 130 of EACCMA to detain the goods as lien for payment of the unpaid taxes. However, the Commissioner's powers under Section 130 of EACCMA must needless to say be exercised rationally, reasonably and following due process. In the absence of evidence that the confiscated goods were actually unaccustomed goods, I find that the 1<sup>st</sup> respondent's action of detaining the same was an illegality as it was done in contravention of the law.

It is also important to note the manner in which the 1<sup>st</sup> respondent's officers confiscated the applicant's goods as shown in the facts deponed to by the applicant in his verifying affidavit which have not been disputed by the 1<sup>st</sup> respondent. It was done arbitrarily and without any attempts to follow due process. There is no doubt that the unlawful confiscation and subsequent detention of the applicant's goods by the 1<sup>st</sup> respondent exposed the applicant to unnecessary financial hardship.

The 1<sup>st</sup> respondent being a statutory body established under the Kenya Revenue Authority Act has a legal obligation not only to perform its statutory functions within the confines of the law but also to treat tax payers fairly in the course of executing its mandate under the law. In this case it is obvious that the 1<sup>st</sup> respondent subjected the applicant to unfair treatment.

The purpose of judicial review is to ensure that an individual is given fair treatment by the authority to which he has been subjected. As the applicant has demonstrated that he was treated unfairly by the 1<sup>st</sup> respondent, I am persuaded to find that the applicant has demonstrated that he is deserving of the remedy of Judicial Review such as the order of prohibition sought in prayer (b) to stop the 1<sup>st</sup> respondent from continuing its detention of his goods in contravention of the law.

I have looked at the applicant's Notice of Motion and noted the wording in Prayer (b) thereof. I am of the view that though the applicant has proved that he is deserving of an order of prohibition, given the circumstances of this case, it would not be appropriate to issue an order of prohibition in terms sought in prayer (b) but in the interest of administering substantive justice in this case, I will allow prayer (b) on terms that the 1<sup>st</sup> respondent or its officers be and are hereby prohibited from continuing to detain the applicant's goods in contravention of the law.

In the end, the applicant partially succeeds in his application in the notice of motion dated 17<sup>th</sup> May 2011 and the same is allowed in prayer (b) on terms stated above with costs to the applicant.

**DATED, SIGNED and DELIVERED** by me at Nairobi this **9<sup>th</sup>** day of **October 2012**

**C. W. GITHUA**

**JUDGE**

***In the presence of:***

Florence – Court Clerk

N/A for Applicant

Mr. Moses Ado for 1<sup>st</sup> Respondent