

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 261 of 2011

REPUBLICAPPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

EX PARTE:

PREMIER FOOD INDUSTRIES

JUDGEMENT

The Applicant is Premier Food Industries Limited, a limited liability company incorporated in Kenya and its core business is manufacturing of food flavouring products under the brand names 'pep' and 'peptang'. It is owned by Industrial Promotion Services (Kenya) Limited. The Respondent is the Kenya Revenue Authority which is a statutory body created under Section 3 of the Kenya Revenue Authority Act, Chapter 469 of the Laws of Kenya. The Respondent is charged with the responsibility of assessment and collection of revenue, as well as with the administration and enforcement of the laws relating to revenue.

The Applicant approached this court by way of a Chamber Summons dated 31st October 2011 seeking leave to apply for orders of:

- a) **Certiorari to quash the decision of the Respondent to charge the Applicant the amount of Kshs 7,444,321.00 in respect of the security bond numbers PBNSB2857/03, PBNSB3011/04, PBNSB3604/04, PBNSB4143/04 and PBNSB0954/04;**
- b) **Certiorari to quash an Agency Notice dated 10th October 2011 issued by the Respondent to Barclays Bank of Kenya Limited declaring the Bank as the sole collecting agent of the Applicant for the purpose of collecting the amount of Kshs 7,444,321.00 demanded by the Respondent;**
- c) **Prohibition to prohibit the Respondent from demanding the sum of Kshs. 7,444,321.00 or any other sum under the Security Bond numbers PBNSB2857/03, PBNSB3011/04, PBNSB3604/04, PBNSB4143/04 and PBNSB0954/04;**
- d) **Prohibition to prohibit the Respondent from issuing any agency notices under Section 131 of the East African Community Customs Management Act 2004, or any other provisions of law to Barclays Bank of Kenya Limited or any other person in respect of the amount of Kshs. 7,444,321.00 or any other sum purportedly due under Security Bond numbers PBNSB2857/03, PBNSB3011/04, PBNSB3604/04, PBNSB4143/04 and PBNSB0954/04;**
- e) **Leave so granted by the court for the Applicant to seek the orders above do operated as a stay of proceedings in question and in particular emanating from the demand by the Respondent in respect of the Security Bond numbers PBNSB2857/03, PBNSB3011/04, PBNSB3604/04, PBNSB4143/04 and PBNSB0954/04, any agency notices issued pursuant to the said demand and any payments claimed thereunder by the Respondent, its servants or agents pending the hearing and determination of these proceedings.**

The chamber summons application was supported by the statutory statement dated 31st October, 2011 and the Verifying Affidavit of Sundararaman Dhamarajan.

Justice Warsame granted the leave sought and ordered that the leave so granted do operate as a stay of proceedings pending the hearing and determination of these judicial review proceedings. The substantive application seeking the orders in the application for leave was filed on 2nd November 2011. The said application was supported by grounds on its face and in particular that:-

- a) **The Applicant has a compelling case for relief in form of the orders sought.**
- b) **Unless this Court intervenes, the Applicant's entire business operations will be paralysed and the Applicant will be unable to operate their bank accounts, access any of the funds held therein and meet their financial obligations to other parties as and when such obligations fall due.**
- c) **Unless this Court intervenes in the manner prayed for, the applicant's reputation and the goodwill which it has built up over many years both in the local and international markets will be brought into disrepute with attendant negative consequences to the Applicant's standing in the market, its business reputation and its business dealings.**
- d) **It is just and equitable to grant the orders sought by this Court.**

Briefly, the facts of this case are that the Applicant is a food processing company which uses sugar as one of the ingredients in the manufacture of its products. The Ministry of Finance administers an arrangement known as the Essential Goods Production Support Programme (EGPSP). Under this scheme, the Ministry of Finance provides for remission of duty or VAT on goods imported into Kenya for use in the production of essential goods. The Applicant imports sugar and utilises the EGPSP where bulk users of industrial sugar are allowed to import sugar at reduced tax rates.

Applications for tax remissions under the EGPSP are made to the Tax Remission for Exports Office (TREO) in the Treasury. As security for payment of any duty that may be found to be due from an importer under the programme, all importers are supposed to furnish the Respondent with bonds to cover each specific shipment. After satisfactorily accounting for the goods imported, the importer then applies to the Respondent to retire the security bonds.

Between the years 2003 and 2004, the Applicant imported some consignments of sugar and obtained the security bonds from Jubilee Insurance Company Limited in favour of the Respondent. The details of the bonds were as follows:

Bond no	Bond Date	Amount
PBNSB2857/03	7 th July 2003	1,271,779.00
PBNSB0954/04	28 th January 2004	1,336,830.00
PBNSB3011/04	17 th May 2004	2,593,712.00
PBNSB3604/04	23 rd June 2004	1,062,000.00
PBNSB4143.04	13 th July 2004	1,180,000.00
	TOTAL	7,444,321.00

Later on, in exercise of its statutory powers the Respondent, through the Bond Section, undertook an audit of the Applicant's tax affairs. As a result of the audit the Respondent formed the opinion that the Applicant had not accounted for the bonds. Through letters dated 2nd March 2010 and 8th March, 2010 the Respondent asked the Applicant to account for the bonds within fourteen days failing which the Respondent would enforce payment of the same, as well as a penalty at the rate of 2% on the amount of the bonds, as though it was duty due.

The Applicant requested three weeks to trace relevant documentation that may exist with regard to the bonds in question. On 15th June, 2011, the Applicant forwarded copies of bond cancellation letters, previously issued by the Respondent to the Applicant.

The Respondent then insisted on seeing the original cancellation letters for the bonds, and further indicated to the Applicant that the documentation forwarded did not relate to the subject bonds but to other bonds which hadn't been the subject of the audit exercise.

The Respondent issued a seven day notice to the Applicant to account for the outstanding taxes, warning the Applicant that failure to account for the bonds would result in the Commissioner of Customs Services enforcing the payment of the securities in question as though they related to unpaid duty.

The Applicant then later received a 'final demand notice' dated 30th May, 2011 claiming the sum of Kshs 7,444,321.00 was owing and that the time for cancellation of the said security bonds had expired.

On 10th October, 2011, the Respondent issued an Agency Notice No. 074 to the Manager, Barclays Bank of Kenya, Barclays Plaza Branch, requiring the bank to pay to the Respondent the sum of Kshs. 7,444,321.00 being enforcement of security bonds executed by the Applicant from any monies which may be held by the Bank. The notice required the Bank to pay the money to the Respondent immediately.

A month later, on 10th November 2011, the Respondent once again wrote to the Bank. The Respondent referred to the Agency Notice and noted that the Bank had so far not complied with the same. The Respondent informed the Applicant that failure to comply with the Agency Notice was in contravention of Section 131 (5) of the East African Community Customs Management Act (EACCMA) 2004. The Respondent further informed the Bank that due to the contravention, the Bank was now deemed to be the principal debtor. The Respondent further gave the Bank three days from the date of the notice to pay the Commissioner of Customs Services, failure to which the Respondent would take enforcement measures against the Bank.

The Bank wrote to the Respondent, informing it that the Bank had been served with a court order dated 1st November, 2011 which stayed the Agency Notice pending the hearing and determination of the proceedings currently before the court.

The Applicant contests the actions of the Respondent of issuing the demand notice and the subsequent Agency Notice to its bankers on the grounds of irrationality, illegality, abuse of power and breach of legitimate expectation.

The Applicant maintains that after importing several consignments of industrial sugar it applied for the cancellation of the security bonds after a reconciliation and audit exercise carried out by the Respondent to confirm that the imported sugar had indeed been used in its manufacturing processes.

The Applicant's case is that the Respondent issued it with three separate letters confirming that the said security bonds had been cancelled and further indicating that the original bonds had been misplaced. In the letters it was stated that the letters were to be treated as authority to discharge the principal to the bond of its obligations. One of these letters was dated 23rd January, 2007 and the two others were dated 20th February, 2007.

The Respondent opposes the application by way of a replying affidavit dated 6th February, 2012 sworn by Jomo Nyakoe, who is the Revenue Officer within the Customs Services Department of the Respondent and a replying affidavit dated 2nd May, 2012 sworn by Martin Kibe a Bonds Officer within the Customs Department of the Respondent.

In the replying affidavit by Jomo Nyakoe, the Respondent contends that it raised a demand for Kshs 7,444,321.00 through a letter dated 30th May, 2011 with respect to five unretired Boffin bonds for the

Applicant. The Applicant responded through a letter dated 7th June, 2011 requesting for time to retrieve their records to confirm the status of the bonds. The Respondent then gave the Applicant the time requested but the Applicant did not produce any evidence to counter the demand.

In the replying affidavit by Martin Kibe, the Respondent contends that under the EGPS programme, the security bonds would only be retired once the importer has satisfactorily accounted for the consignments for which the bonds were executed. In this case, an audit of the Applicant's tax affairs established that it had not accounted for the goods imported under the security bonds in the demand notice.

The Respondent further states that the Applicant by way of a letter dated 7th June, 2011 sought time of three weeks to enable them to respond to the issues raised by the Respondent in the demand letter of 30th May, 2011. By way of a letter dated 15th June, 2011 the Applicant forwarded two bond cancellation letters from the Respondent which the Applicant claimed to have retired the bonds in question. However, the cancellation letters were in respect of the bonds that were not the subject of the audit exercise. The Respondent claim the bond cancellation letters were in respect of different bonds.

It is the Respondent's case that the bonds referred to in the said letters are different from the ones queried by the Respondent. The Applicant was informed as much but failed to account for the imports leaving the Respondent with no choice but to issue a seven day notice to account for the taxes by way of a letter dated 27th November, 2011.

The Respondent's case is that even after being accorded sufficient time to rebut the demand letter dated 30th May, 2011, the Applicant failed to account for the unretired bonds and as a result the Respondent invoked Section 131 of the EACCMA and issued an Agency Notice dated 10th October, 2011 seeking recovery of Kshs 7,444,321.00 in unretired Buffin bonds.

The Respondent is of the view that its actions were reasonable and in accordance with the provisions of the law, and in particular sections 106-109 of EACCMA which govern the operations of customs bonds.

The Respondent avers that it has in its possession the original bonds in question, and that an examination of the same shows that they have not been cancelled, which validates its claim that they are still outstanding, and that since all the five bonds in question are unaccounted for it is justified in demanding the payment of tax on them.

The Respondent further avers that the bonds in question relate to Tax Remission for Exports Office (TREO) transactions. These transactions are to be accompanied by reconciliation letters. A letter must accompany the application to retire the bonds. The Respondent argues that the Applicant has not produced reconciliation letters to show that these bonds have been officially cancelled.

In summary the Respondent's case is that the motion is without merit, is unfounded and should be dismissed.

The issues for determination by the court are:-

- a) Whether the letters from the Respondent produced by the Applicant relate to the customs security bonds that the Respondent is claiming taxes on;
- b) Whether the decision of the Respondent to charge the Applicant the amount of Kshs. 7,444,321.00 as unpaid duty is unreasonable, unfair and arbitrary;
- c) Whether the decision of the Respondent to issue the Agency Notice is illegal and ultra vires;
- d) Whether the Respondent acted outside the provisions of the law by requiring the Bank to immediately pay the money claimed;

- e) Is the Applicant deserving of the orders sought?
- f) Who should have the costs of the application?

The Applicant does not dispute the fact that the Respondent is by law entitled to demand payment for any unretired security bonds. The Applicant's case is that the bonds upon which the Respondent is making demands were retired through letters addressed to it by the Respondent.

Let me start by considering the validity of the Agency Notice issued to the Bank by the Respondent. The Applicant argued that the said notice contravened Section 131 of EACCMA which provides that an agency notice may only be issued requiring the agent to collect or to furnish a return within 30 days giving details of the monies held by that agent on behalf of the principal (taxpayer). If within 30 days, the monies, are not remitted, or notice given that the agent is unable to comply, the agent then becomes liable for payment of the same. In support of this argument counsel for the applicant cited the decision of the court in the case of **I & M BANK V KRA & 2 OTHERS JR MISC CIVIL APPLICATION NO 685 OF 2008**.

In that case, the Court held that an agency notice issued by the Kenya Revenue Authority without the benefit of the 30 day period before payment was ultra vires, contrary to the law and liable to be quashed by the issuance of appropriate judicial review orders. According to Gacheche, J:-

“It is clear from the above provisions of the law (the Income Tax Act) that once an agent is appointed, he has a clear thirty days within which to comply with the agency notice, unless of course, he notifies the Commissioner of his incapacity to act.”

In reply the Respondent submitted that there is nothing in Section 131 of EACCMA that prevents the Commissioner from requiring immediate payment of taxes from an agent appointed thereunder on account of a taxpayer who has defaulted. In the Respondent's view the 30 days period referred to in the said section only applies to the agent. The Respondent argued that since the agent (Bank) did not complain then the Applicant cannot be allowed to argue the Bank's case. The decision of Majanja, J in **REPUBLIC V COMMISSIONER OF INCOME TAX EX PARTE CHARTERHOUSE BANK LIMITED [2012] eKLR** was cited in support of this contention. In the cited case the validity of an agency notice, issued in circumstances similar to those of the case before me, was raised and Majanja, J found that the agency notice in question had validly been issued and it was only the agent namely the Central Bank of Kenya who should have raised an objection to the agency notice. The learned Judge stated that:-

“Thirdly, if the Central Bank was aggrieved it would have raised an objection to the agency notice. In fact, by a letter dated 5th March 2004, the Central Bank wrote to the bank seeking to know its position in the matter. The ex-parte applicant was informed by the Central Bank that, “we intend to implement the notice without delay.” To date no objection or intervention has been lodged by the Central Bank.”

As for the case before me, there is no dispute that the Agency Notice dated 10th October, 2011 demanded immediate payment of any monies held on behalf of the Applicant by the Bank. I do not find it appropriate to comment on the decision in **I & M BANK** case because I believe the decision in the matter before me lies elsewhere. I only wish to agree with Majanja, J that since the Bank has not complained about the Agency Notice then the Applicant is not the proper party to complain. Even if the court were to find that the Agency Notice was improperly issued, the much the court can do is to order the issuance of a proper agency notice.

Secondly, the Applicant argued that its legitimate expectation had been breached by the actions of the Respondent. Every person who comes into contact with a public body is entitled to fair treatment from the public body. The issue of legitimate expectation will turn upon the finding on the facts of this case. One thing is however clear: the principle of legitimate expectation cannot be invoked to prop an illegality. Were the security bonds issued to the Respondent by the Applicant discharged? The answer to this question will determine the outcome of this matter. The Applicant says the bonds were

discharged. On its part the Respondent argues that the bonds were not discharged.

In support of its case the Applicant referred to three letters. One letter is dated 23rd January, 2007 and the two others are both dated 20th February, 2012. All the three letters are addressed to Jubilee Insurance Co. Ltd the surety in respect of certain security bonds. The three letters discharge security bonds as follows:-

<u>Bond Number</u>	<u>Amount</u>
PBNSB 2598/03	KSHS.104,284
PBNSB 2513/03	KSHS.1,271,779
PBNSB 2925/04	KSHS .1,062,000
PBNSB 3521/04	KSHS. 1,180,000
PBNSB 1812/04	KSHS.1,336,830
PBNSB 2312/04	KSHS. 2,593,712
TOTAL	KSHS.7,444,321

In a demand letter dated 30th May, 2011 the Respondent demanded kshs.7,444,321.00 from the Applicant and attached a schedule to the said letter. I produce an abridged version of that schedule as follows:-

BOND NO	BOND	DATE	AMOUNT
PBNSB 3604/04	CB13	6.28.2004	KSHS.1,062,000.00
PBNSB 4143/04	CB13	7.22.2004	KSHS.1,180,000.00
PBNSB 0954/04	CB13	11.2.2004	KSHS .1,336,830.00
PBNSB 2857/04	CB13	9.7.2003	KSHS. 1,271,779.00
PBNSB 3011/04	CB13	5.27.2004	KSHS.2,593,712.00
			KSHS.7,444,321.00

In the schedule the principal name is given as Premier Food Industries and the guarantor's name is given as Jubilee Insurance.

Based on the schedule to the said demand letter the Respondent argues that the demand is for different bonds from those contained in the cancellation letters referred to by the Applicant. To buttress this argument the Respondent pointed to the fact that the numbers of the bonds allegedly cancelled were different from those of the bonds in the demand letter.

The Applicant however insists that the cancelled bonds are one and the same with those in the Respondent's demand letter. The Applicant points to the fact that the amounts in the cancelled bonds tally with the amounts in the demand letters.

Going through the Applicant's exhibits I find that the Applicant has annexed documents which confirm the bond numbers as per the Respondent's demand letter. When the Applicant was put to task about this issue it argued that it cannot tell why the Respondent gave the wrong bond numbers in the cancellation letters. It argued that it was upon the Respondent to explain the anomaly. In the further affidavit the

Managing Director of the Applicant produced copies of a book showing all the documents sealed by the company. I have looked at the said copies and they do not have the bond numbers. The said document is therefore not of much help to the Applicant.

It would be irrational and unreasonable for the Respondent to demand tax from the Applicant if the Applicant had indeed discharged its obligations in respect of the security bonds in question. I believe that there is a procedure for discharging security bonds. The Applicant must have followed the procedure before receiving the cancellation letters. It did not attach any document to its application to show that it indeed submitted any documents to the Respondent so as to trigger it to write the cancellation letters. The Applicant did not submit any document from its guarantor Jubilee Insurance Company to confirm that the amount in question had indeed been discharged by the Respondent.

Looking at the evidence placed before the court, it is clear that there is nothing to confirm the Applicant's claim that the security bonds in the cancellation letters are the same with the security bonds in the demand notice. The Applicant had a duty to clearly convince the court that the security bonds in the cancellation letters are the same with those in the Respondent's demand notice. It did not discharge that onus. He who alleges must prove. In my view, judicial review was not the best remedy for the Applicant. The disputed facts may have been better resolved upon the production of documentary and oral evidence. The end result is that with the kind of evidence placed before the court the prayers sought cannot be granted. The application therefore fails and the same is dismissed with costs to the Respondent.

Dated and signed at Nairobi this 10th day of October , 2012.

W. K. KORIR, J