



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Appli. 135 of 2009

BLUE PLUS LIMITED.....APPLICANT

Versus

THE KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

Oonge and Company Advocates filed the Chamber Summons dated 2nd March 2009 on behalf of the ex parte Applicant, Blue Plus Limited, seeking leave of this court to commence Judicial Review proceedings against the Kenya Revenue Authority and the Hon. The Attorney General as follows;

That the Applicants be granted leave,

1. to apply for an order of certiorari to remove into this court for the purposes of being quashed the directive by the 1st Respondent to close and seal the factory known as Blue Plus Limited situated at Seven Stars Complex off Mombasa Road on LR 19141;
2. An order of mandamus directed at the 1st and 2nd Respondent, their Agents/Representatives compelling them to open the Factory known as Blue Plus Limited situated at LR 19141 at Seven Stars Complex off Mombasa Road;
3. An order of prohibition, prohibiting the 1st and 2nd Respondent from sending away workers of the Applicant numbering about three hundred from the factory premises and allow them to continue operating;
4. That the grant of leave do operate as stay allowing the Applicant to gain access to the factory and continue operating pending the hearing and determination of this application.

The application is founded on facts contained in the affidavit of Gilbert Gichana Nyamwocha, a director with Blue Plus Limited, another affidavit titled replying affidavit sworn by Gilbert Gichana on 24th March 2009 and the statutory statement dated 26th February 2009. The grounds upon which the Application is brought are that the 1st Respondent acted unreasonably and contrary to public policy and that the rules of natural justice by not giving the Applicant any notice before inspecting the premises and proceeding to confiscate some equipment and documents and later, ordering all workers out and locking and sealing the factory without assigning any reason to the said closure. That the said acts offend the presumption of innocence under S. 77 (2) (a) of the Constitution and is ultra vires that provision.

In reply to the application, Mr. Paul Karuga, who works with the 1st Respondent's Enforcement Department as acting Senior Revenue Officer deponed that he is conversant with this matter. That the Government has innovated a programme called Manufacture Under Bond (MUB) to encourage exports by having import of raw materials duty free for production of goods for export but that traders have taken advantage of it to evade payment of import duty by importing goods without payment of taxes only to sell the goods in the local market. That denies the Government revenue and kills the local industries.

The Applicant is one of the bonded factories under S. 160 of the East African Community Customs Management Act (EACCM Act). The deponent visited the Applicant's premises in company of other officers, found the Managing Director who took them round. They were informed that the company imports items duty free, sews garments for

export to the U.S.A. and also exports goods on behalf of Kenya Knit Garments EPZ Mombasa, Rolex Garments EPZ Athi River and Global Apparels Kenya EPZ Athi River. That Kenya Knit, Rolex and Global Apparels all denied exporting the garments on behalf of the applicant, but admitted that Kenya knit Garment subcontracted them to make some garments from time to time (PK 1). The 1st Respondent's officers went to the Applicant's premises to do an audit at the Applicant's premises in July 2008 following information of some malpractices and they revealed that the applicant imported fabrics duty free to sew garments for export allegedly to the USA but that the Applicant manipulated the figures in their invoices to reflect lower values of the imported consignments (PK 3). That the applicant also changed supplying invoices from Bei Bora Trading Ltd. and Winka Fashions to read Blue Plus Ltd. and prepared import declarations with lower values (PK 4). That the 2 companies whose invoices were used are not exempt from payment of duty and the Applicant is therefore used as a conduit to evade payment of taxes. Another anomaly discovered was that the company imported fabrics in 2007/08 whose tax compensation was Ksh. 52,058,480/= but they could not account for them. That the Applicant was also found to be supplying goods to local supermarkets, i.e Satellite supermarket Ltd. contrary to their status as an EPZ as their imports are exempt from tax. The 1st Respondent exhibited a local purchase order evidencing that fact (PK 5). That the applicant breached S. 164(2) EACCMA for failing to export finished garments for the year under audit and also S. 166(3) when they sold the goods to local markets without the authority of the Commissioner of Customs. That since the licence is issued subject to the provisions of EACCMA, it is liable to cancellation. The 1st Respondent contends that they gave notice of the nature of investigations they were carrying out to the Director and that they made an inventory of the items taken from the Applicant's premises in presence of Joanne Chelagat Tiony (PK 6) and that the Director was informed of the reasons for closure on 17th February 2009 i.e for breach of Provisions of EACCMA. That the 1st Respondent is willing to reopen the factory on condition that a guarantee of 52,912,552, for the unaccounted for taxes is given.

In their further replying affidavit, the Applicants deny all the allegations of tax evasion and breach of the EACCMA. Though the Respondent's Counsel did not raise this issue

I do find that the application is incompetent and orders incapable of being granted. This is because the application offends the provisions of Order 53 Rule 1(2) Civil Procedure Rules. The rule requires that the facts to support the Chamber Summons application are contained in the verifying affidavit whereas the statement should only contain the name and description of the applicant, the Relief sought and the grounds upon which it is sought.

In the case of SILVANO ONEMA OWAKI V THE COMMISSIONER OF REVENUE CA 45/2000 KLR the Court of Appeal explained the meaning of Order 53 Rule 1(2) Civil Procedure Rules. The court said thus:

“we would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for Judicial Review. That appears to be the meaning of Rule 1 (2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol 1 at para 53/1/7

“The application for leave by a statement”. The facts relied on should be stated in the affidavit (See R.V. Wandsworth JJ, ex parte Read (1942) 1 K.B. 281) The statement should contain nothing more than the name and the description of the Applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.”

In the instant case, the Applicant filed the affidavit in support sworn by Gilbert Gichana Nyamwocha which briefly states what their case is. However, all the facts and exhibits are contained at paragraphs 4-20 of the statement. It is not the statement that should contain the evidence but the verifying affidavit. A statement is not of any evidential value in such an application. If paragraphs 4-20 of the statement are struck out, then the supporting affidavit as sworn does not contain any evidence that can sustain the application before this court. On that ground alone, this application is for striking out. Due to the defect in the application, this court will not go into the merits of the application. The Chamber Summons is hereby struck out with costs to the Respondent.

Dated and delivered this 6th day of May 2009.

R.P.V. WENDOH

JUDGE

Present:

Mr. Oonge for the Applicant

Mr. Odundi for the Respondent

Muturi: Court Clerk