



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 676 OF 1998

GURDOBA ENTERPRISES LTD.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....DEFENDANT

R U L I N G

On or about the 17th day of March, 1998, the defendant issued the plaintiff with a Notice of seizure in respect of two underground tanks containing petroleum products, two fuel pumps and one lorry registration number KXU 220.

It is the plaintiff's case that there is no justifiable reason why the goods should be liable to forfeiture and as such the seized goods should be released forthwith. The plaintiff avers that the defendant is in breach of its statutory duty.

In the plaint dated and filed on 23rd March, 1998, the plaintiff seeks the following orders:

(a) An injunction to restrain the defendant by itself, its servants, workmen

or agents, or otherwise howsoever, from attaching, seizing and or distraining the plaintiff's chattels or goods:

(b) A mandatory injunction against the defendants, its servants, workmen or agents for the release of the plaintiff's seized goods

(c) Damages

(d) Costs.

Alongside the said plaint, there was filed an application by way of Chamber Summons under Order 39 of the Civil Procedure Rules and section 3A of the Civil Procedure act for the substantive orders (a) and (b) above. The application is grounded on the reason that Duty has been fully paid on the he plaintiffs goods.

The application is supported by an affidavit sworn by one Haron Mohamed Noor a director for the plaintiff applicant sworn on 23rd march, 1998 and a further affidavit sworn on 31st March.

The defendant has filed grounds of opposition and an affidavit in reply sworn by one Francis Mbatha Nzalu. I shall return tot he contents thereof later herein below.

Following submissions made by both learned counsel herein, I believe the first issue to determine is whether or not an injunction can be issued against the defendant.

The plaintiff's counsel submits, it can while the defendant's submits otherwise. It all depends on the interpretation of the Kenya Revenue Authority Act No. 2 of 1995. The preamble to the Act reads as follows:

“an Act of Parliament to establish the Kenya Revenue Authority as a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and to provide for connected purposes.”

Section 3 of the act provides as follows:

“3(1) There is established an Authority to be known as the Kenya Revenue Authority.

(2) The Authority shall be a body corporate with perpetual succession and a Common seal and shall be capable of suing and being sued in its corporate name, and, subject to this Act, may borrow money, acquire and dispose of property and do all such other things as a body corporate may lawfully do.

(3) The Authority shall be an agency of the Government for the collection and receipt of all revenues and shall be under general supervision of the Minister.”

Section 16 of the Government Proceedings Act Cap.40 provides as follow:

“16(1) In any Civil Proceedings by or against the Government the Court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require: provided that-

(I) Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(ii) in any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or delivery of property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the government to the land or property, or to the possession thereof.

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the government if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the Government.”

The learned counsel for the defendant has cited H.C.C.C. No. 2786 of 1992 Rwigara Asinapol -v- Commissioner of Customs & Excise and submitted that an injunction cannot issue in this case as held in that particular case. On the other hand, the learned counsel for the plaintiff cited H.C.C.C. No. 1931 of 1997 Truphena Kesia and Nyawara T/a Africana one Caterers Services -v- Kenya Broadcasting Corporation and Calleb elaki Kibera T/a Home Park Caterers and submitted that the defendant herein is a statutory Corporation and that the provisions of the Government proceedings Act do not apply.

I have read the two authorities. Both are High Court decisions which are not binding on me but may be of persuasive value.

The application of the Government Proceedings Act Cap. 40 to the Kenya Revenue Authority Act No 2 of 1995 has not been expressly provided for. It is not clear why the legislature elected to be silent in this very important piece of legislation. Whatever the reason, my view is that if it were intended that the Government Proceedings Act Cap 40 would apply to the Kenya Revenue Authority, this would have been provided for. This is especially so because the Kenya Revenue Authority Act No. 2 of 1995 is a latter Act and the Draftsman could not possibly leaves that out. That he did, is a clear pointer that the application of the Government Proceedings Act Cap 40 and in particular section 16 thereof shall not apply.

Further, the Kenya Revenue Authority is a creature of statute with capacity to sue or to be sued in its corporate name. It must submit itself to the rigours of litigation and stop operating under the shadow of the Government when it comes to legal proceedings.

In my view the provisions of section 16 of the Government Proceedings act are not available to the defendant and I find that where proved, the orders of injunction can be issued against it.

Having so found, I must now address the issue of injunction orders sought. The Notices of seizure are part of the record. The Notices of seizure are part of the record. The two relating tot he tanks and the lorry give reason for the seizure as “being unaccustomed goods in contravention or sections 196 & 197 of the Customs act.” The one in respect of the pumps gives reasons for seizure as “ being used to deliver unaccustomed goods in contravention of section 197 of the Customs & Excise Act.”

At this stage the plaintiff is only required to prove that there is a prima facie case with a probability of success; that if the orders are not given there will result irreparable loss not capable of being compensated by an award of damages and, if the court is in doubt it will decide the matter on a balance of convenience. - See Giella -v- Cassman Brown & Company Ltd (1973) E.A 358.

The plaintiff is a licensed distributor of petroleum products. annexed to the application is the Trade License “HMN1’ and another licence issued by the City Council of Nairobi relating to the underground tank for storage of such products. The defendant has no disputed that.

Mr Francis Mbatha Nzalo was called to be cross examined on the contents of his affidavit of 1st April, 1998. he is the one who visited the premises of the plaintiff in company of two police officers. he is the one who seized the goods complained of. It is significant to note that he acted on information from oil industries that the plaintiff’s premises was one of the dumping sites of unaccustomed petroleum products.

He said the search revealed that the goods seized were unaccustomed. However, during cross examination he conceded the goods seized were indeed customary in that the documents shown and produced from Total indicated duty had been paid. The learned counsel for the defendant has infact told the court that the products will be released.

The defendant's officers may have had reasonable suspicion of the plaintiff's possession of; unaccustomed goods but with respect, before the seizure they should have ascertained the truth. In the instant case the truth has come out that the goods were not unaccustomed. And so, going by the Notices of seizure the grounds therefor cannot be sustained.

If the plaintiff had paid duty, as it has been established, on the petroleum products, it cannot be alleged that the pumps were used to deliver unaccustomed goods. Further, the contents found in the lorry Reg. No KXU 220 tallied in all material particulars with the delivery notes from Total Kenya Ltd.

The Kenya Revenue Authority is bestowed with heavy responsibilities. But caution must be exercised in the execution of such responsibilities. That was not the case in this matter. The officers may have been overzealous and in the process seized goods that should never have been seized.

In the end therefore, I find the plaintiff has established a very strong prima facie case with a probability of success. Having done so, it is not necessary for me to consider the other two principles for granting the orders.

Accordingly, injunction orders shall issues as prayed in the Chamber Summons. The effect thereof is that the defendant shall cause the underground tanks and the pumps belonging to the plaintiff opened. The defendant shall also cause the m/v Reg. No. KXU 220 together with the contents to be released to the plaintiff. The orders shall take effect forthwith.

An inquiry as to damages shall await the full trial. The plaintiff shall also have the costs of this application.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of April, 1998.

A. MBOGHOLI MSAGHA

JUDGE

Mr Owino for the plaintiff

Miss Kimani for the defendant