



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, VISRAM & GATEMBU, JJA)

CIVIL APPEAL NO. 237 OF 2013

BETWEEN

MATCHMASTERS LIMITED.....APPELLANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Githua, J) dated 7th May, 2013 and delivered by (Korir, J.) on 9th May, 2013

in

H.C. Misc. Appl. No. 1119 of 2007)

JUDGMENT OF THE COURT

Introduction

1. This appeal stems from a judgment of the High Court at Nairobi (C. W. Githua, J) dated 7th May 2013 and delivered by Korir, J on 9th May 2013 dismissing the appellant's application for judicial review dated 18th October 2007. In that application, the appellant had applied for: an order of certiorari to quash the decision of the respondent to recover tax allegedly due from the appellant in the amount of Kshs. 8,231,421.00; orders of prohibition to prohibit the respondent from taking steps to recover the said tax amount; and an order of mandamus to compel the respondent to refund any amounts already received or collected in respect thereof.

Background

2. The background, in brief, is that by Legal Notice No. EAC/08/2006 published in the East African Community Gazette, the Chairperson, Council of Ministers, an organ of the East African Community, notified that it had approved measures on customs duty rates on some items. One of the items affected by that notice was match boxes in respect of which "import duty rate 50%" was announced. The notice stipulated that, "this Notice shall be deemed to have come into force on the 1st day of July 2006" and was carried in the East African Community Gazette bearing the date, 30th June 2006. At the foot of the Gazette Notice, however, was inscribed, "Arusha, Tanzania 21st August 2006".

3. Following an audit of the appellant, a manufacturer and importer of match boxes, carried out by the Customs Services Department of the respondent, the latter demanded from the appellant, tax amount of Kshs.8,231,421.00 being principal amount and accumulated penalties on account of the said Legal Notice No. EAC/08/2006 for the period 1st July 2006 to 21st August 2006.

4. Whereas the appellant had no issue paying tax based on said Legal Notice No. EAC/08/2006 for the period after 21st August 2006, it contended that the legal notice “*was signed, gazetted and became law*” on 21st August 2006 and could not be applied for any period before 21st August 2006. In other words, the legal notice could not have retroactive application. To the extent that the amount of Kshs. 8,231,421.00 that was demanded related to a period prior to 21st August 2006, the appellant contended that it was not payable or recoverable. The respondent, on the other hand, maintained that as the commencement date of the legal notice was clearly stated to be 1st July 2006 and not 21st August 2006 the amount demanded was payable.

5. On 20th September 2007, and with a view to recovering that amount, the respondent issued an agency notice to the appellant’s banker, Investment and Mortgages Bank Ltd, requiring it to pay the said amount. In order to have the agency notice lifted, the appellant agreed, on without prejudice basis, to pay the amount demanded by installments, whereupon the respondent lifted the agency notice. Thereafter, the appellant initiated the judicial review proceedings that culminated in the judgment the subject of this appeal.

6. In dismissing the appellant’s application, the learned Judge held that the contention by the appellant that the date of publication of the legal notice was 21st August 2006 was misplaced. Having obtained and perused “*the entire East African Community Gazette*” that contained the legal notice in question, the Judge held that the date of publication was the date printed on the Gazette, namely, 30th June 2006.

The Appeal and Submissions

7. The appellant has faulted the judgment of the High Court on grounds set out in its memorandum of appeal, the substance of which are, that the Judge erred in failing to appreciate the materiality of the date of 21st August 2006 appearing at the foot of the legal notice and inferring that the same was a clerical or typographical error; that the Judge misdirected herself in holding that the date of publication was 30th June 2006; the Judge erred in procuring her own evidence and making unilateral findings and conclusions thereon; that the judge failed to consider that the Gazette Notice was controvertible prima facie evidence; and the judge erred in determining that duty was payable without evidence of the date of entry of imports on which the duty was charged.

8. Urging the appeal before us, learned counsel for the appellant Mrs. Leah Onchwari relied on her written submissions which she highlighted. She submitted that the inference by the Judge that there was a typographical or clerical error in the legal notice was not supported by any evidence; that had there been any error, the same should have been corrected by the East African Community Printer; that the effect of the inference that there was a typographical or clerical error in the legal notice was detrimental to the appellant and negated the principle of certainty of law as enunciated in ***Keroche Industries Ltd v KRA & 5 others [2007] eKLR***; that the effect of the Judge’s finding was to give rise to ambiguity on the provision of a tax law and that any such ambiguity must be resolved in favour of the tax payer as held by the High court (Visram, J as he then was) in ***Commissioner of Income Tax v Westmont Power (K) Ltd [2006] eKLR***.

9. According to counsel, the legal notice having been published on 21st August 2006, it could not operate retrospectively so as to make the amended import duty rates to be effective from the earlier date of 1st July 2006. In that regard, reference was made to the High Court decision in ***CFC Stanbic Bank Ltd v KRA, Petition No. 566 of 2012 [2014] eKLR***; and the decision of this Court in ***R.M.M v B.A.M [2015] eKLR*** for the proposition that taxation laws should not be retroactive.

10. It was also submitted that the Judge misapprehended the provisions of Section 75 of the Community (Interpretation) Act No. 6 of 2004 by misconstruing that the legal notice was published on 30th June 2006; that under sections 25 and 26 of the Laws of the Community (Interpretation) Act No. 6 of 2004, similar to our own sections 27 and 28 of the Interpretation and General Provisions Act, subsidiary legislation will only come into operation when it is published.

11. It was also urged that under Section 124 of the Customs and Excise Duty Act, duty is only payable at the point of actual entry into Kenya and the same cannot be levied retrospectively consequent to the importation of the goods and the application of duty at the rate of 50% before 21st August, 2006 of was erroneous.

12. Opposing the appeal, learned counsel for the respondent Ms. J. Lavuna submitted that the date of publication of the notice is easily

verifiable as it appears on the face of the Gazette notice which in this case was 30th June 2006; that under Section 27 of the Interpretation and General Provisions Act and Section 26 of the Laws of the Community (Interpretation) Act 2004, provision can be made for the effective date to be a date other than the date of publication; that in this case the effective date was expressly stated to be 1st July 2006 and there is no retrospective application if the taxes are assessed from the prescribed date.

13. According to counsel, there is no ambiguity in this case as the intention to levy the tax is clearly shown by the words used. Citing passages from the title **Principles of Statutory Interpretation** by J.P Singh at page 575 and 577 it was submitted that the law must be strictly constructed and tax cannot be avoided on the basis of a conceived hardship; and that a defect in phraseology cannot defeat a clear intention of tax laws. It was submitted that the respondent acted within the law and that the effective date of 1st July, 2006 is one which was adopted by all the East African Community party states; and that the date of publication was conclusively settled by the Judge who obtained and perused the entire Gazette Notice.

Analysis and determination

14. We have considered the appeal and the submissions by counsel. In essence there are two questions for our consideration. The first is when was Legal Notice No. EAC/08/2006 published? The second question is when did the legal notice take effect? Related to that is whether the notice had retrospective application.

15. As regards the question when was Legal Notice No. EAC/08/2006 published and when did it take effect, the learned Judge found as a fact that the notice was published on 30th June 2006. The Judge had this to say:

“From the date appearing on the face of the Gazette, there cannot be any doubt that the Gazette was printed on 30th June 2006 and since this was the date on which it was published, this became the date of its publication. The Legal Notice containing the revised tariffs was carried in the said Gazette and it goes without saying that it was also published on the same date. That is why the date of 30th June 2006 appears on its top right corner. It therefore follows that the submission by Mr. Oraro that the date of publication of the Legal Notice was 21st August 2006 is factually incorrect and cannot be sustained.”

And later in the judgment went on to state:

“Since the Legal notice expressly stated the date on which the revised tariffs were to come into effect and guided by the provisions of Section 26 of the Community Interpretation Act and Section 27 of the Interpretation Act and Section 27 of the Interpretation and General Provisions Act, I find that in this case, the effective date of Legal Notice No. EAC/08/2006 was 1st of July 2006 and not 21st August 2006 as submitted by the Applicant.

16. As already stated, the appellant complains that the finding that the date of publication of the notice was 30th June 2006 is not correct in view of the inscription of the date “21st August 2006” at the foot of the legal notice.

17. During the hearing of the appeal, we requested counsel to make available to us, the entire East African Community Gazette in which the legal notice in question was contained. Part of the Gazette was supplied to the Court through a supplementary record of appeal filed by the advocates for the appellant on 10th January 2019.

18. We have perused the Legal Notice in question as contained in that Gazette, printed by the Government Printer, Dar es salaam, Tanzania and which on its face proclaimed, “Arusha, 30th June 2006”. Legal Notice No. EAC/08/2006 appears at page 2 and 3 of the Gazette. At the top of that page, the date 30th June, 2006 is printed, as is the case in all the subsequent pages up to the last page of the Gazette, which is page 7.

19. At the bottom of the legal notice, it is provided that “This Notice shall be deemed to have come into force on the 1st day of July 2006” and bears the name of the Chairperson, Council of Ministers, after which the inscription “Arusha, Tanzania 21st August 2006” appears. It is noteworthy that the legal notice that appears at page 4 to 7 of the same Gazette, namely Legal Notice No. EAC/9/2006, with which we are not concerned, also provides that it shall be deemed to have come into force on the 1st day of July 2006 and also bears a similar inscription “Arusha, Tanzania 21st August 2006” after the name of the author, the Chairperson, Council of Ministers.

20. By dint of Section 85 of the Evidence Act, Cap 80 the production of a copy of any written law, or of a copy of the Gazette containing any written law or of any notice purporting to be made in pursuance of a written law, or where such law or notice (as the case may be) purports to be printed by the Government Printer, “*shall be prima facie evidence in all court and for all purposes whatsoever of the due making and tenor of such written law or notice*”.

21. Based on that provision, there is a rebuttable presumption that the Legal notice was published in the Gazette of 30th June 2006 as appears on the face of the Gazette. There is however, the troubling, date of 21st August 2006 that appears at the bottom of the legal notice. To what does that date relate? Is it the date when the notice was prepared? If so, is it possible that it could have been published on 30th June 2006, in effect, before it came into existence? And then there is the provision to which we have referred that “this notice *shall be deemed to have come* into force on the 1st day of July 2006”. Does that mean that the 1st day of July 2006 was in the past by the time of publication appeared? The situation is further compounded by the respondent’s letter dated 12th September 2007 addressed to the appellant in which the author, an officer of the respondent, wrote, “*notwithstanding the fact that the Legal Notice was published in August 2006...*”

22. This is how the learned Judge addressed those troubling questions. It is necessary to quote the Judge at some length. She stated:

“Though ideally the date indicated at the bottom of Legal Notice is supposed to signify the date of the Legal Notice or when it was presented for publication as can be seen from the sample Legal Notices availed to the court by Respondent, it is important to note that the date of the notice is more often than not different from the date of its publication.

The date 21st August 2006 indicated in this case cannot possibly be the date of the Legal Notice in this case since it is not logically possible to have a document dated about one and a half months after its publication. The normal or usual practice is to have documents including Legal Notices dated or signed by their authors before they are either published or forwarded for publication. In my humble opinion, the indication of the date of 21st August 2006 as the date of the Legal Notice herein was clearly a mistake possibly caused by a clerical or typographical error.”

23. It is not clear to us on what basis the Judge considered the date of 21st August 2006 to have been either a clerical or typographical error. There was no evidence to support that hypothesis. As the party relying on the legal notice to assert its claim and as the party contending that the date of publication of the legal notice was 30th June 2006, it was incumbent upon the respondent to explain the date of 21st August 2006. It was not, with respect, open to the Judge to speculate as she did that the date of 21st August 2006 was a clerical or typographical error. It seems to us, that given the date appearing at the bottom of the legal notice, coupled with the stipulation or provision that the notice would, seemingly relate back to 1st July 2006 raises doubts as to whether 30th June 2006 was indeed the date of publication. These are matters on which evidence would have been helpful but none was tendered.

24. In our view several interpretations can be given to the Legal notice with regard to the date of publication. In effect there is ambiguity. In ***Commissioner of Income Tax vs Westmont Power (K) Ltd [2006] eKLR***, the High Court (Visram, J, as he then was) whilst upholding the doctrine applied in the English case of ***Commissioner of Inland Revenue vs Scottish Central Electricity Power Company (1931)15 TC 761*** that “it would be contrary to all principle to seek for an implication against a tax payer” expressed that “it is paramount that taxation provisions must be express and clear so as to leave no room for ambiguity.” Those words in our view apply equally to the situation at hand.

25. In the absence of clarity as to when the Legal Notice was published, the inquiry as to whether it had retrospective application is moot. For if the publication was earlier than the effective date, the question of retroactive application does not arise. If on the other hand the publication was later than the effective date, then the inquiry as to its retroactive application would be germane. In either case, the inquiry would be predicated upon the foundation of the date of publication.

26. In conclusion therefore, we hold that there is ambiguity regarding the date of publication of Legal Notice No. EAC/8/2006 and more importantly the effective date when the new tax rates were to apply. In ***Stanbic Bank Kenya Ltd vs Kenya Revenue Authority [2009] eKLR***, Nyamu, JA adopted with approval the words of Lord Simonds in ***Scott v Russell [1948]2All E R 1*** that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him. In this case, the Legal Notice in question does not, unambiguously, provide the effective date as to when the new tax rate was to apply with the result that the appellant must have the benefit of the ambiguity.

27. Although the learned Judge found that this was not a proper case for judicial review as the respondent had acted within its mandate, this issue was not canvassed before us and we have accordingly not addressed it in this judgment.

28. We accordingly allow the appeal, and set aside the judgment and decree of the High Court dated 7th May 2013 and delivered on 9th May 2013 and substitute therefore an order allowing the appellant’s application dated 18th October 2007 in terms of prayers 1 and 4 thereof. The orders flowing from those prayers are as follows:

“(i) FOR, Certiorari to remove into this Honourable Court and to quash the decision of the Kenya Revenue Authority (Customs

Services Department) by a letter dated 2nd August, 2007, whereby it demanded extra revenue from the ex parte Applicant in the sum of Kshs. 8,231,421/=

(ii) FOR, an order of mandamus compelling the Kenya Revenue Authority to refund to the ex parte Applicant any amount received or collected pursuant to or connected with the demand for extra revenue by the 2nd August, 2007 aforesaid.”

29. The appellant shall have the costs of the appeal as well as the costs of the proceedings in the High Court.

Dated and delivered at Nairobi this 8th day of March, 2019.

P. N. WAKI

.....

JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR