



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KARANJA & KIAGE, J.J.A)

CIVIL APPEAL NO. 122 OF 2014

BETWEEN

**KENYA REVENUE AUTHORITY 1ST APPELLANT COMMISSIONER OF
CUSTOMS & EXCISE**

**KENYA REVENUE AUTHORITY 2ND APPELLANT
COMMISSIONER GENERAL**

**KENYA REVENUE AUTHORITY
..... 3RD APPELLANT**

AND

**KING BIRD (KENYA) LIMITED
..... RESPONDENT**

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi, (Korir, J.) dated 27th March, 2012

in

MISC. CIVIL APPLN. NO. 243 OF 2010)

JUDGMENT OF THE COURT

By this appeal the 1st appellant, Kenya Revenue Authority together with its Commissioner of Customs and Excise and its Director General who are its co-appellants (hereinafter referred to as ‘the appellants’) challenge the judgment and decree of the High Court of Kenya at Nairobi (Milimani) (W. Korir, J.) rendered on 27th March 2012 by which it directed the discharge of a bank guarantee for **Kshs. 2,966,079** which had been provided by the respondent King Bird Kenya Ltd, to secure the release of the respondent’s 487 motorcycles which the appellants had seized and detained at the port of Mombasa.

That judgment was in judicial review proceedings filed by the respondent seeking an order of certiorari to remove and quash the appellants’ decision to so detain the motorcycles ostensibly over unpaid taxes and fines. The statement set out the grounds on which the relief was sought to the effect that the respondent, a trader in, *inter alia*, motor cycles, had imported the said motor cycles in June 2010. They were in three

containers under Bill of Lading Nos. 537075844, 551075741 and 801882681 which were duly entered into the respondents' system and given Entry Numbers. The respondents engaged Morevo Agency, a clearing and forwarding firm duly licensed by the appellants to clear the motor cycles and delivered to the said firm the relevant import documents. After assessment of the payable import duties was done by the appellants' officers, the applicant was advised of the amount of Kshs. 3,971,368 which it duly paid. The motor cycles were not released, however, as the appellants' agents decided to appraise the duty payable with the result that extra duty in the sum of Kshs. 848,066 was demanded. The respondent remitted this sum to the agent for payment to the appellants. Still, the motor cycles were not released and the appellants made a further demand of Kshs. 1,595,207 as extra duty which the respondent again remitted to the clearing and forwarding firm for payment to the appellants so the goods could be released. They were not

What followed next is recounted and complained about in the statement as follows;

“9. The imported goods remain detained despite payments made by the applicant towards duty hereinabove.

10. Instead of the goods being released to enable the applicant continue its business, the said Clearing firm has delivered to the applicant further demands for payment to Kenya Revenue Authority. It is clear on the face of the documents that the claims now being made are of doubtful basis.

11. The applicant has been to the offices of the respondents in Mombasa and Nairobi seeking to know the basis of the demands herein; and seeking to be informed of the reason behind the detention of the imports, without success.

12. The action of the respondents' officers herein are unfair and against the survival of the applicant's business which is now endangered by the continued detention of the goods.

13. The action of the respondents' officers herein is unfair, unjustified, *ultra vires* the law and amounts to irregular practice and abuse of power.

14. The decision is premised on bad faith to harass the applicant in its business.

15. The actions of the officers of the respondents are disproportionate and contrary to the applicant's rightful and legitimate expectations to fair treatment.”

Those assertions are repeated and amplified in the verifying affidavit of Wang Xiang sworn on 12th July 2010.

The appellants opposed the application through a replying affidavit sworn by Seraphine Anamanjia, a Revenue Officer in their customs services. She swore that inspection and verification of the motor cycles imported by the respondent established that their values had been under-declared. The appellants therefore instructed the respondent to pay extra duties and fines amounting respectively to **Kshs. 1,776,078** and **Kshs. 2,150,000** making a total of **Kshs. 3,326,078** which the deponent swore was demanded from the respondent but he did not pay it. In justification of the appellants' imposition of the extra duties and fines, the deponent referred to **sections 41 and 122(1)** of the East African Community Customs Management Act. She concluded by stating that the appellants were justified to demand the aforesaid sum of fines and extra duties and that the appellants should in the circumstances be allowed to undertake their statutory duties unhindered so as to safeguard much-needed government revenue.

During the pendency of the judicial review proceedings, and to obviate further losses to the respondent's business, a consent was entered into between the parties by which the seized motor cycles were released to the respondent upon its obtaining a bank guarantee for the sum of **Kshs. 2,966,078** as security. It is this guarantee that the learned Judge discharged by his impugned judgment.

In their Memorandum of Appeal, the appellants have raised some nineteen grounds of complaint. The

first four grounds fault the learned Judge for failing to appreciate the provisions of **sections 201 and 203** of the Act and in particular for holding that a conviction and imposition of a fine for offences thereunder must be by a court of law and not the appellants. The appellants in their submissions set out the relevant provisions of the Act as follows;

“S.201; Where on conviction for an offence under this Act, a person is liable to pay a fine, that person shall, unless the goods are prohibited goods or are ordered to be forfeited under this Act, pay duty of the goods in addition to the fine.”

“Section 203 states:

“A person who, in any manner relating to the customs-

(a) makes an entry which is false or incorrect in any particular , or

(b) makes or causes to be made any declaration, certificate, application, or other document which is false or incorrect in any particular, or

(c)

(d)

(e) in any way is knowingly concerned in any fraudulent evasion of the payment of any duty or

(f)

(g)

(h)

Commits an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding ten thousand dollars”.

The appellants’ contention is that the imposition of the fine is not a judicial function but a power exercisable by themselves and without the necessity of a prior conviction by a court. Their submission at page 4 is in fact that;

“Once the appellants are convinced that some offences have been done and established, then the appellants can impose a fine.”

(Our emphasis)

With the greatest respect, we are completely unable to fathom that argument, let alone accept it. True it is the adjective **convinced** that has the noun **conviction** meaning a strongly held belief or opinion but that surely cannot be the meaning intended by the legislature in relation to offences so that the notion of the appellants being **convinced** cannot be the basis of the imposition of fines even had they the power to impose them, which they do not. We are in no doubt whatsoever that the **conviction** referred to in the two sections bears the meaning carried in Black’s Law Dictionary 9th Edition 2009 at P384;

“1. The act or process of judicially finding someone guilty of a crime; the state of having been found guilty.

2. The judgment (as by a jury verdict) that a person is guilty of a crime.”

We think that this is a matter so plain that it is somewhat surreal to read the appellants’ submissions that

they, and not the courts, could convict and fine the respondent or any other person alleged to have committed an offence under the Act. The determination of guilt leading to conviction and sentence is a purely and exclusively judicial function. To hold otherwise would lead to an absurdity where the appellants constitute themselves accuser, prosecutor, jury, judge and executioner rolled into one. That such would herald the end of liberty is made more plain by the fact that the penal provisions referred to prescribe the punishment of either imprisonment or a fine and it would follow that if the appellants can impose a fine under those provisions, they can also imprison offenders which is unarguably untenable.

We find and hold that the conviction referred to under **section 201 and 203** of the Act is a finding of guilt following the judicial process of a criminal trial before a court of law and that any fine upon such conviction can only be imposed by a court of law and the learned Judge was right to so hold. The complaints in those four grounds accordingly fail.

That finding also disposes of grounds 5 to 8 of the memorandum of appeal which fault the learned Judge for finding that there was no evidence that the respondent had committed any of the crimes specified under **section 203** of the Act and that the fines imposed were not only on unclear basis but also imposed without jurisdiction. Whatever suspicions the appellants had against the respondent and any evidence backing them up, the only lawful recourse open to them would have been to have formal charges laid before a court of law and the evidence presented at a trial.

This they did not do and we cannot but independently conclude upon our own analysis of the record in a fresh and exhaustive manner, as we are enjoined to do on a first appeal, that the learned judge was bound to arrive at his finding that;

“For a fine to be imposed under section 201 there has to be a conviction. The respondents did not present to the court any conviction. The respondents also submitted that the applicant made false or incorrect entries and made false declarations thereby contravening section 203 of EACCMA. There is however no evidence that the applicant committed any of the crimes specified in the said section. In fact the claim by the respondents that the applicant has breached the provisions of section 203 without any evidence to support such claim only goes to prove that the respondents are acting in bad faith, unreasonably and maliciously. I am at a loss as to why the respondents decided to impose fines on the applicant without any clear legal basis. The only conclusion is to agree with the applicant that the fines were an afterthought and were meant to cover up the inefficiencies of the respondents. The respondents acted in excess of their jurisdiction by imposing those fines. The actions bring the applicant’s case into the judicial review arena and the solution is to quash the fines that were imposed without any legal basis.”

Those grounds of appeal accordingly fail.

The appellants next fault the learned Judge for his finding regarding the exact sum they claimed from the respondent as fines and extra duty and their propriety or basis in law. These complaints are the subject of grounds 9 to 15 of the memorandum of appeal. The bone of contention seems to be the discrepancy between the sum of **Kshs. 3,326,078** that appears in the appellants’ replying affidavit as the total of **Kshs. 1,176,078** extra duty and **Kshs. 2,150,000** fines on the one hand, and the sum of **Kshs. 2,966,079** which their advocate indicated as the amount claimed and on the basis of which a bank guarantee was obtained. The learned Judge in his assessment concluded that the said discrepancy lent credit to the respondent’s contention before him that the appellants were acting unfairly and capriciously towards it. Save for the learned Judge’s miscalculation that led him to question the difference between the two figures as **Kshs. 360,289** when in fact it is **Kshs. 359,999** as properly pointed out by the appellants, the gist of the matter, namely that there was no explanation as to how the amount claimed dropped by that figure remains valid.

The explanation given by the appellants before us in their submissions is that **“the figure of Kshs. 2,966,079 was arrived at hurriedly to facilitate the issue of leave and giving out conditions on stay”** but surely that figure had to come from some place and needed to have a basis. None seems to have been given and we cannot therefore fault the learned Judge for following this line of reasoning;

“Without a reasonable explanation being given on the different figures, the only conclusion is that the respondents do not know what is due from the applicant. What the respondents are doing amounts to plucking figures from the air and inserting them in their documents. Their alleged assessment of extra duty due from the applicant has not been done in accordance with the law. The applicant is therefore correct when it claims that the respondents have acted unfairly towards it. With the kind of evidence presented to the Court by the respondents the court is not in a position to tell the amount of extra duty the applicant is supposed to pay and the only logical conclusion is that the applicant has paid whatsoever it was supposed to pay to the respondents. A citizen of this country ought to know the correct amount of taxes due to the taxman.”

When it is borne in mind, moreover, that the bulk of the figure claimed, whether the larger or the smaller, actually comprised the fines that we have already found to have been nullities for having no basis in law, we have no difficulty finding, as we do, that those grounds of complaint must also fail.

We think that what powers the appellants have under the Act must be exercised in a reasonable manner and in particular they must eschew the appearance of arbitrariness or caprice in determining and expressing the duties they say are payable. Shifting figures created uncertainty and cast a doubt on the appellants’ *bona fides* in their dealings with the respondent.

The final ground of appeal, the 16th, the appellants having abandoned all subsequent ones, is that the learned Judge erred in failing to find that judicial review is concerned with the decision-making process and not the merits of the decision. The appellants cited in aid this Court’s decisions of *MUNICIPAL COUNCIL OF MOMBASA vs. REPUBLIC & ANORTHER* [2002]eKLR and *THE COMMISSIONER OF CUSTOMS & 2 OTHERS vs. AMIT ASHOK DOSHI & 2 OTHERS* Mombasa Civil Appeal No. 157 of 2007 and urged that in so far as they exercised their powers in accordance with the Act, their ensuing decisions were not proper subjects for judicial review.

In answer to that contention the respondent’s submission is that whereas the appellants have the sole mandate to collect taxes on behalf of Government, their performance of that mandate is subject to the law and must accord with the principles of natural justice and fairness and eschew any actions in excess of authority or abuse of power. It contends that the appellants’ officers acted unreasonably, excessively, unjustifiably and arbitrarily in demanding extra duties and detaining the respondent’s goods thereby occasioning delay so great that it incurred port charges and container delay charges in the sum of **Kshs. 1,902,655.40**. Those actions were disproportionate and contrary to the respondent’s legitimate expectations of fair treatment and were calculated to harass the respondent in its business.

We think that the proper province of judicial review is settled in our jurisdiction. Both sides to this appeal agree that judicial review is concerned with the decision-making process, as was held by this Court in *KENYA NATIONAL EXAMINATIONS COUNCIL vs. REPUBLIC EX PARTE GEOFFREY GATHENJI NJOROGE & NINE OTHERS* (Civil Appeal No. 266 of 1996).

As part of the analysis of the decision itself, judicial review issues on the basis of well-known grounds which were expressed thus in *THE COMMISSIONER OF CUSTOMS & 2 OTHERS vs. AMIT ASHOK DOSHI & 2 OTHERS* case (supra);

“They include illegality – that is to say, acting either without jurisdiction or in excess of jurisdiction –, irrationality, that is, making a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person or tribunal would arrive at, and, procedural impropriety, which includes failure to observe natural justice.”

From our own analysis we are quite satisfied that the learned Judge was justified in finding that the decision of the appellants properly warranted his exercise of the judicial review jurisdiction. There was ample illegality in the imposition of the fines absent a judicial conviction. There was unreasonableness and irrationality in the demands that were made and enforced by the detention of the respondent’s motorcycles. There was a flagrant violation of the rules of natural justice and a high-handedness

amounting to abuse of power on the part of the appellants. Perhaps they ought to have remembered the Shakespearean caution in *Measure for Measure*; “O, it is excellent to have a giant’s strength but it is tyrannous To use it like a giant.” All powers donated by law are always and ultimately subject to law and must be exercised within the law.

We are unpersuaded that the learned Judge fell into error in finding that the appellants’ actions reeked of abuse of power and in finding that the case before him was on all fours with, and attracted the description given by Nyamu, J (as he then was) in *KEROCHE INDUSTRIES LIMITED vs. KENYA REVENUE AUTHORITIES & 5 OTHERS* [2007] eKLR;

“Abuse of power in my view poisons the entire tree as rightly put by the learned counsel for the applicant Mr. Orengo. My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same are abused by decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of discretion. A court of law should never sanction abuse of power, whether arising from statute or discretion.”

We think that abuses of power must always attract a stern rebuke from the courts which are the custodians of the Constitution and guarantors of the rule of law. And the learned Judge was right in discharging his said duty.

The upshot is that we find no merit in this appeal. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 10th day of March, 2017.

P. N. WAKI

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P.O. KIAGE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR