



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, M'INOTI & MURGOR, J.J.A.)

CIVIL APPEAL NO. 116 OF 2013

REPUBLIC.....APPELLANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

EXPARTE ALLTEX EPZ LIMITED

(Appeal from the judgment and decree of the High Court at Nairobi, (Majanja, J.) dated 5th October 2012

in

HC MISC. APP. NO. 709 OF 2008)

JUDGMENT OF THE COURT

Despite the manner in which this appeal is intitled, the real appellant is *Alltex EPZ Ltd*, a limited liability company, which was the *ex parte* applicant in the judicial review proceedings giving rise to this appeal. The appellant is registered as an export processing zone operator under the *Export Processing Zones Act* carrying on the business of processing, manufacturing, or production of garments in the Economic Processing Zone (EPZ), at Athi River. The appellant was also duly registered under the *East African Community Custom Management Act (the Act)* under which it held a license pursuant to *section 160* to manufacture goods at its EPZ premises, under security bond.

The security bond, required by *regulation 147* of the *East Africa Customs Management Regulations, 2006 (the regulations)* enabled the appellant to import duty free, goods and raw materials for production of garments for export at its EPZ business. Because of the advantages conferred on an EPZ operator in the form of exemption from duty and taxes, a fairly rigid regime of checks and accountability has been put in place under the Act and the regulations made thereunder. Goods that are imported under the security bond arrangement must be strictly used in the EPZ and the operator is under an obligation to account for all goods that it has imported under its license. Breach of the conditions of the bond, such as importation of goods that are not meant for the EPZ business, failure to satisfactorily account for all imported goods, or diversion of manufactured products from the export to the local market, results in the operator having to pay taxes and duties on those goods, as would have been the case but for the exemption, together with interest and penalties.

The respondent is the **Kenya Revenue Authority**, a Government agency established by an Act of Parliament with the mandate of collecting revenue on behalf of the Government. After concluding that the appellant had breached the conditions of its security bond, the respondent demanded payment of taxes, interest and penalties, which the appellant contested in the judicial review proceedings leading to this appeal. The central issue in the appeal is whether the High Court erred by holding that the appellant was obliged to pay duty on goods that were fraudulently imported duty free by its employees on the strength of the appellant's security bond.

Pursuant to the provisions of the Act, the appellant executed a **General Bond Number GBNSB5525** in the sum of **Kshs 20,000,000/=** to cover the goods and materials that it would import for its EPZ business. In or about 2003, an employee of the appellant named **Peter Muthenya Muindi**, in collusion with other persons, used the appellant's said security bond and procured clearance, unlawfully and without payment of duty, of goods that were not destined or intended for the appellant's EPZ business.

The respondent avers that as a result of those actions of the appellant's employee, tax of **Kshs 3,413,378/=** was lost, which with interest and penalties added up to **Kshs 6,561,303**. The said employee together with three others were subsequently charged with offences under the **Penal Code** and the **Customs and Excise Act** in **Criminal Case No. 3077 of 2003** before the Chief Magistrate's Court, Mombasa. They were however acquitted on 3rd May 2007 under **section 201** of the **Criminal Procedure Code** for lack of sufficient evidence.

On 23rd February 2007 the respondent demanded payment of duty of **Kshs 3,413,378/=** from the appellant. Thereafter the parties exchanged correspondence in a bid to amicably settle the matter but the efforts came to naught. On 22nd October 2008, the respondent issued an agency notice to the appellant's bankers, **Barclays Bank (K) Ltd.**, demanding immediate payment of **Kshs 6,561,303/=** made up of the principle duty, penalties an interest.

On 11th November 2007, the appellant moved to the High Court and applied for an order of *certiorari* to quash the agency notice and an order of *prohibition* to stop the respondent from demanding the said amount or any other amount arising from the fraudulent actions of its employee, narrated above. The appellant contended that the goods fraudulently cleared by its employee were not its goods and neither were they used in its business nor for its benefit and that by demanding taxes from it, the respondent had failed to exercise its discretion according to reason and justice and had thereby acted illegally. Opposing the application, the respondent contended that the appellant had violated the Act and that having held out its employee as the person in charge of its import declarations, the appellant was legally responsible for and bound by the employee's acts, which were committed in the course of his employment.

By the judgment impugned in this appeal, **Majanja, J.** identified only one issue for determination, namely whether in the circumstance the appellant was liable to pay duty on account of the criminal and delinquent acts of its employee. He concluded that under **section 148** of

Act, the appellant was liable for the acts of its duly authorised agent. Accordingly he dismissed the application with costs, thus provoking this appeal.

Although in its memorandum of appeal the appellant has set out six grounds of appeal, they all converge on the central issue, which was determined by the High Court, namely whether the respondent was liable to pay duty arising from the fraudulent acts of its employee and duly authorised agent. If we understood **Mr. Ogado**, learned counsel for the appellant properly, the learned judge erred by relying on section 148 of the Act instead of what counsel calls "the common law position that a principal is not liable for criminal acts of its employees."

Prosecuting the appeal, counsel submitted that under the Act, the basis of levying taxes and duties against a party is ownership by that party of the imported goods. In this case, he submitted, the appellant was neither the importer nor the owner of the goods as defined in the Act and was not even aware of their importation. Although the documents used to import the goods purported to show the appellant was the importer, they were forgeries. We were accordingly urged to find that the learned judge erred by

assuming, contrary to the evidence, that the appellant was the owner of the goods.

The appellant also faulted the respondent for levying taxes against it while fully aware of the circumstances under which the goods were imported. In the appellant's view, the levy of taxes was injudicious exercise of discretion by the respondent, which makes its decision biased, absurd, irrational, and unreasonable within the meaning of the *Wednesbury principles* and thus amenable to judicial review. (See *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation [1948] 1 KC 223*).

Turning to the crux of the appeal, the appellant contended that the learned judge erred by disregarding the known common law position regarding the relationship between principal and agent and also by misconstruing section 148 of the Act. Relying on *Warren v. Henlys Limited [1948] 2 All ER 935*, it submitted that under common law, the employer is not liable for the actions or omissions of his agent unless a nexus between the agent's acts or omissions and his employment is proved and further that the acts or omissions were on behalf of and for the benefit of the employer. In this appeal it was contended that the agent was not acting in the course of his employment when he illegally imported the goods in question, which were for his own benefit rather than the appellant's

On section 148, the appellant urged us to find that the learned judge interpreted the provision in an incomplete manner and that the proviso thereto absolves the owner from liability for offences committed by his duly authorised agent, unless the owner actually consented to the commission of the offence. In this case, it was submitted, there was no evidence that the appellant had consented to the commission of the offence by its agent.

Opposing the appeal, *Ado Moses*, learned counsel for the respondent, urged that the judgment of the High Court was sound and that there was no basis for interfering with it. He submitted that whilst under sections 147 of the Act, a duly authorized agent was deemed to be the owner of goods and therefore liable to pay duty due under the Act, that did not absolve the principal from liability. Similarly, it was submitted, under section 148, the principal of a duly authorized agent is liable for the acts and declarations of the agent and may even be prosecuted for any offence committed by the agent as if the principal had committed the offence himself. Accordingly we were urged to find that the commission of the offence by the agent did not absolve the appellant from paying duty.

The respondent further submitted that Peter Muthenya Muindi was in charge of the appellant's import declarations and had authority from the appellant to deal with the respondent regarding those declarations. Accordingly, we were urged to find that the appellant was in law liable for the actions of its agent, having given him authority and held him out to all persons, including the respondent, as having authority to make declarations on the appellant's behalf and to clear goods under the relevant customs law. The respondent relied on *Uxbridge Permanent Benefit Building Society v. Pickard [1939] 2 KB 248* in support of that proposition.

Lastly the respondent submitted that granted its express statutory duty to collect taxes, and in the absence of evidence of abuse of the power vested in it, there was no basis upon which orders of judicial review could be issued to stop the respondent from discharging its duties.

We have carefully considered the record of appeal, the judgment of the High Court, the memorandum of appeal, the submissions by the respective parties and the authorities they relied on. This being a first appeal, we are enjoined to consider both issues of fact and law. The main issues of fact are not in dispute. The appellant was at all material times licensed under the Act and had in force a security bond No. **GBNSB5525**. The bond enabled the appellant to import materials duty free for its EPZ business, subject to set conditions. Breach of those conditions would entitle the respondent to demand from the appellant payment of duty. For purposes of customs declarations and clearance of goods, the appellant appointed Peter Muthenya Muindi as its agent under the Act.

In 2003 the said Peter Muthenya Muindi, intending to evade payment of duty, unlawfully and falsely made declarations that the appellant had imported some goods for its EPZ business. As a result of those

declarations, duty amounting to Kshs. 3,413,378/= was not paid, which together with penalties and interest escalated to **Kshs 6,561,303/=** as of 22nd October 2008. The agent was prosecuted for criminal offence connected with the clearance of the said goods but was acquitted for lack of evidence. The respondent then sought to recover the **Kshs 6,561,303/=** from the respondent, who in turn resisted the claim on the basis that it could not be liable for the criminal conduct of its agent because he was not acting in the course of his employment.

We will first dispose of the appellant's argument that the learned judge erred by ignoring the common law principles on the liability of a principal for acts of an agent. In our view this submission has absolutely no basis in law. In this jurisdiction, a court of law cannot ignore the provisions of a statute and supplant them with principles of common law. If any authority were required for that proposition, it is **section 3(1) (c)** of the **Judicature Act** which provides that the substance of common law and doctrines of equity apply only in so far as the Constitution or a statute does not apply. In ***David Sironga ole Tukai v. Francis arap Muge & Others, CA No. 76 of 2014***, this Court stated as follows on the relationship between the common law and statute in Kenya:

“Section 3(1) (of the Judicature Act) embodies what has been called the hierarchy of norms and provides for how the jurisdiction of the courts in Kenya shall be exercised. The section creates a deliberate and

hierarchical sequence of laws, starting with the Constitution, followed by Statutes and next the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897. It does not require too much imagination to see that under section 3(1) the application of the substance of the common law and the doctrines of equity is subject first to the Constitution and the Statutes. Indeed to emphasize that the substance of common law and the doctrines of equity cannot override provisions of the statute, section 3(1) (c) makes it clear that the substance of common law and the doctrines of equity apply only in so far as the statute does not apply... In other words, the Judicature Act does not allow a court of law to ignore an express statutory provision under the guise of applying the doctrines of equity. The application of the substance of common law, the doctrines of equity and statutes of general application in Kenya is further circumscribed by the requirement in the Judicature Act that they shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary...In our view, the import of this qualification is that once an issue has been expressly and comprehensively provided for by legislation, the courts cannot invoke the substance of common law, the doctrines of equity and statutes of general application to contradict the provisions of the Kenya statute.”

We reiterate that position and add that the liability of the appellant in this appeal is to be determined according to the terms of the Act, which has expressly, comprehensively, and exhaustively addressed the relationship between the owner of goods under the Act and his agent. **Section 145 (1)** of the Act empowers the Commissioner of Customs to license a person to act as agent for transacting business relating to declaration or clearance of goods. By dint of **section 146**, where the owner of goods is required or authorised under the customs laws to perform any act, his authorised agent may perform such act on his behalf. The Act is very clear that to be an agent, the person must be exclusively in the employment of the owner of the goods. As we have stated, there is no dispute that for the purposes of the Act, Peter Muthenya Muindi was an employee as well as an agent of the appellant.

Under the Act, whatever the appellant could do relating to declarations or clearance of goods, the agent could do on its behalf. In the case before us, the agent declared and represented on behalf of the appellant that the goods in question belonged to the appellant and by virtue of that declaration and representation, the goods were exempted from duty. The appellant contends that because it did not in fact own or import the goods in question, it was not the owner within the meaning of the Act and therefore it cannot be liable to pay duty and taxes on them.

The Act defines owner of goods to **“include”** any person being or holding himself or herself out to be the owner, importer, exporter, consignee, agent or the person in possession of, or beneficially interested in, or

having control of, or power of disposition over the goods. The use of the word “include” suggest that the definition is not limited only to the persons named in the provision. Under the definition also, a person does not need to be the owner of goods as is commonly understood; it is enough if he holds himself out or represents himself to be the owner.

The appellant assumes that to be liable, it must have held itself out or made the representation by itself (by its officers other than the agent). But those are not the terms of the Act. Whatever the appellant could have done regarding the declarations, its agent could also do the same on its behalf. Where the appellant could have represented or held itself out as the owner of goods, the agent could do it on its behalf. In this case the agent held out and represented the appellant as the owner of the goods. In law that was as good as though the appellant itself had held out or made the representation.

Specifically on the liability of the principal for the acts of the agent, section 147 of the Act provides as follows:

“147. A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.”

While the agent is deemed to be the owner of goods in respect of which he has made declarations and is personally liable for payment of duties due thereon, the proviso to section 147 is express enough that the fact that the agent is liable does not relieve the owner of the goods from liability.

The last provision on this duo liability of both the agent and the owner is section 148 which provides:

“148. An owner of any goods who authorizes an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:

Provided that-

(i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorised agent unless the owner actually consented to the commission of the offence;

(ii) nothing herein contained shall relieve the duly authorised agent from any liability to prosecution in respect of any such offence.”

Under this provision, the owner of goods who has authorised an agent to act for him is liable for the acts and declarations of the agent and may even be prosecuted for any offences committed by the agent, though he cannot be imprisoned unless it is proved that he consented to the commission of the offence. The fact that the owner is liable however does not preclude the agent from prosecution for his criminal acts.

Having carefully considered the above provisions of the Act, we are not persuaded that the learned judge misinterpreted them or read them in an incomplete manner as alleged by the appellant. His interpretation was consistent with that of the High Court in ***Republic v Kenya Revenue Authority ex parte African Boot (K) Ltd, HC Misc, App. No. 54 of 2010*** and ***Republic v. Commissioner of Customs Services ex parte SDV Transami (K) Ltd, HC Misc. App No. 81 of 2011***, which we are persuaded is the correct interpretation of the Act. Accordingly, finding no merit in this appeal, we dismiss the same with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 29th day of September 2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR