

IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ. A)

CIVIL APPEAL NO. 235 OF 2010

BETWEEN

KENYA REVENUE AUTHORITYAPPELLANT

AND

SPECTRE INTERNATIONAL LIMITEDRESPONDENT

(APPEAL FROM A JUDGMENT AND ORDER OF THE HIGH COURT OF KENYA AT

KISUMU (A. ALI-ARONI, J) DATED 13TH MAY 2010

IN

KISUMU MSCCA NO. 164 OF 2009(J.R.)

JUDGEMENT OF THE COURT

This is a first appeal from the judgement of the High Court of Kenya at Kisumu (Ali-Aroni, J) delivered on 14th May, 2010. The Ex-parte applicant Spectre International Limited (“the respondent” in this appeal) commenced Judicial Review proceedings against the appellant Kenya Revenue Authority after obtaining requisite leave to do so. By the Notice of Motion brought under various provisions of law the respondent prayed for various orders of certiorari, prohibition and mandamus against the appellant. The learned judge after hearing submissions of counsel quashed decisions of the appellant and granted orders of prohibition and mandamus against the appellant. The appellant was dissatisfied with those findings and appealed to this court.

Being a first appeal we are duty bound to reconsider the whole matter and re-evaluate the same to reach our own conclusions – See the dictum of Sir Kenneth O'Connor speaking for the predecessor of this Court in Peters v Sunday Post Limited [1985] EA 424 where he stated:

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion...”

See also the decision in Mwanasokoni v Kenya Bus Services Limited (Mombasa) Civil Appeal No. 35 of 1985 (ur).

Going through the record and particularly the various affidavits and statements of facts it would appear that the facts are not really disputed.

The respondent is a limited liability company engaged in the manufacture of different kinds of spirits

and other products. By a letter of 4th May, 2006 the appellant approved the respondents' application to sell spirits to the respondents' customers in Tanzania and Uganda on excise duty exempt basis. The said letter laid out several conditions amongst which were the respondents execution of a bank guaranteed bond to cover the value of exports consignments outstanding at any time; approval by the Tanzania and Uganda tax authorities of the respondents' customer as an excise manufacturer or excise stamp purchaser; production by the respondent of evidence of export proceeds by the respondents customer; evidence of Kenya customs documentation evidencing export of consignments and evidence of duty payment by the respondents' customer in Tanzania or Uganda. Approval of subsequent applications by the respondent would in any event be contingent on resolution of issues relating to part consignments and the appellant would at all times monitor movement of the consignments.

In furtherance of the said conditions the appellant stationed its tax officer Mr. S. K. Muhu and its customs escort officer Mr. F. Musungu at the respondents factory at Kisumu. The first officer would prepare all documents whenever there was a consignment and hand them over to the second officer who would take custody of the documents and goods and escort the whole consignment to the port of exit for export goods.

On 20th April, 2009 a customer of the respondent Nkwamunash International Limited of Uganda purchased neutral spirit from the respondent. A motor vehicle registration make UAH 735 U belonging to the said customer was thus loaded with 25,000 litres of neutral spirit consisting of 125 drums of 200 litres each. A cargo Receipt Form No. F 119 on the letterhead of "Republic of Kenya, Customs and Excise Department" was duly prepared and official seals of the appellant and the respondent were duly fixed. This document was addressed to the officer in charge, Busia Customs Services and the goods were released to "F. Musungu (PNO) 86106305". Those goods were to be removed to "PRO Busia Customs Services". The motor vehicle, which considering the quantity of the consignment must have been a large truck left the respondents' premises at 5:43p.m. on 21st April, 2009. It was driven by an agent of the respondent's customer, one Mr. Waswa. One of the passengers was Mr. Musungu whose official duty was to ensure that the goods were removed from Kenya through the export exit point, Busia.

On the morning of 22nd April, 2009 the respondent received information from its said customer that the motor vehicle was missing. The respondent immediately alerted the appellant and its police arm and a report was also made to Kisumu Central Police Station and duly recorded.

On the evening of the same day 22nd April, 2009 police informed the respondent that the motor vehicle had been found in Vihiga District way off the appellants' designated route for export goods to Uganda. The next morning the appellants' and respondents' representatives, accompanied by police officers, visited Vihiga. They not only found customs seals broken from the consignment but 5200 litres from the consignment was missing. But this was only half the drama! This was because the truck driven Mr. Waswa and Mr. Musungu were also missing.

Mr. Waswa and Mr. Musungu were later found at different locations where they had been abandoned after being abducted, injured and drugged. They had no sense of time or place. They were rushed respectively to Busia District Hospital, Busia and Aga Khan Hospital, Kisumu, where they were admitted.

Contents of what remained of the consignment was verified at Yala Police Station in the presence of the representatives of the appellant, the respondent, the respondents' customer and the insurance company whereafter the appellant placed fresh seals on the consignment which was then driven and parked at the respondents' premises.

Police investigations were ongoing even as the parties litigated.

When the consignment left the respondents' premises as stated and upon being reported lost the appellant on the same day 22nd April, 2009 by its letter of the said date stated as follows to the respondent:

“KENYA REVENUE

AUTHORITY

ISO 9001:2000 CERTIFIED

KRA/CSD/WR/OFF/L VOL.VII

Spectre International Ltd

P. O. Box 2131

KISUMU

Dear Sir/Madam

RE: C63 NO. 2009KSM80352

Please note that the goods covered by the above entry i.e. 25,000 litres Neutral Spirit has been diverted into the local market and did not reach its final destination.

This is in contravention of Section 200 of the EAC Customs Management Act 2004 and Regulations 104 (22 and 23) of the EACC Regulations, 2006.

You are called upon to pay taxes and penalties as shown below in line with Section 210 of the EACCMA 2004 and Regulations aforementioned.

Entry No & Date	Assessed	Excise Duty					
	Customs Value	@ Kshs. 200 VAT per Litre	Add. Duty	Penalty	Fine	Total	
2009 KSM 80352 20.04.09	25,000 Lts Neutral Spirit value Kshs. 1,450,000	5,000,000.00	1,090,000.00	609,000.00	133,980.00	725,000.00	7,557,980.00

Meanwhile, an offence has been preferred against you with regard to the consignment within (3) three days from the date of this letter for compounding of the offence in line with section 219 of the EACCMA 2004 otherwise, punitive action shall be taken against you without further reference to you.

Yours faithfully,

E. L. KHAGULI (MRS.)

SENIOR ASSISTANT COMMISSIONER

CSD W/REGION

c.c Deputy Commissioner

Enforcement Nairobi

c.c. Senior Deputy Commissioner

KRA Western Region.”

The appellant was therefore not only accusing the respondent of diverting the whole consignment to the local market and demanding payment of Excise Duty, Value Added Tax, Additional Tax, Penalty and a Fine of Kshs. 7,557,980/= but also accusing the respondent of compounding an offence contrary to law. The said sum was revised through the appellants' letter of 26th May, 2009 to Kshs. 1,672,060/=.

The respondent was not amused and filed Judicial Review proceedings already adverted to.

The learned judge heard the judicial review proceedings and held that the appellant had acted unreasonably and unfairly in reaching the decision it had reached. The learned judge therefore quashed the appellants' decision in effect holding that tax and penalties demanded of the respondent were not collectable.

In the appeal to this court the appellant took fourteen grounds of appeal which are that:-

“1. The learned Judge erred in law and in fact in holding that the Appellant acted unreasonably and unfairly in demanding for the payment of taxes for the lost quantity of spirits that was being transported by the Respondent to Uganda.

2. The learned Judge erred in law and in fact by quashing the decisions contained in the Appellant's letters dated 22nd April 2009 and 26th May 2009, because the Appellant had not acted in excess or lack of its jurisdiction or departed from the rules of natural justice.

3. The learned Judge erred in law and in fact by granting orders of Mandamus because the Appellant had not failed or refused to perform any public duty which is bound by statute to perform.

4. The learned Judge erred in law and in fact by granting orders of Prohibition because the Appellant had not acted in excess or lack of its jurisdiction or departed from the rules of natural justice.

5. The learned Judge erred in failing to find that the Respondent is liable for the taxes demanded for the lost consignment of Spirits as they were duly authorized agents of the consignee, Nkwamunsha International Company (U) Ltd, and as such were liable to pay the taxes for the lost spirits in accordance with Section 147 of the East African Community Customs Management Act (EACCMA).

6. The learned Judge erred in law in failing to find that the Respondent was liable for the taxes on the lost consignment of Spirits because they were deemed to be owners of the goods in accordance with definition of “Owner” under Section 2 of East African Community Customs Management Act, since they were the clearing agents of the Nkwamunsha International Company (U) Ltd (consignee).

7. The learned Judge erred in law in failing to find that the demand for the taxes on the lost consignment of spirits by the Appellant was valid and within the law because the same had been demanded in accordance with the East African Community Customs Regulation 104 (13).

8. The learned Judge erred in law in failing to find that the Respondent should be held liable to pay for the taxes on the lost consignment of spirits as they had taken out a Security Bond to cover the amount of taxes payable in the event that the spirits being conveyed were diverted into the

local market and did not reach their final destination in Uganda.

9. The learned Judge erred in law in failing to find that the Respondent should be held liable to pay for the taxes totaling to Kshs. 1,627,060.00 for 5,000 litres of spirits which was lost.

10. The learned Judge erred in law in failing to find that the Appellant did not remit the duty for the lost spirits in accordance with Section 141 of the East African Community Customs Management Act because it was satisfied that the spirits were consumed locally.

11. The learned Judge erred in law in failing to find that the consignment of spirits that was being conveyed by the Respondent was deemed to be under customs control as long as the same were within the Customs gazetted route to Uganda and that the control ceased once the spirits were diverted from the Customs gazetted route.

12. The learned Judge erred in law in failing to find that the Appellant's letters dated 22nd April 2009 and 26th May 2009 were invitations for compounding offences Committed under the East African Community Customs Management Act, 2004 and that the Respondents were not being compelled to agree to compounding of the offences.

13. The learned Judge erred in law in failing to find that the Appellant did not breach or act in excess of the law when they invited the Respondent for the compounding the offences committed in accordance with Section 219 of the East African Community Customs Management Act.

14. The learned Judge erred in law failing to find that the Respondent had a choice to either agree to the compounding of the offence committed or not as provided under Section 219 (2) of the East African Community Customs Management Act.”

When the appeal came up for hearing it was urged by the appellants' learned counsel Mr. P. Mutuku assisted by Ms B. Odundo. The respondent was represented by learned counsel Mr. I. E. N. Okero. Mr. Mutuku, after summarizing the facts as stated in this judgement submitted that when the goods were purchased from the respondent for purposes of export of the goods, was exporter of the same and also the clearing agent and was therefore responsible for payment of Value Added Tax and other taxes. In the event counsel thought that the learned Judge acted in error in finding that the appellant acted unreasonably as, according to him, the appellant needed not to show any reasons for demanding payment of taxes. In a situation where there was no explanation on whereabouts of the goods it was counsels' view that the respondent was liable to pay taxes as demanded. On whether or not prerogative orders could issue against the appellant counsel submitted that they could not issue as the appellant had exercised powers donated by statute.

In opposing the appeal learned counsel for the respondent referred to the 2 letters by the appellant respectively dated 22nd April, 2009 and 26th May, 2009 where the appellant in exercise of powers donated to it by Section 210 of the East African Community Customs Management Act 2004 and Regulation 104 (22) and (23) of the East African Community Customs Management Regulations, 2006 required the respondent to pay taxes for the neutral spirit that, according to the appellant, had been directed by the respondent to the local market. The first letter was written on the day that the consignment was reported missing while the second letter corrected the tax demanded. In both letters it was stated that an offence had been committed and the respondent was required to compound the offence in terms of Section 219 of the said Act. Counsel submitted that the respondent had released the consignment to the appellants' officer and the conditions set by the appellant for export of goods to Tanzania or Uganda had not been breached. In any event, submitted counsel, had the appellant received an explanation from its officer on whereabouts of the goods before taxes were imposed by the appellant? In addition was the fact that investigations by the appellant and the police were still ongoing.

The appellant laid emphasis on several provisions of the Act which appear to place strict liability for payment of taxes in various circumstances.

Section 141 of the Act on remission of duty provides for a situation where goods are lost or destroyed on board an aircraft or vessel or in removing, loading, unloading or receiving them into, or delivering them from, any customs area or warehouse or in a Customs area at warehouse, before the goods are delivered out of the Customs control to the owner. In those circumstances the Commissioner may remit duty payable for the goods if satisfied that such goods have not been and will not be consumed in a Partner State.

The Act defines an owner of goods for the purposes of the Act in the following terms:

“Owner” in respect of -

(a) an aircraft, vessel, or vehicle, includes every person acting as agent for the owner, or who receives freight

or other charges payable in respect of, or who is

in possession or control of, the aircraft, vessel, or vehicle;

(b) goods, includes any person other than an officer acting in his or her official capacity 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;

“package” includes every means by which goods for conveyance may be cased, covered, enclosed, contained, or packed;”

Section 210 defines goods that are liable for forfeiture.

Section 213 of the Act donates power to seize goods liable for forfeiture.

Section 214 has an elaborate procedure on how seizure is to be undertaken.

Part XVIII of the Act is on Settlement of cases by the Commissioner and Section 219 thereof gives power to the Commissioner to compound offences. This power is not to be exercised unless the person alleged to have committed an offence admits the same. The offence must be put in writing and must be specific. The appellants counsel also referred us to The East African Community Customs Management Regulations, 2006. Regulation 104 on “goods in transit” has an elaborate procedure on how goods are to be exported to a Partner State. Sub – Regulation 13 provides:

“(13) Where the quantity of goods in transit is found at the port or place of exportation or at any place of exit into foreign territory to be less than that specified in the entry, the owner of the goods shall immediately pay to the proper officer the duty chargeable on the discrepancy, unless it is accounted for to the satisfaction of the proper officer.

Sub Regulation (22) and (23) are in the following terms:-

“(22) A person who diverts from the transit route specified under sub-regulation (4) commits an offence and shall be liable to a fine not exceeding fifty percent of the value of the goods and the goods which are the subject of the offence shall be liable to forfeiture.”

“(23) Where goods in transit cannot be traced the person referred to under sub-regulation (22) shall pay to the proper officer the penalty to bond in addition to the fine.”

The appellant, in issuing the letter of 22nd April, 2009 already discussed in this judgement was

therefore exercising the various powers donated to it by the statute and the regulations. The learned judge, in exercise of Judicial Review discretion, found that the appellant exercised such powers unreasonably and granted prerogative orders to the respondent. Was the judge entitled to reach the findings she did?

In the course of the judgement the learned judge after identifying the issues calling for her consideration expressed herself thus:

“...The court notes that at no point has the respondent alleged that the ex-parte applicant was involved in directing the neutral spirit for use in the local market. They do not dispute either that the consignment was robbed and their driver and their own officer drugged and injured at the point of robbery. It is obvious to the court that the bone of contention is whether or not the ex-parte applicant is liable to pay for the imposed tax on goods stolen or missing on transit...

We have already set out in detail the undisputed facts in this matter and we need not repeat them here again. The appellant confirms in the affidavits and submissions of counsel, that upon loading of the consignment which was destined for Uganda the same was handed over to its officer, Mr. Musungu, who took charge of it and boarded the truck to escort the consignment to the export exit point in Busia. Mr. Musungus' role was inter alia to ensure that the pre-export conditions which had been imposed by the appellant in approving the respondents' application for export of goods to Tanzania and Uganda were met. He was to guarantee that this consignment reached its destination and was not diverted to the local market. But according to the appellant and the respondent the truck was found a day after leaving Kisumu in Vihiga District with some of the goods missing and unaccounted for. Both the truck driver and Mr. Musungu were found at different locations abandoned after being abducted, beaten and drugged. They had to be admitted to hospitals. It is not stated how long Mr. Musungu remained in hospital and no attempt was made by the appellant in the affidavit evidence to give an explanation on what had happened when the consignment left Kisumu. Its officer was best placed to offer an explanation. In any event, and we agree with the submission by counsel for the respondent on this aspect of the appeal, the appellant issued its letter of 22nd April, 2009 on the same day the consignment and its officer were reported missing. No time was allowed for investigations by either the appellant or the police to establish what had happened upon the truck leaving Kisumu.

We are in full agreement with the learned judge when she says in concluding the judgement:

“It is trite law that persons charged with statutory powers and duty ought to exercise the same reasonably and fairly and that the discretionary (sic) ought [not] to be used whimsically (sic), unreasonably arbitrarily or against the tenets of natural justice. If the discretion is used arbitrarily or unreasonably, the court may step in to remedy the situation. The respondent has not shown any ground or reason why it formed the opinion that the ex-parte applicant diverted the goods. Indeed the respondent admits that investigations are not complete, that notwithstanding the respondent rushed to demand payment..

In a situation where the appellants' officer has not offered an explanation on circumstances leading to loss of part of a consignment and the appellant issues demands for tax payment on the ground that goods destined for export have been diverted to the local market where no investigations are carried out at all, we are satisfied that the learned judge did not err at all and was entitled to issue the prerogative orders which she did and which we confirm.

In the event this appeal has no merit and it is dismissed with costs to the respondent.

Dated and Delivered at Kisumu this 18th day of October 2013

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR