REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 95 of 2004

KENYA REVENUE AUTHORITY …….....…… APPELLANT

AND

RAJENDRA RATILAL SANGHANI …….....…….RESPONDENT

(Appeal from the judgment/order of the High Court at Nairobi (Mr. Justice

Lenaola Ag. J) dated 28th January, 2004

in

H.C. MISC. CIVIL APPLICATION NO. 561 OF 2004)

****

JUDGMENT OF THE COURT

This is an appeal from the Judgment of *Lenaola J* delivered on 28th January 2004 in High Court Misc. Civil Application No 561 of 2004. Kenya Revenue Authority (hereinafter the "***KRA***") is the appellant and Mr. Rajendra Ratilal Sanghani is the respondent (hereinafter "*Mr. R. R. Sanghani*")

The litigation arises from the importation of a Mercedes Benz 500 SEL car (hereinafter "*the car*") bearing the number plates ***KAD 786 M.*** It is alleged to have been imported by Mr. Philip Moi who is a son of the then President of Kenya. The car was bought from Philip Moi by Mr. R. R. Sanghani at the price of Shs.8 million in 1994. The price was paid in full by Mr. R. R. Sanghani. In his affidavit sworn on 28th May 2003 Mr. R. R. Sanghani deponed, *inter ali,a* as follows:-

4. "That before concluding the said purchase of the said motor vehicle Mr. Philip Moi represented to me that all duties had been paid and that the said motor vehicle had no problems but however told me to follow up the log book later, which log book he has never delivered to me up to this moment despite incessant demands.

5. That under unclear circumstances the respondent seized the said motor vehicle some time in the year 2001."

A Notice of Seizure ***DN: 023246*** was issued by the Customs and Excise Department of the ***KRA*** on 4th May 2001 claiming that the car had been seized "*as liable to forfeiture*" under the Customs and Excise Act on the following grounds:-

"***suspected to be uncustomed and liable to forfeiture under section 196 of the Customs and Excise Act Cap 472"***

The Notice of Seizure went on to state "***If you claim or intend to claim that the things seized are not liable to forfeiture, you should within one calendar month from the date of this notice, give notice in writing of your claim in accordance with the provisions of the Customs and Excise Act. In default of such notice the things seized shall be deemed to have been lawfully condemned and will be liable to be disposed of in such manner as the Commissioner may direct."***

Mr. R. R. Sanghani replied to this Notice in a letter date 4th June 2001 saying: "***I hereby confirm that I am the owner of the above vehicle, which I had purchased from Mr. Philip Moi in the year 1994. Sir, I plead with yourselves to kindly let me know how I can get my vehicle back."***

In a letter dated 10th December 2001 the ***KRA*** wrote to Mr. R. R. Sanghani saying, *inter alia, "****....you may wish to come to the office of the undersigned for compounding of your case under section 214 of the Customs and Excise Act ....***

If no response is received within 14 days of receipt of this letter, we will proceed to dispose off (sic) the vehicle in the manner provided for under the Law."

On 6th March 2003 Mr. R. R. Sanghani wrote to the Head of Investigation Department of the ***KRA*** a letter which was heavily relied upon by Counsel for the ***KRA*** as an admission. It referred to the Seizure Notice dated 4th May 2001 and went on to state as follows:-

"***Sir, as you are aware I had bought this vehicle from Phillip Moi for Kshs. 8,000,000.00 which I had paid him in full. I had been assured that all fees and tax for the said vehicle had been cleared.***

Sir, I humbly request you to pardon me and let me have the car as I have already suffered a great deal in the motor vehicle industry. For example I sold my cars mainly Jeep Cherokees and I have never been paid for them and when I demanded my funds I was convicted for an offence I never committed then put behind bars without the mandatory option of bail. Secondly as you are aware I lost approximately 50 units of jeep as they were auctioned last year by the KRA. This resulted in a loss of Kshs.100,000,000.00 to me not to mention that I also lost my bank thereafter, Guilders International Bank.

Sir, I kindly request that you sympathise with me and assist me as I was cheated on this particular car deal.

Your kind consideration of the above will be highly appreciated. Thanking you in advance."

On 14th April 2003 the ***KRA*** responded in these terms:-

"***Please refer to your letter of appeal to Head of Investigation dated 6th March 2003 stating the circumstances under which you acquired the above vehicle and therefore the need for its restoration.***

You were subsequently advised about the necessity to have your case compounded and have the revenue due thereon paid up.

We note with regret that you have not responded. In this respect we are advising the warehouse keeper to proceed and dispose of the vehicle in the manner provided by for (sic) under the law."

On 16th June 2003 Mr. R. R. Sanghani filed judicial review proceedings under ***Order 53 Rule 3*** of the Civil Procedure Rules and ***section 8*** of the ***Law Reform Act Cap 26*** of the Laws of Kenya seeking the following orders:-

"*1. This Honourable Court be pleased to issue an order of Certiorari to remove into the High Court for purposes of having it quashed and to quash the decision embodied in a letter dated 14th April 2003 in respect of seizure notice 023246.*

2. This Honourable Court be pleased to grant an Order of Mandamus to issue to the respondent whether through its agents, servants or employees to compel it to release forthwith unconditionally motor vehicle registration number KAD 786M, Mercedes Benz 500SEL to the applicant or his order or agent.

3. This Honourable Court be pleased to grant an Order of Prohibition to issue to the respondent whether through its agents, servants or employees to restrain it (sic) from ever demanding or collecting customs duties, penalties, interest, storage charges or other charges levied on motor vehicle registration number KAD 786M from the applicant after the release of the said motor vehicle to him.

4. This Honourable Court be pleased to grant an Order of Mandamus to issue to the Commissioner of Motor Vehicles (sic) to compel him to issue a log book in the name of ***RAJENDRA RATILAL SANGHANI*** *in respect of motor vehicle registration number KAD 786M upon payment of respective log book fees.*

5. An order condemning the respondent to bear the costs of this (sic) proceedings."

Lenaola J. delivered his judgment on this application on 28th January 2004 in which he made orders substantially in terms of prayers 1 to 5 inclusive, in the application as set out above.

The appeal now before us is against this decision of Lenaola J.

The ***Memorandum of Appeal*** dated 18th May 2004 set out five grounds of Appeal of which ***ground 4*** was abandoned by Mr. Matuku, learned counsel for the appellant at the outset of his submissions and ***ground 5*** was also abandoned by him when it was pointed out that the Learned Judge had not made any decision on the issue as to whether the application was time- barred under ***section 207*** of ***Cap 472***. The three remaining grounds of appeal were as follows:-

"***1. The learned Judge erred in law and in fact in issuing an Order of Certiorari to remove into the High Court for the purpose of it being quashed and quashing the decision embodied in a letter dated 14th April 2003 in respect of Seizure Notice No. 073246 (sic).***

2. The learned Judge erred in law and in fact by holding that the appellant whether through its agents, servants or employees to (sic) be compelled by an Order of Mandamus to release forthwith unconditionally Motor Vehicle registration number KAD 786M, Mercedes Benz 500SEL to the respondent or his Order or agent without considering that the Motor Vehicle is not duty paid.

3. That the learned Judge erred in law and fact in ordering an order of prohibition to issue to the appellant whether through its agents, servants or employees to restrain it from ever demanding or collecting customs duties, penalties, interest, storage charges or other charges levied on Motor Vehicle registration number KAD 786M from the respondent after the release of the said motor vehicle to him, while in fact the respondent had admitted that the subject Motor Vehicle was not duty paid."

The decision referred to in the remaining ground of appeal numbered 1 of 3 above dated 14th April 2003 was "*to advise the warehouse keeper to proceed and dispose of the vehicle in the manner provided under law.*" The letter further referred to the necessity for the revenue to be paid up.

We agree with the superior court's decision to the effect that the failure to follow the procedure laid down in ***sections 200*** and ***202(2)*** of ***Cap 472*** precludes the Commissioner of Customs from depriving Mr. R. R. Sanghani of the car.

The relevant provisions of the Customs and Excise Act, ***Cap 472*** in force at the time the judgment of

Lenaloa J. was delivered on 28th January 2004, before they were amended with effect from 10th June 2004, read as follows:-

"***Section 200 (4). Where anything liable to forfeiture under this Act has been seized, then, subject to proviso (i) to subsection (1) and to subsection (3) (a), the owner thereof may, within one month of the date of the seizure or the date of a notice given under subsection (1), as the case may be, by notice in writing to the Commissioner claim the thing.***

Section 202 (1). Where a notice of claim has been given to the Commissioner in accordance with section 200 (4) then the Commissioner may, within a period of two months from the receipt of the claim, either-

(a) by notice in writing to the claimant, require the claimant to institute proceedings for recovery of the thing within two months of the date of the notice; or

(b) himself institute proceedings for the condemnation of the thing:

Provided.....

(2) Where the Commissioner fails within a period of two months either to require the claimant to institute proceedings, or himself to institute proceedings, in accordance with subsection (1), then the thing shall be released to the claimant:-

Provided.....

(3) Where the Commissioner has, in accordance with subsection (1) required the claimant to institute proceedings within a period of two months and the claimant has failed to do so, then on the expiration of that period the thing shall be condemned and shall be forfeited and may be sold or otherwise disposed of as the Commissioner may direct.

(4) ......"

Lenaola J. in his judgment correctly found that the appellant failed to exercise either of the options open to him in accordance with these provisions. The Judge said that after the respondent had written his letter to the appellant dated 7th June 2001 in which he stated "*I hereby confirm that I am the owner of the above vehicle, which I had purchased from Mr. Philip Moi in the year 1994"*, the appellant had only two options:-

i) institute proceedings himself; or

ii) give notice to the claimant to institute proceedings within two months failure to which (sic) the vehicle would be forfeited and sold or otherwise dealt with as he may direct.

The Judge went on to say "*Neither of these things were done and therefore* ***section 202(2)*** *comes into play in which case after two months from the date of receipt of the letter dated 4th June 2001, the motor vehicle ought to have been released to the applicant" i.e.* ***Mr. R. R. Sanghani.*** That decision cannot be faulted in law.

We will now turn to the issue as to the recoverability of the unpaid duty, which we have considered and we have come to the conclusion that the superior court was wrong in deciding that the Commissioner of Customs no longer had any right to recover the unpaid duty. ***Section 202 (4) (b)*** of the Act expressly provided that "***If anything seized is not condemned under subsection (3), the court shall release it to the owner subject to payment of any applicable duty."***

We see no reason why the Commissioner of Customs should be precluded from collecting the unpaid duty. Whether he sees it fit to do so in the circumstances of this case, we need not speculate. The order

made by the Judge seeks to prevent the Commissioner from making it a condition precedent to the release of the car that the outstanding duty is paid. Clearly, that order does not accord with the provisions of the law cited above.

In dismissing the appeal against the grant of the order of mandamus therefore, we order that the words "***forthwith unconditionally***" be deleted from the superior court's ***Order No. 2*** which will now read:-

2. That an Order of Mandamus be and is hereby issued to the respondent whether through its agents, servants or employees to compel it to release motor vehicle registration number KAD 786M, Mercedes Benz 500SEL to the applicant or his order or agent.

We further allow the appeal against the grant of an order of prohibition and order that the superior court's ***Order No 3*** be and is hereby set aside.

Ground of appeal No 4, as stated above, was abandoned by the appellant's counsel at the outset of his submissions. This ground related to ***Order No 4*** which was directed against the "***Commissioner of Motor Vehicles"*** requiring him to issue a log book for the car. ***Section 3(1)*** of the Traffic Act ***Cap 403*** provides for the appointment of a ***Registrar of Motor Vehicles*** who shall be responsible for the registration and licensing of motor vehicles but there does not seem to be any officer called the ***Commissioner*** of Motor Vehicles so that the Order would not appear to have any practical effect. In these circumstances we order that ***Order*** of Mandamus issued by the superior court as ***No 4*** be and is hereby set aside. Ground 5 of the grounds of appeal was also abandoned and we have nothing to say about it.

As both parties to the appeal have succeeded to some extent we make no order as to the costs of the appeal and we further order that each party shall bear their own costs incurred in the High Court.

Dated and delivered at Nairobi this 14th day of July, 2006.

R. S. C. OMOLO

…….

JUDGE OF APPEAL

P. N. WAKI

……..

JUDGE OF APPEAL

W. S. DEVERELL

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR