Kenya International Freight & Warehousing Association v Mombasa Monitoring Station, National Revenue Authority of South Sudan (Petition E011 of 2024) [2024] KEHC 7933 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7933 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION E011 OF 2024

OA SEWE, J

JUNE 27, 2024

BETWEEN

KENYA INTERNATIONAL FREIGHT & WAREHOUSING ASSOCIATION ..... PETITIONER

AND

MOMBASA MONITORING STATION, NATIONAL REVENUE AUTHORITY OF SOUTH SUDAN ..... RESPONDENT

(In The Matter Of Alleged Contravention Of Fundamental Rights And Freedoms Under Articles 40, 43, 47, 38, & 50 Of The Constitution And In The Matter Of The East Africa Community Customs Management Act, 2012 And In The Matter Of East Africa Community Customs Management Regulations And In The Matter Of The Decision Communicated On 1St March 2024 By The Mombasa Monitoring Station, National Revenue Authority Of South Sudan To All Kenya Clearing Agents)

RULING

1. This ruling is in respect of the Notice of the Motion dated 25th March 2024. The said application was filed by the petitioner, Kenya International Freight & Warehousing Association, pursuant to the provisions of Articles 23(3)(a), (b) and (c) of *the Constitution* of Kenya, 2010, and Order 40 Rules 1 and 4(1) of the Civil Procedure Rules, 2010, for orders that:

   (a) Spent

   (b) Pending the hearing and determination of the application inter partes a conservatory order be issued staying the implementation of the decision and/or direction of the respondent of 1st March 2024 directing the petitioner to collect revenue on its behalf.

(c) The Court do issue a Prohibitory Order restraining the respondent from collecting the said revenue in Kenya.

(d) Costs of the application be provided for.

(2) The application was premised on the ground that, by a Directive dated 1st March 2024, the respondent instructed all clearing agents to pay revenue collected to a foreign entity, yet there is in place a Regional Electronic Cargo Monitoring and Tracking System (RECTS) operated by Kenya Revenue Authority under the East Africa Community Customs and Management Act and the Regulations made thereunder. Accordingly, the petitioner contended that the said Directive is ultra vires and therefore ought to be quashed. The petitioner further stated that the implementation of the Directive amounts to unreasonable and double taxation and has occasioned unnecessary pile up of cargo at various clearance stations in Kenya.

(3) The application was supported by the affidavit of Roy F Mwanthi, the Chairman of the petitioner, which is the umbrella body incorporating all the clearing agents within the Republic of Kenya. The petitioner averred that on 1st March 2024, the respondent issued a Directive to all its members instructing them to collect the sum of USD 350 per container of all goods destined for South Sudan and pay the same to a private enterprise known as Invesco Uganda Limited. It was further the contention of the petitioner that, there is already in existence a cargo tracking system put in place by the Customs Department in Kenya known as Regional Electronic Cargo Tracking System, which is a mandatory facility for use by all its members.

(4) The petitioner pointed out that the Directive to collect the revenue through ECTN is being implemented in Kenya at the Ports, Inland Container Deports, Container Freight Stations, Malaba and Busia Border Points, yet its members are required to submit the sums collected to a private company based in Uganda. The respondent added that, as an organization, they are experiencing delays in the release of goods headed to South Sudan from Mombasa, ICDs and CFSs as the goods are only released after authorization by the South Sudan Customs Officers.

(5) In response to the application the respondent filed Grounds of Opposition dated 5th April 2024, contending that:

(a) The petitioner has no legal capacity in law to either sue or be sued in its own name, and therefore any proceedings commenced by it, such as the instant litigation, are a nullity.

(b) The Notice of Motion is incompetent and a nullity in law, and no further proceedings can be taken thereon other than to have them struck out.

(c) In the alternative, the petitioner has not pleaded either with specific particularity or otherwise, any facts that demonstrate that the respondent has breached an of its rights to property under Article 40 of *the Constitution*.

(d) There is nothing ultra vires in the Directive dated 1st March 2024, it being a Directive by a sovereign state for its nationals.

(e) The Courts in Kenya are not vested with any jurisdiction to determine whether the levy imposed by the Government of South Sudan on its citizens is either rational or reasonable; or in any manner whatsoever question its implementation.

(f) RECTS relied on by the petitioners does not perform the same duties as those performed by the ECTN system adopted by the respondent.

6. In addition to the Grounds of Opposition, the respondent filed a Replying Affidavit sworn by Bolis Maker Samuel, a South Sudan national stationed at the respondent's office in Mombasa. He is the officer in charge of the facility, which collects revenue on behalf of the Government of South Sudan. The respondent averred that the ECTN is an electronic system recognized and used worldwide that has now been introduced, installed and used by the Government of South Sudan in the collection and management of all revenue in the country, accruing from both imports and exports.

7. The respondent explained that, prior to the introduction of the ECTN system, revenue collection was being handled manually, with attendant loopholes and shortcomings. It further stated that the introduction of the ECTN system is intended to enhance efficiency in revenue collection and added that the USD 350 is payable not by Kenyans but by importers and exporters who are citizens of South Sudan. The respondent explained that the money paid so paid is not revenue for the Government of Kenya, but is revenue for the Government of South Sudan, which has the right to determine where the money ought to be paid.

8. At paragraphs 19, 20 and 21 of its Replying Affidavit, the respondent deposed that the Government of South Sudan, through its Ministry of Finance & Planning, wrote a letter dated 9th February 2024 to the Kenya Government through the Cabinet Secretaries for the National Treasury & Economic Planning, the Ministry of Roads, Transport & Public Works, and the Ministry of Investment, Trade & Industry, about the ECTN system. The letters were annexed to the respondent's Replying Affidavit to demonstrate that the matter was openly discussed between the two governments before implementation not only in South Sudan but also in Kenya and in all the partner states.

9. The respondent further pointed out that, by introducing the ECTN system, it is not in breach of any of the provisions of the EACCMA; and that, at any rate, no single provision of the Act was specified by the petitioner as having been breached. The respondent denied allegations of delays at the various collection points and endeavoured to show that the system has in fact improved cargo management and eliminated cargo diversion at the border points.

10. The respondent also explained that RECTS is a system used to monitor movement of containers and vehicles within the region; and that it has nothing to do with customs documentation such as Bills of Lading, Commercial Invoices, Packing Lists in the manner that the ECTN system does. Therefore, the respondent contended that ECTN is neither a competitor or supplemental to the RECTS. In the premises, the respondent prayed for the dismissal of the application, asserting that no tangible material has been placed before Court to warrant the issuance of the orders prayed for therein.

11. The petitioner sought leave of the Court to respond to some of the issues raised in the Replying Affidavit. It accordingly filed a Further Affidavit sworn by Roy F Mwanthi on 17th April 2024. It reiterated its stance that the charge of USD 350 imposed by the respondent vide its Directive dated 1st March 2024 is illegal, null and void in that it amounts to illegal taxation introduced under the guise of cargo tracking system. The petitioner averred that any taxation ought to pass through the legislative process and must entail public participation for the same to be passed as law.

12. The petitioner further reiterated its assertion that imposition of the levy has led to massive delays in clearance of Sudanese cargo, leading to high demurrage and truck detention charges, which are borne by its members. The petitioner further deposed that it is a registered association and therefore is entitled to sue. It annexed a copy of the Certificate of Registration as Annexure RM1 to the Further Affidavit.

13. The application was filed alongside the Petition under a Certificate of Urgency during the Easter Recess of the High Court. Accordingly, conservatory orders were given on 29th March 2024 staying the implementation of the Directive dated 1st March 2024 pending the hearing and determination of

the Motion. Directions were thereafter given on 9th April 2024 for the disposal of the application by way of written submissions.

14. In its written submissions dated 17th April 2024, the petitioner reiterated its averments in its Further Affidavit. On locus standi, the petitioner relied on Article 258 of *the Constitution* to demonstrate that it has the right to institute court proceedings in respect of contraventions or threatened contraventions of *the Constitution*. The petitioner further submitted that its members are only licenced to collect revenue for and on behalf of the Commissioner of Customs for the Kenya Government.

15. It was therefore the petitioner's submission that the Directive that now requires them to collect USD 350 per container on behalf of the Sudanese government to be deposited in a foreign bank account of a company called Invesco Company Ltd in Uganda is illegal, null and void in so far as the imposition was not approved by the Kenyan Parliament under Article 201 of *the Constitution*. Reliance was placed on Bidco Oil Refineries Limited v Attorney General & 3 Others [2013] eKLR, Kenya Union of Domestic Hotels Educational Institutions and Hospitals & Allied Workers (KUDHEIHA) v Kenya Revenue Authority & 3 Others [2014] eKLR and Pharmaceutical Manufacturing (K) Co. Ltd & 3 Others v Commissioner General of Kenya Revenue Authority & 2 Others [2017] eKLR for the submission that the imposition of taxes is a constitutional imperative and that the power to impose tax is reposed in the Legislature.

16. On behalf of the respondent, written submissions were filed herein by Mr. Paul Buti, Advocate, dated 23rd April 2024. He urged the Court to note that the impugned letter was written by a sovereign state and is therefore not amenable to construction from the lens of the Kenyan Constitution or laws. Counsel reiterated the fact that the sum in question is payable, not by clearing agents, but by the consignees, who are citizens of South Sudan. Reliance was placed on Kagenyi v Musairamo [1968] EA 43 to support his argument that the factual basis set out in the respondent's Replying Affidavit having not been challenged by the petitioner, ought to be accepted by the Court as the truth.

17. In addition to impugning the Petition for lack of specificity on the basis of Anarita Karimi Njeri v Republic [1979] eKLR, the respondent submitted that the decision by the Republic of South Sudan to impose the charges on its citizens can only be challenged in South Sudan. The respondent relied on Republic v Kenya Ports Authority & OGEFREM, Ex Parte Rosmik Trading Co. Ltd & Others [2012] eKLR for the submission that a similar procedure charged by the Democratic Republic of Congo could not be impeached by a Kenyan Court unless it could be shown that the process was manifestly unlawful.

18. An attempt was made to challenge the locus standi of the petitioner, particularly in the Grounds of Opposition dated 5th April 2024. The respondent contended that the petitioner has no legal capacity to either sue or be sued. I however have no hesitation in dismissing this argument granted the clear provisions of Article 258 of *the Constitution*. A person in that context includes an association acting in the interest of one or more of its members. Indeed, in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012*, the Court of Appeal held:

> "Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold

that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of *the Constitution*."

19. As to whether the Petition was pleaded with sufficient specificity, the respondent relied on Anarita Karimi Njeru v Republic in which it was held:

> "...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

20. It is however a requirement of Rule 10(3) and (4) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, that:

> (3) Subject to rules 9 and 10, the Court may accept an oral application, a letter or any other informal documentation which discloses denial, violation, infringement or threat to a right or fundamental freedom.
>
> (4) An oral application entertained under sub rule (3) shall be reduced into writing by the Court."

21. Accordingly, I fully endorse the expressions of Hon. Odunga, J. (as he then was) in Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & Another [2016] eKLR that:

> "On the issue whether this Court can determine the constitutional issues raised without compliance with the requirements stipulated in Anarita Karimi Njeru vs. Attorney General (supra), it is my view that the said decision must now be read in light of the provisions of Article 22(3)(b) and (d) of *the Constitution* under which the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss a petition merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which these proceedings may even be commenced on the basis of informal documentation..."

22. Moreover, in Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR, the Court of Appeal pointed out that:

> "...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

23. Bearing the foregoing in mind, it cannot be said that the Petition is lacking in specificity as to the constitutional provisions alleged to have been infringed by the respondent. The provisions are in fact set out at paragraphs 16 of the Petition as well as in the prayers.

24. That said, the single issue for determination is whether the petitioner has made out a good case for the issuance of conservatory orders. In this regard, I have given careful consideration to the application, and in particular, the grounds relied on by the petitioner as explicated on the face of the application and in the two affidavits filed in support of the application. I have likewise considered the Grounds of Opposition filed on behalf of the respondent as well as the averments set out in the affidavit sworn by Bolis Maker Samuel.

25. It is worth stating at the outset that, at this stage, the Court need not examine the merits of the case closely. Hence, I bear in mind the caution expressed by Hon. Ibrahim, J. (as he then was) in the Muslim for Human Rights & 2 Others vs. Attorney General & 2 Others [2011] eKLR that:

> " The court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-à-vis the case of either party. The principle is similar to that in temporary or interlocutory injunctions in civil matters..."

26. Similarly, in Nairobi High Court Petition No. 16 of 2011: Centre for Rights Education & Awareness (CREAW) & 7 Others v Attorney General, it was held:

> " At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*."

27. As to the nature of a conservatory order, the Supreme Court had the following to say in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR:

> " Conservatory orders bear a more decided public-law connotation; for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as "the prospects of irreparable harm" occurring during the pendency of a case or "high probability of success" in the Applicant's case for order of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant cases."

28. For purposes of Articles 22 and 23(3)(c) of *the Constitution*, an applicant for conservatory orders must satisfy the Court as to the following three elements:

    (a) A prima facie case with a high likelihood of success;

    (b) That the Petition will be rendered nugatory;

    (c) That public interest weighs in the applicant's favour.

29. In Kevin K Mwiti & others v Kenya School of Law & others (supra), it was held that:

> " A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law.

30. With the foregoing in mind, I have considered the Petition in the light of the averments set out in the petitioner's Notice of Motion and its Supporting Affidavit. There appears to be no dispute that, on the 1st March 2024, the respondent issued a Directive that henceforth an amount of USD 350 per container would be paid in respect of all goods destined for South Sudan. It is also common ground that the monies are to be deposited to a private company based in Uganda known as Invesco Uganda Limited.

31. Whereas the petitioners are of the posturing that the Directive is unconstitutional in every sense, the respondent contends that the petitioners have no basis for questioning the decisions of a sovereign state made on behalf its citizens. They asserted that the Courts in Kenya are not vested with any jurisdiction to determine whether the levy imposed by the Government of South Sudan on its citizens is either rational or reasonable; or in any manner whatsoever question its implementation.

32. As has been pointed out herein above, the Court is not required to delve into the merits of the application at this stage. Granted the assertions of the respondent, it is manifest that the impugned Directive was made by or on behalf of the Government of South Sudan in respect of imports to and exports from that national. The respondent has explained that the amount of USD 350 is payable only by its nationals; and therefore that it has the to determine the modalities of payment.

33. From the foregoing, it is plain that the petitioner has not made out a prima facie case, granted the doctrine of sovereign immunity. The Directive appears to fall under the category of acts known as acta jure imperii. Until it is proved otherwise there would be no basis for restraining the respondent from implementing the directive.

34. In the premises, I find no merit in the Notice of Motion dated 25th March 2024. The same is hereby dismissed with an order that the costs thereof be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JUNE 2024

OLGA SEWE

JUDGE