

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang J.)

MISC. APPLICATION NO. 52 OF 2010

IN THE MATTER OF: AN APPLICATION BY GREENBERG TRADING
LIMITED FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, PROHIBITION AND MANDAMUS

-AND-

IN THE MATTER OF: THE EAST AFRICAN COMMUNITY CUSTOMS
MANAGEMENT ACT, 2005 (ACT NO. 1 OF 2005)

-BETWEEN-

REPUBLIC.....APPLICANT

-AND-

KENYA REVENUE AUTHORITY.....RESPONDENT

ex parte

GREENBERG TRADING LIMITED

JUDGMENT

Pursuant to leave granted by this Court on *16th April, 2010* the applicant's motion for judicial review, dated *20th April, 2010* was filed on *21st April, 2010*. The application was brought under Order LIII, Rules 1, 2, 3 and 4 of the earlier edition of the Civil Procedure Rules, and ss.8 and 9 of the Law Reform Act (Cap.26, Laws of Kenya). The applicant sought several Orders, as follows:

- (i) an *Order of certiorari to remove into the Court and quash the decision of the respondent, its officers and agents contained and effected in Form F89:*

Notice of goods deposited in Customs Warehouse – being Notice No. 084685 dated 3rd March, 2010, depositing the applicant's containers Nos. TCKU 9703936, GATU 8538265 and FCIU 8669950, with Portside Terminal Freight Limited [Portside CFS];

- (ii) an Order of certiorari to remove into the Court and quash the decision of the respondent, its officers and agents contained and effected in Form F.89: Notice of goods deposited in Customs Warehouse – being Notice No. 084679 dated 18th February, 2010, depositing the applicant's containers Nos. CLHU 8946151 and PONU 8112424 with Portside Terminal Freight Limited [Portside CFS];*
- (iii) an Order of certiorari to remove into the Court and quash the decision of the respondent, its officers and agents and orally communicated to the applicant on 4th January, 2010, refusing to release and allow the applicant to clear and take possession of the applicant's containers Nos. FSCU 3806088 and GLDU 5223230 from Portside Terminal Freight Limited [Portside CFS];*
- (iv) an Order of mandamus to issue directing the respondent to release to the applicant containers Nos. CLHU 8946151, TCKU 9703936, PONU 8112424, FSCU 3806088 and GLDU 5223230 forthwith and Nos. GATU 8538265 and FCIU 8669950 upon payment of duty therefor;*
- (v) an Order of prohibition to issue prohibiting the respondent from acting arbitrarily and capriciously when dealing with the importation of goods by the applicant;*
- (vi) an Order for costs of the proceedings.*

The applicant contended that the respondent's notices in question were "*irregular and unlawful*" for having been issued *without jurisdiction*; for being *ultra vires* the East African Community Customs Management Act, 2005; for having been made in breach of the *rules of natural justice*; for being contrary to the *principles of proportionality*; for being contrary to the *legitimate expectations* of the applicant; for having been made in *bad faith*; for being *arbitrary and capricious*; and for being *unreasonable and contrary to public policy and public interest*. It was averred, too, that the containers were attracting daily cumulative charges of more than Kshs.105,000/=, with the risk that these charges would exceed the value of the goods themselves.

The factual aspect of the case was covered in the pleadings in the accompanying Statement, and in the verifying affidavit of *Elizabeth M. Wainaina*, the applicant's Operations Manager, dated *14th April, 2010*.

For the respondent, *Dishon Njuguna*, Ag. Senior Assistant Commissioner in the Investigation & Enforcement Department, swore a replying affidavit on *13th May, 2010*.

The deponent deposed, *inter alia*, that: investigations had established that "*goods belonging to the applicant and contained in 45 containers had been unprocedurally removed from Portside CFS, using forged entries that related to different consignments thereby evading payment of taxes*"; the investigations disclosed that "*the applicant and/or its agents used fake customs documentation to illegally procure the release of the said 45 containers from Portside CFS without payment of duties and taxes*"; the investigations showed that some of the trucks allegedly used to remove the containers from Portside CFS were registered as motor cycles and saloon cars.

The deponent averred that he believed to be true, the advice of his Advocate, that *"Orders of mandamus being sought...directing the respondent to release...the two containers FSCU 3086088 and GLDU 5223230 is misconceived and incapable of being complied with as the said containers are not under the respondent's control and/or possession."* Similarly the deponent believed his Advocate's advice, *"that the applicant is guilty of material non-disclosure as it has failed to disclose the additional five containers belonging to the applicant being detained by the respondent."*

With regard to container No. MSKU 0131665, the deponent averred that the applicant through its shipping agent, has sought and deceptively obtained permission from the respondent to transfer ownership to M/s. Tamam Transporters of P.O. Box 41572-80100, Mombasa.

The deponent avers that its investigations showed that the applicant, though a duly-registered taxpayer, with Identification Number P051218969T, *"does not file any income tax returns thereby not shouldering its fair share of the burden of tax while still enjoying services afforded by the Government"*. He deposed further that the respondent has already instituted criminal charges against the applicant's clearing agent's employees who facilitated the unlawful release of 45 containers removed from Portside CFS without payment of duty.

The deponent deposes that powers are conferred by s.130(2) of the East African Community Customs Management Act, 2005 to identify and detain goods consigned to the applicant that were found to be under customs control, as lien for the payment of duty/taxes owing. He deposed that the applicant owes the respondent taxes amounting to Kshs.50,013,392/60 on account of 45 containers belonging to the applicant, that were removed from the CFS without payment of taxes.

The deponent deposes that the period for which the goods were detained is not unreasonable as alleged by the applicant; for Form 89 (Notice of Deposit) *"clearly*

spells out that the goods would be detained for a period of two months and if not cleared within the said period the same may be disposed of as the Commissioner for Customs may direct."

Learned counsel **Mr. Mabeya**, for the applicant, submitted that the applicant had imported identified containers of merchandise, in 2009; the goods were duly declared upon entry and duty was paid; the containers were thereafter released to the applicant; but when the applicant went to take the goods from Portside CFS, it was found that the respondent had issued Form F 89 in respect of certain of the containers (Nos. 084679 and 084685 dated *18th February, 2010* and *3rd March, 2010* respectively); the effect of the said notices (in F89) was to detain the applicant's goods; the grounds for such detention were specified as: 'pending verification', 'payment of taxes and investigation', and, 'pending investigations in respect of stolen containers'. Counsel's objection was that the respondent had *"failed to specify the sort of verification it intended to carry [out]"; "failed to specify the alleged taxes that were to be paid"; failed to disclose the nature of [the] investigations it intended to carry out"; "failed to give particulars of the alleged stolen containers"*. Counsel urged that the respondent acted unreasonably and in breach of the rules of natural justice; and that *"the alleged investigations set out in the replying affidavit...is an afterthought."*

Counsel submitted that the respondent's conduct was contrary to the principle of proportionality: *"the respondent failed to weight between the benefits to be gained by the public, by the detention of the containers, [and] the interests of the applicant who has lost its investments and business opportunity."*

Counsel submitted that the respondent's justification of the detainer of the goods, on grounds of previous evasions of tax, is not to be believed: *"If it was true that the applicant's containers were being detained because of the alleged stolen containers and lost revenue, the respondent would have then, or by now, demanded payment of*

the said taxes.” Counsel urged that *“the respondent’s action was disproportionate and in breach of the principle of proportionality.”*

Counsel submitted that the respondent had no jurisdiction to take the impugned decisions: *“the law does not allow the respondent to detain the applicant’s goods as it did.”* It was urged that there was no basis for recourse to Form F89, which was the instrument employed to detain the goods in question.

It was submitted that the respondent’s action was arbitrary and capricious; for, when the applicant wrote to the respondent complaining about the detention of the goods, there was no response; and in the Form F89 itself, no reasons had been set out.

Counsel submitted that the respondent had acted in bad faith, and had been actuated by malice, in taking the impugned decisions: for the respondent *“never answered any of the applicant’s complaints”*. It was urged too that the criminal case which the respondent had instigated, *“is against persons not associated with the applicant.”*

Counsel urged that the respondent’s action was in contravention of legitimate expectations: that *“once a tax liability arises..., the respondent would notify the applicant of the same and demand payment of the same; in doing so the respondent would specify to the applicant how the liability arose, the transactions in question, and how the same is payable.”* Counsel submitted it was the applicant’s legitimate expectation that *“the regular practice of the respondent is that once goods have been verified and duty therefor paid, the respondent would release the goods to the importer unless, of course, there has been any tax liability communicated to the importer.”* Counsel submitted it was the legitimate expectation of the applicant that, having had the containers verified by the respondent, and having fully paid the duty therefor, the respondent would release the same to the applicant; but in this case, after verification and payment of duty, the respondent moved to detain the containers; and

as at the time of filing the instant proceedings, *"the respondent had not disclosed to the applicant that it had suspected non-payment of taxes by the applicant."*

Counsel further contested the respondent's action for being irrational and unfair, and against the public-interest object of facilitating commercial transactions.

Counsel cited in support of the applicant's case, a passage in a decision of the High Court (*Ibrahim, J*), in *Republic v. The Kenya National Examinations Council, ex parte Kemunto Regina Ouru*, Eldoret H.C. Misc. Civ. Application No. 1 of 2009:

"An important limb of the duty to act fairly is the requirement to give a person to be adversely affected by the decision a reasonable opportunity to be heard, albeit on a limited basis. It does not have to be a full-fledged adversarial trial."

Learned counsel, *Ms. Odundo* for the respondent, submitted that the respondent *"has the legal authority to stop any goods for verification and to carry out any investigations it deems necessary, [and to hold] as lien for unpaid duty and taxes"*. In this regard counsel relied on s.130(2) of the East African Community Customs Management Act, 2005 (EACCMA), which provides:

"Goods under Customs control which belong to any person from whom duty is due, and any goods afterwards imported or entered for export by that person, shall be subject to a lien for such debt and may be detained by the Partner State until such duty is paid and the claim of the relevant Partner State shall have priority over the claims of whatever nature of any other person upon the goods and the goods may be sold to meet the duty due if the duty is not paid within two months after the goods are detained."

Counsel submitted that the reasons for detaining the goods in question were *"well spelt out in the F89 deposit slips and were communicated at length to the*

applicant.” The relevant information comes from “*self-assessments by importers as well as importation documents supplied by the importer..., which are yet to be provided.*” Where, as in this case, such documentation was missing, the respondent engages in a “*lengthy process of estimating duties and taxes based on the shipping information available*” – and “*this assessment was not ready as at the time these proceedings were commenced.*”

Counsel urged that the applicant is asking the Court for the “*quashing of a non-existent order*”: the respondent had not detained containers Nos. FSCU 3806088 and GLDU 5223230 which are said to be at the CFS. There are quite other containers (PCIU 3512166, TSAU 5600946 and MSKU 0131665) of the applicant which are in the respondent’s possession – but the applicant is not claiming these.

Learned counsel submitted that the respondent’s action complied with the principle of proportionality, and was taken within the statutory jurisdiction of the respondent. It was upon confirming that 45 containers imported by the applicant had been removed from Portside CFS without payment of the requisite duty, that the respondent invoked s.130(2) of the EACCMA, 2005 and detained the applicant’s containers: Nos. PCIU 3512166; JSAU 5600946; MSKU 0131665; MEDU 8363129; PONU 7788311 – as *lien* for the unpaid taxes in the sum of Kshs.50,013,392/60. The decision to detain the said containers was communicated in the respondent’s letter, Ref. KRA/IED/SR/OFF/016/10 dated *18th March, 2010*.

Counsel submitted that the respondent was not shown to have acted arbitrarily, capriciously or in bad faith; on the contrary, “*the respondent has acted within the law.*”

Learned counsel submitted that the respondent has not acted in breach of any legitimate expectation of the applicant – for legitimate expectation must be claimed within the law; in the instant case, “*the applicant has acted against the law...by illegally removing its containers from customs control without payment of duty.*”

Counsel relied on a decision of the High Court (*Nyamu & Wendoh, JJ*), *Coastal Bottlers Limited v. The Commissioner of Domestic Taxes*, Nairobi H.C. Misc. Appl. No. 1756 of 2005, in which the following passage appears:

“We also find that any ruling that violates any specific statutory provisions could not satisfy the requirement of the principle of legitimate expectation.”

And counsel’s submission was that the detention of the containers in question, which was in every respect consistent with the law, should not be said to be in breach of the principle of legitimate expectations.

Similarly, counsel urged, no detraction from the public interest was entailed in the respondent’s action, as the detention of the applicant’s goods “*was done within the law, to recover lawful taxes that [fell] due [in respect of] the 45 containers*”; and the reasons for the detention of the goods were communicated to the applicant by way of Form F89 and of subsequent correspondence.

Learned counsel contested the application for failing to annex any evidence to show that the respondent has detained container Nos. FSCU 3806088 and GLDU 5223230.

It is a trite statement of principle that *judicial review*, the cause of action raised by the applicant, is all about *proper and lawful conduct of public administration*. This principle, in the context of the legal system’s *grundnorm* today, is specifically incorporated in Article 47 of the **Constitution of Kenya, 2010** which stipulates [Art.47(1)] that –

“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”;

and further subsumed under the “*national values and principles of governance*”, provided for in Article 10(2)(c) of the said Constitution, thus:

“(2) *The national values and principles of governance include –*

.....

(c) *good governance, integrity, transparency and accountability.*”

Against that background, the merits of the instant application are to be resolved on the basis of the relevant facts, and the legal issues raised in the submissions of counsel.

In the applicant’s prayer for Orders of *certiorari*, the claim relates to, *inter alia*, goods-containers Nos. GLDU 5223230 and FSCU 3806088; and these particulars also feature in respect of the prayer for an Order of *mandamus*. There is, however, no evidence placed before the Court that the said containers have been detained by the respondent: the respondent is certain that the two containers were not detained. The burden of proof, in that regard, is not discharged by the applicant.

The applicant has sought the judicial review orders of *certiorari*, *mandamus* and *prohibition*, contending that the respondent, as a public authority, acted with *unreasonableness*, and in breach of principles of *natural justice*; acted in breach of the principle of *proportionality*; took actions outside its *jurisdiction*; acted with *arbitrariness* and *caprice*; acted in *bad faith*; acted in disregard of the applicant’s *legitimate expectations*; and acted in derogation of the *public interest* and *public policy*.

On the facts before the Court, the applicant has remained silent as regards some 45 goods-containers that were imported in its name, and then secretly removed from the designated Port facility, thus evading the tax and duty-payment obligation, which falls under the superintendency of the respondent, by law.

By virtue of the East African Community Customs Management Act, 2005 the respondent is the Government's tax and duty-collection agency, and it has a duty to collect taxes and duties in respect of all imported goods. The respondent is empowered, for that purpose, to *detain* imported goods belonging to a party such as the applicant, asserting *lien* thereon and, if need be, *selling* the same to make good any losses occasioned by unauthorized removals of imported goods. Such, from the evidence, was the case here; and the respondent has furnished sufficient evidence that it duly *informed* the applicant of the mischief committed, and of its intention to exercise the redressive statutory powers.

Did the respondent, by proceeding to thus enforce the law, act disproportionately *vis-à-vis* the mischief in question? without jurisdiction? with arbitrariness and caprice? in bad faith? in disregard of the applicant's legitimate expectations? in derogation of the public interest? contrary to public policy?

That cannot be; because the applicant was only discharging its *obligations* as required by statute. Action under statute, and within procedures of information, communication and fairness, is the intendment of Parliament, and, subject to the terms of the Constitution, is obligatory for the public agency in question, and calls for deference by the subject; in any case, the judicial process will uphold the same, and hence the definite obligation of *deference* by the subject.

I dismiss all the applicant's prayers for Orders of *certiorari* to remove into the Court and quash the decisions of the respondent.

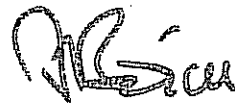
I dismiss the applicant's prayer for an Order of *mandamus* compelling the respondent to release certain goods-containers.

I dismiss the applicant's prayer for an Order of *prohibition* to issue against the respondent in the discharge of its statutory duties.

The applicant shall bear the costs of these proceedings.

Decree accordingly.

SIGNED at NAIROBI



J.B. OJWANG

JUDGE

DATED and DELIVERED at MOMBASA this 16th day of February 2011.

H.M. OKWENGU

JUDGE

MARY KASANGI