

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO. 709 OF 2008

BETWEEN

REPUBLIC APPLICANT

AND

KENYA REVENUE AUTHORITY RESPONDENT

EXPARTE

ALLTEX EPZ LIMITED

JUDGMENT

Introduction

1. The *ex-parte* applicant ('the applicant') is a licenced Export Processing Zone (EPZ) within the meaning of the *Export Processing Zone Act (Chapter 517 of the Laws of Kenya)*. It is also licenced under section 160 of the *East Africa Community Customs Management Act, 2004 (EACCMA)* to manufacture goods under bond.

2. All the imported goods destined to the EPZ under this programme are duty free and the licensee must account for their usage within the licenced premises and if diverted, taxes are payable. Regulation 174 of the *East Africa Customs Management Regulations, 2006* provides that, "A security bond shall be furnished to cover movement of goods from one export processing zone to another or between the enterprises within a particular export processing zone and the points of importation and exportation."

3. The issue in this case is whether the licensee must pay taxes, secured by the security bond, in the event the goods destined for the EPZ are diverted by the criminal or delinquent act of its employee.

The Application

4. By a Notice of Motion dated 17th November 2008, the applicant sought the following orders of judicial review;

- (1) *An order of certiorari to quash the Kenya Revenue Authority's decision to charge the applicant the amount of Kshs.6,561,303/= under the Security Bond number GBNSB 5525/02, which was fraudulently used by a third party in the applicant's name.*
- (2) *An order of certiorari to quash an agency notice dated 22nd October 2008 issued by the Kenya Revenue Authority to Barclays Bank of Kenya Ltd declaring Barclays Bank of Kenya Limited as sole collection agent of Alltex EPZ Limited for the purpose of collecting the amount of Kshs.6,561,303/= demanded by the Kenya Revenue Authority.*
- (3) *An order of prohibition to prohibit the Kenya Revenue Authority from demanding the sum of Kshs.6,561,303/= or any other sum following the fraudulent and irregular usage of the Security Bond GBNSB 5525/02.*
- (4) *An order of prohibition to prohibit the Kenya Revenue Authority from issuing any agency notices under section 131 of the East African Community Customs Management Act 2004 or any other provisions of law to Barclays Bank of Kenya Ltd or any other person in respect of the amount of Kshs.6,561,303/= or any other sum purportedly due*

from Alltex EPZ Limited following the fraudulent and irregular usage of the Security Bond GBNSB 55254/02.

(5) The costs of this application be provided for.

5. The motion is supported by the statement dated 17th November 2008 and the verifying affidavit of Alexcious M. Mwathi, a manager of the applicant, sworn on 17th November 2008 and a supplementary affidavit sworn on 23rd June 2009.

The Applicant's Case

6. The applicant's case dates back to 2003, Peter Muthenya Muindi, an employee of the applicant together with others, forged customs entries related to the Security Bond Number GBNSB 5525/02 ("the Security Bond") in the sum of Kshs. 20,000,000/= which they used to irregularly clear certain goods which had no relation to the applicant and without the requisite payment of duty to the Kenya Revenue Authority ("KRA").

7. As soon as the applicant discovered the fraud, it reported to the police and Peter Muthenya Muindi and his accomplices were arrested and charged with fraud in the Chief Magistrates Court at Mombasa under *Criminal Case No. 3077 of 2003*. Officers of the applicant and KRA employees testified during the trial and on 3rd May 2007, the accused were acquitted on the basis that there was insufficient evidence to place the accused on their defence. The court noted that the investigators from the KRA failed to testify.

8. On 12th March 2007, while the criminal case was in progress, KRA by a letter dated 23rd February 2007 demanded payment of Kshs.3,413,278.00 plus a penalty of 2% per month. The applicant denied that the amount was due by a letter dated 13th March 2007 stating that the matter was still pending in court.

According to the applicant, this position was buttressed by the letter dated 20th November 2003 where KRA acknowledged the position that the Security Bond in question could not be cancelled until investigations were finalised.

9. By a letter dated 19th June 2008, KRA called upon the applicant to honour the security bond without providing any reasons for failure to cancel it. Despite the letter dated the 19th June 2008, the applicant received an internal memorandum, reference KRA/1&E/INV/SR/1 dated the 17th December 2007 in which the Senior Assistant Commissioner I&E, S/Region referred to a report by the IC RPS Southern Region in which he recommended that the Security Bond be retired.
10. Thereafter the applicant sought to meet KRA officers to discuss the cancellation of the security bond and followed up such requests with a letter on the 14th July 2008. The Kenya Association of Manufacturers had also written to the KRA on 20th April 2004 highlighting the then prevalent fraudulent usage of Customs Security Bonds by unscrupulous businessmen to irregularly import goods for the local market without paying duty.
11. On the 16th October 2008, KRA wrote to the applicant demanding the payment of Kshs.6,561,303/= made up of Kshs.3,413,378/= being the principal sum purportedly payable under the Security Bond, and Kshs.3,147,925, being penalties at 2% per month.
12. The applicant avers that since being issued with the demand letter, the applicant sought to discuss the matter with the KRA but despite such attempts on the 22nd October 2008 issued an agency notice to its bank, Barclays Bank of Kenya Limited,

appointing them as collection agents pursuant to **section 131** of the *EACCMA* and demanding that the bank pays the sum of Kshs.6,561,303/= out of the moines held on account of the applicant as and when the same may be held by the bank.

13. The applicant relied on written submissions dated 13th October 2009. In support of the applicant, Mr Odhiambo, counsel for the applicant submitted that the employer should not be held liable for the criminal acts of the employee. At the material time the employee was acting on his own behalf and for his own benefit. Mr Odhiambo further submitted that the applicant has not paid any tax for the goods secured by bond and reason why it does not want to pay is that it did not import the goods subject to the tax.

14. The respondent acknowledged that the bond has been fraudulently used and that this fact having been established, then it was unreasonable for the KRA to demand tax. Counsel maintained that the applicant reported the fraud and assisted the KRA in apprehending the malefactor in good faith and it did not benefit from the fraud.

15. Mr Odhiambo submitted that while the KRA has a statutory duty and power to collect taxes, it can only collect taxes from persons from whom it is due and within reason and justice. Counsel contended that under **section 131** of *EACCMA*, the Commissioner is entitled to issue Agency Notices to any person who holds money on account or for the account of another person if that other person owes tax to the respondent and in that case the Commissioner must first be satisfied that the tax is owing from the person against whom or in respect of whom the Agency Notice is issued. Furthermore, that **section 131** of *EACCMA* does not entitle the Commissioner to anything

against anyone but rather the power must be exercised within reason and justice. Counsel relied on the case of *Susannah Sharp v Wakefield and Others* [1891] AC 173.

16. Mr Odhiambo submitted that section 109 of *EACCMA* gives the Commissioner the discretion to levy tax on a bond that has been used and this discretion should be exercised within reason and justice. In this case, therefore, the applicant deserves discretion to be exercised in its favour as no wrong can be attributed to the applicant.

17. The applicant argues that it is not liable to pay tax for the criminal acts of its employee as the criminal acts were not done in the course of employment. Several cases were cited to support this position among them *Ndoo t/a Ngomeni Bus Service v Kakuzi Limited* [1984] KLR 554, *Anyanzwa v Gasperis Nairobi CA Civil Appeal No. 31 of 1981 (Unreported)* and *Waren v Henlys Limited* [1948] 2 All ER 935. Counsel submitted that these decisions demonstrate that for an employer to be liable for the wrongful act of his employee, the employee must have been acting within the scope of what the employee is authorised to do or a mode of doing an act within that class. The applicant's contention is that once the employee was engaged in fraud and was acting beyond his scope of employment, he became personally and exclusively responsible for his action.

Respondent's Case

18. The respondent has opposed the application grounded on the replying affidavit of Julius Kihara, an assistant commissioner with Customs Services Department at the material time, sworn on 4th June 2009 and a further replying affidavit on 7th July 2009.

19. The facts deponed to by the applicant are not really disputed. What is in dispute is whether the applicant is liable to pay the tax secured by the security bond. The respondent's position is that it is entitled to demand the taxes due and did indeed make such a demand on 23rd February 2009 and when the applicant failed to make any proposals for liquidating the tax, the Commissioner issued a final demand on 16th October 2008 and at the same time instituted recovery measures by serving agency notices to the applicant's bank.

20. Mr Kihara also depones that on 20th November 2003, the Commissioner, in reply to the applicant's request to have its bond in respect of one of the above entries retired, informed it that it could not do so since it was suspected that the subject goods were being cleared with the knowledge and facilitation of Peter Mathenge Muindi, who was at the material time their employee.

21. According to Mr. Ado, counsel for the respondent, the application lacks merit. He submits that the applicant is a company which has its own employees and the acts of the employee are acts of the company and in the circumstances the applicant cannot evade liability for the security bond. Mr Ado relied on several cases where the court has held that taxpayer is responsible for the acts of its employee notwithstanding the criminal or delinquent acts of the employee. These cases are *Republic v Kenya Revenue Authority ex-parte Africa Boot (K) Limited* Nairobi HC Misc. Civil Application No. 54 of 2010 (Unreported), *Republic v Commissioner of Customs Service ex-parte SDV Transami (K) Limited* Nairobi HC Misc. Civil Application No. 81 of 2011 (Unreported) and *Republic v Kenya Revenue Authority ex-parte Total Kenya Limited*

Determination and Disposition

22. As I stated at the opening part of this judgment, the only issue for determination is whether the applicant must pay taxes, secured by the security bond, in the event the goods destined for the EPZ are diverted by the criminal or delinquent act of its employee.

23. The applicant has relied on the common law position regarding the employer and employee relationship to support its case. The position is illustrated by the case of *Warren v Henlys Ltd* (Supra at p. 937) where the court stated that, "a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorised by the master, or (b) a wrongful and unauthorised mode of doing some act authorised by the master."

24. The Court of Appeal also considered this issue in the case of *Ndoo t/a Ngomeni Bus Service v Kakuzi Limited*, (Supra at p.56) where Kneller JA expressed the view that, "A master is not responsible for a wrongful act done by his servant, unless it is done in the course of his employment...But a master is liable even for acts which he has not authorized, provided they are so connected with acts which he has authorised, that they might be regarded as modes-although improper modes-of doing them. In other words, a master is responsible not merely for what he authorised his servant to do, but also for the way he does it..."[Emphasis mine]

25. These decisions in my view represent the common law position but this case must be determined from a reading of the applicable statute. In matters governing the management and administration of the collection of customs duties, sections 145 to 148 of the *EACCMA* specifically provide for authorised agents. Section 148, whose side note reads, "*Liability of owner for act of duly authorised agent*" which is relevant to our this provides:

148. An owner of any goods who authorises 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 himself or herself committed the offence.

Provided that-

(ii) 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;

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

[Emphasis Mine]

26. The language of the statute leaves no doubt that the legislature intended that for purposes of collection of duty, the owner of the goods would be liable for the actions of the agent whatever the circumstances. At the time the goods were cleared, it is not in dispute that Peter Muthenya Muindi, was the applicant's employee and therefore its agent.

27. I would therefore agree with the reasoning in *R v Kenya Revenue Authority ex parte African Boot (K) Limited (Supra) (Unreported)* cited by the respondent where the court (Korir J.) opined that, "...The same case applies here so that when a customs agent engages in fraudulent activities, the importer cannot ask Kenya Revenue Authority for compensation. The importer has to bear the loss with fortitude and find a way of recovering money misappropriated from the customs agent. A prudent taxpayer will always monitor the activities of its agent so as to ensure compliance with the law. The only civil duty a tax payer can do is to report the agent so that the licence can be revoked by the respondent.... The applicant argued that Hellman acted in concert with the respondent's employees so as to defraud it of the money that was meant to pay custom duties. This may well be true but just as the applicant did not authorise its agent (Hellman) to steal so did the respondent not authorise its employees to engage in fraudulent activities. Maybe the applicant could have had a stronger case had it established that Hellman was the respondent's agent. It is however clear that the applicant was defrauded by its agent. It is unfortunate that the applicant suffered such a big loss. The only answer to its application, however is that the same must be dismissed and it is so dismissed."

28. I also agree with the observation of the court (Warsame J.) in *Republic v Commissioner of Customs Services ex-parte SDV Transami (K) Limited (Supra)* where the learned Judge stated that, "It is clear that an owner of any goods who authorizes an agent to act for him shall be liable for the acts and declaration of such duty by the authorised agent. Consequently, the respondent was perfectly right in making a demand against the applicant ..."

Conclusion

29. Having come to the conclusion that the applicant is liable for the acts of its employee, it follows that there is no basis upon which I can grant orders sought in the application as the applicant action was supported by the law.

30. Any action flowing from the decision to enforce the collection of tax which included issuing agency notices cannot be impugned by way of certiorari as prayed in (2). Similarly, an order of prohibition sought in prayer (1) cannot lie to prohibit what is a consequence of a legal act, that is, the enforcement and collection of taxes.

31. I therefore dismiss the Notice of Motion dated 17th November, 2008 with costs to the respondent.

**DATED and DELIVERED in NAIROBI this 5th day of October
2012**

D.S. MAJANJA
JUDGE

Mr D. Odhiambo, instructed by Daly and Figgis Advocates for the *ex-parte* applicant.

Mr M. Ado, Advocate, instructed by the Kenya Revenue Authority.