REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT KISUMU
CORAM: OMOLO, LAKHA & KEIWUA, JJ.A.
CIVIL APPEAL NO. 45 OF 2000

BETWEEN

COMMISSIONER GENERAL, KENYA REVENUE

AUTHORITY THROUGH REPUBLIC ..... APPELLANT

AND

SILVANO ONEMA OWAKI

T/A MARENGA FILLING STATION ..... RESPONDENT

(Appeal from the ruling of the High Court of Kenya at Kisumu (Wambilyangah J) dated 18th August, 1999 in MISC.C.A. NO. 39 OF 1999)

JUDGMENT OF THE COURT

Silvano Anema Owaki t/a Marenga Filling Station (hereinafter called the applicant), on March 15, 1999 applied to the superior court for leave to make an application for orders of certiorari and mandamus. The order of certiorari was to remove into the superior court and quash seizure notice No. 022233 issued on January 15, 1999 by the Kenya Revenue Authority under s**ection 200 of the Customs and Excise Act (CAP. 472)** (hereinafter called the Act).

The order of mandamus was to compel the Commissioner General Kenya Revenue Authority and those claiming through him to remove custom seals placed on the applicant's fuel pumps and underground tank inlets and outlets situated at Marenga Beach. The application also prayed for the grant of leave to operate as a stay of the said seizure notice, until the determination of the application for the said orders of certiorari and mandamus.

The application for leave was grounded on the matters set out in the statement accompanying the application and in the verifying affidavit. The statement is required by rule 1 (2) of Order LIII of the Civil Procedure Rules to set out the name and description of the applicant, the relief sought, and the ground on which it is sought. The facts relied on are required by the rule to be in the verifying affidavit not in the statement as largely happened in this case. We shall return to this aspect of the matter later in the judgment.

The applicant had from October 15, 1998 to January 15, 1999 been operating the station when officials of S.G.S Limited accompanied by officers from Kenya Revenue Authority and police visited the Station. The S.G.S officers took samples from tanks containing kerosene, diesel, regular and super petroleum products. The respondent has denied that there were police officers at the station as alleged by the applicant.

The purpose of the samples was for the Kenya Revenue Authority (hereinafter called the Revenue) to determine whether the fuel in the applicant's tanks was intended for export and if so to seize it for failure on the applicant's part to pay duty. The fuel was tested on the spot and shown to have been for export. This fact was disputed by the applicant who on January 7, 1999, submitted his claim to the Revenue which advised that he either proceed to court to challenge the seizure or plead guilty to being in possession of suspected uncustomed goods, contrary to **section 196 (c) of the Act** . The applicant demanded that the testing of the products be carried out by an agency not connected with the Revenue.

The Revenue declined the demand and the applicant did not get the products tested in any way to show that what the Revenue was alleging was incorrect. Instead the applicant embarked on some inconclusive inquiries with his suppliers who indicated that all their products were obtained from the Kenya Pipeline Company. The applicant says that regular petrol is not a product for export and the tests carried out by S.G.S. Limited showing that regular petrol was for export were malicious.

The applicant also alleged that the notice of seizure had been given with malice and without him being given an opportunity to be heard.

In the verifying affidavit the applicant says:

> ***"18. That I had read in various newspap ers that S. G. S. Officials were abusing their privileges in Maliciously contaminating fuel to demand bribes. (Annexed hereto and marked SAO 6 & 7 are copies of newspaper cuttings)."***

On the other hand, the applicant appears to blow hot and cold in his assertion of malice against S.G.S Limited. In his statement accompanying the application (for what it is worth) the applicant has it:

> ***"26. That, the applicant has been informed by dealer s in petroleum products that the pigment put in export petroleum products takes up to 6 to 7 uses of tanker for it to be cleared hence there is a likelihood that the vehicle used in delivery of the products could have previously carried products for export and therefore contaminated."***

The Revenue in placing the seals in the fuel tanks, appear to have been acting under section 175 of the Act . It is an offence under the section to interfere with such seals. The power of seizure is given by section 199 of t he Act and any officer involved in it is protected for things done in good faith.

It is in the context of the Act that the allegations of malice and denial of opportunity to be heard are to be examined and tested. For it is in the Act that duties of the Revenue are spelt out and that the liabilities of every taxpayer to pay tax are contained.

The Revenue under s**ection 175 of the Act** is not required at that stage to do other than lock up or seal the particular item or place of suspicion. There is no obligation to hear the person affected by the locking up or sealing. The next relevant section is 199 under which the power of seizure is contained. It also does not create any obligation to accord the person affected the opportunity to be heard.

We should observe that the Revenue in carrying out the duties imposed on it by Parliament could not, without proof be said to be acting maliciously. The next step in the process of forfeiture is that under **section 200 of the Ac**t in which the procedure on seizure is set out in detail. If any seizure took place in the absence of the owner of the thing seized a notice to that effect and the reason for it is to be given within one month of the seizure. It would seem in this case that the sealing and seizure was effected in the presence of the manager of the applicant and there was no other notice needed.

The other important provision as far as seizure is concerned is **section 200 (4**) in which the owner of the thing seized has an opportunity to claim and upon such a notice of claim the thing seized becomes liable to be dealt with in accordance with the Act. In the event of the claimant giving security for the payment of the value thereof the thing may be delivered to the claimant.

The next step is **section 202** , which the Revenue appears to have complied with in respect of the notice of seizure, which is the subject matter of these proceedings. That notice followed closely the requirement of that section and in our judgment accorded to the applicant what Parliament had intended that he be given. We therefore see nothing wrong with what was done by the Revenue to render the seizure notice a nullity and amenable to judicial review.

The ex parte application for leave was heard on March 16, 1999 by Wambilyangah J. who granted leave to bring the application for judicial review in these terms:

> ***"Having considered the matter deponed to in the supporting affidavit I give leave as sought in the present application dated 15th March 1999."***

The order which was extracted read as follows:

> ***"1. That leave be and hereby granted to the applicant to file an application for judicial review within 21 days. 2.That the said leave to act as a stay of the notice of seizure No. 022233 dated 15.1.1999 pending the hearing and determination of this judi cial review application."***

The power to order leave to operate as stay of proceedings is given by rule 1 (4) of Order LIII of the Civil Procedure Rules . As can be seen from the rule the judge must specifically and expressly order the leave to operate as stay of the particular proceeding.

It is quite clear from the order made on March 16 by the learned Judge that he did not direct his mind to the prayer for leave to operate as stay and therefore did not grant it. The order that was eventually extracted is at great variance with that made by the learned Judge. The order as extracted is a nullity and did not operate to stay the said seizure notice.It follows that the execution of that order by the

applicant and an auctioneer was unlawful and of no effect to stop the operation of the said notice of seizure, or affect the placing of the seals on the tanks as aforesaid.

Those orders were followed by an application to commit officers of the Revenue to civil jail for what is said to be the failure on its part "to oblige in the opening of the filling station".

According to the applicant, the Revenue was served with the order of stay but it refused to comply with it. An auctioneer appointed by the applicant for that purpose executed the order. As a result, all the fuel that was seized by the Revenue was subsequently sold without it being tested by somebody other than the S.G.S. Limited or without the applicant giving security in terms of section 200 of the Act .

That meant the superior court at the hearing of the application for judicial review had to contend with the report availed by the Revenue through S.G.S. Limited. However, that court rejected that report saying an affidavit by the officers of the S.G.S. Limited should have been availed so as to show "the pro cedure used to detect and determine the offence committed by the applicant" .

We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of his products containing biocide the chemical used only in products meant for export.

That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters.

We would observe that it is the verifying affidavit not the statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1 (2) of Order LIII . This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:

> ***"The application for leave "By a statement" - The facts relied on should be stated in the affidavit (see R. v. Wandsworth JJ., ex p. Read [1942] 1 K. B. 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. I t is not correct to lodge a statement of all the facts, verified by an affidavit***."

At page 283 of the report of the case of R. V. Wandsworth Justices, Viscount Caldecote C.J. said:

> ***" The Court has listened to argument on the proper procedure or remedy i n the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case o f excess of jurisdiction."***

The court in the **Wandsworth case** was considering the provisions of Order 53 of the English Rules of the Supreme Court which are in pari materia with our Order LIII of the Civil Procedure Rules . This appeal must, therefore, succeed and it is allowed with costs with the result that the order of the superior court dated August 18, 1999 is hereby set aside with costs to the appellant.

Dated and delivered at Kisumu this 21st day of December, 2001.

R. S. C. OMOLO

JUDGE OF APPEAL

A. A. LAKHA

JUDGE OF APPEAL

M. Ole KEIWUA

JUDGE OF APPEAL

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

DEPUTY REGISTRAR