

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 9 OF 2004

M.V.AL QADERY 4.....1ST PLAINTIFF/1ST APPLICANT
ABDALA SHEHE.....2ND PLAINTIFF/2ND APPLICANT
VERSUS
COMMISSIONER OF CUSTOMS AND EXCISE
TANZANIA REVENUE AUTHORITY.....DEFENDANT

R U L I N G

KIMARO, J.

The plaintiffs, a Sea Vessel and its Chief Officer (Captain) have filed this suit praying for a declaratory order that the seizure and custody of the vessel and the cargo by the Defendant is unlawful and unjustified. They are also praying for damages for the Defendant's unlawful acts.

In terms of the plaintiff's pleadings, the vessel (1st plaintiff) while in the high sea with a consignment of 175 tonnes of unrefined raw sugar was intercepted at Bagamoyo on suspicion that the consignment was illicit drugs. It was proved that the consignment was not illicit drugs but unrefined raw sugar. The consignment invited the Defendant to come in with allegations that the consignment was uncustomed goods and the vessel was impounded.

A suit was filed at Bagamoyo District Court against the Commissioner for Customs by one Ally Mohamed who purported to be the owner of the consignment

and resident of Mozambique. On 24/11/2003 the suit was marked settled on a condition that the Vessel be ferried to Dar-Es-Salaam for Customs Investigation.

On 25th February 2004, this suit was then filed based on the cause of action stated above.

The respondent who is represented by Mr. Lugaiya, Learned Advocate raised a preliminary objection:

1. *The 2nd Defendant does not qualify to be a Party to this suit and therefore Order 1 Rule 1 of the Civil Procedure Code 1966 has been offended.*
2. *The suit is re-sub judice because Civil Application No.23 of 2003 has not been determined.*
3. *The jurisdiction of this court is barred by Sections 159 and 163 of the East African Customs and Transfer Tax Management Act 1976 as applied by Act No. 19 of 1977.*

This court approved hearing of the preliminary objection by written submissions.

In his final submissions in support of the preliminary objection, Mr. Lugaiya submitted for the first point that the 2nd Defendant has no cause of Action because he is nether the owner of the consignment, nor the Agent of the owner. He is a stranger to the suit and he is not covered by Order 1 rule1 of the Civil Procedure Code, 1966.

Regarding the second point of objection, it was submitted that there is a pending application in the High Court in respect of the Civil Case which was filed at the Bagamoyo District Court. The application is asking for a review in respect of a ruling which was delivered by the District Court on the question of the jurisdiction of the District Court to entertain the suit. Mr. Lugaiya lamented that although the suit in the District Court was withdrawn on an understanding that Customs Laws would be followed and the matter to be finalised by the Commissioner of Customs, the plaintiffs have opted to come to this court without any explanation, while the owner of the cargo has not been heard.

As for the last point of objection Mr. Lugaiya said the plaintiffs came to this court before compliance with the procedure provided for under East African Customs Management Act, as applied by Act No.19 of 1977. In terms of Section 159 once a seizure notice is issued, there is a procedure to be complied with. The procedure is that if the owner of the cargo is not satisfied with the seizure, there is a process for an Appeal under Section 5A of the Tanzania Revenue Act No.11 of 1995 as amended by the Tax Revenue Appeals Act, No 15 of 2000.

Mr. Lugaiya's view is that the action taken by the plaintiff's is a gross abuse of the procedures of the court and an embarrassment to the defendant. He prayed that the objection be upheld and the suit be dismissed.

The response by MSK Law Partners Advocates is that the right to sue is vested on the plaintiff and he/she is the one who is to determine who should be sued. The right to sue is determined by the question whether the plaintiff has a cause of action. According to the Advocates for the plaintiff, the 1st plaintiff being a world wide vessel is attended to by more than one Captain for smooth operation, and that the 2nd

plaintiff is an Assistant of the Captain In charge who initially submitted the crew list. They concluded that he has a capacity to sue.

As regards the second point of objection the answer given by MSK Law Partners is that there is no matter which is pending in any court because Civil Case No. 18 of 2003 was concluded on 24th November 2003.

On the third point, it was submitted that the matter was not withdrawn for purposes of compliance with Customs Law. Rather, the matter was marked settled and the vessel brought to Dar-Es-Salaam for investigation.

They denied issuance of seizure notice saying that the one which is alleged to have been issued on 13th November 2003 was issued before the matter was marked settled and was issued unilaterally and without compliance with the requirements of the law.

Basically those were the arguments given by the Advocates in this case.

After a thorough scrutiny of the documents filed and the submissions made, this court agree with Mr. Lugaiya that there must be something wrong in the filing of the present suit. If the case which was filed at Bagamoyo District Court was filed by the person who purported to be the owner of the consignment, which also forms the subject matter of this suit, there is no reason why these proceedings should be filed by the Captain of the Vessel and not the owner. Even the plaint does not make any reference at all to the suit which was filed at Bagamoyo. This omission suggests that the plaintiffs were trying to evade an objection on re- judicata.

Secondly, the settlement Order in Civil Case No.18 of 2003 at the Bagamoyo District Court is very clear. It reads and I quote:

“ Since the parties have come to a settlement, the suit is hereby marked settled and no order as to costs or that every party to bear his own costs. The vessel be ferried to Dar-Es-Salaam for customs investigation as agreed.

Sgd. E.H.Malekela – PDM

24/11/2003.”

Before the above order was made, Mr. Mkoba – Learned Advocate who appeared for the plaintiff had submitted as follows:

“ The parties have reached a settlement of the matter, in terms of the fact that the vessel will be taken to Dar-Es-Salaam for customs investigation and that the defendant will conduct the investigation under the customs laws. No order as to costs.”

What comes from the above submission and the order which followed subsequently, is that the vessel and the consignments which was being carried by the said vessel had to be subject to investigations under the Customs Law.

Since that was the essence of the settlement order, neither the owner of the cargo nor someone else deriving title from him, can be allowed to come before this court in circumvention of the order which had been agreed upon. It was therefore wrong for this suit to be filed before this court. The parties in Civil Case No.18 of 2003 had to comply with the consent order. It does not serve any purpose for the

plaintiffs to come to this court under concealment of facts as they have done in this case. Parties are obliged to comply with the settlement order. Changing of the plaintiff does not change the cause of action and what had been agreed upon.

I uphold the preliminary objection on status of the second plaintiff to file this suit and the jurisdiction of this court to entertain the suit after there had been a settlement order to be complied with, and dismiss the suit with costs.

N.P.KIMARO,
JUDGE
8/06/2004

Date 9.6.2004

Coram: Hon. N.P.Kimaro, J.

For the Plaintiff/Applicant – Mr. Living Kimaro.

For the Defendants/Respondent – Mr. Lugaiya.

CC: R.Mtey – Edith.

Court: Ruling delivered today.

Order: The preliminary objection on the status of the 2nd Plaintiff is up held. Also the issue of the jurisdiction of this court after the settlement order had been reached is upheld. Consequently the suit is dismissed with costs.

N.P.KIMARO,
JUDGE
9/06/2004

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I Certify that this is a true and correct
of the original order Judgement Rulling
Sign [Signature]
Registrar Commercial Court Dsm.
Date 9/6/04