



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**JR. MISCELLANEOUS APPLICATION NO. 387 OF 2018**

**IN THE MATTER OF: AN APPLICATION BY ALKHEMY BRANDS LIMITED THE APPLICANT, FOR LEAVE TO APPLY FOR AN ORDER OF CERTIORARI, PROHIBITION AND MANDAMUS**

*AND*

**IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2010, ARTICLES 31, 47**

**AND 50 (1 & 2)**

*AND*

**IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

*AND*

**IN THE MATTER OF: THE EXCISE DUTY ACT NO. 23 OF 2015**

*AND*

**IN THE MATTER OF: ILLEGAL UNPROCEDURAL & UNCONSTITUTIONAL SHUT-DOWN OF COSMETICS PRODUCTION FACTORY OWNED BY ALKHEMY BRANDS LIMITED**

*AND*

**IN THE MATTER OF: ILLEGAL AND UNPROCEDURAL SEIZURE OF COSMETIC PRODUCTS**

**ALKHEMY BRANDS LIMITED.....EX-PARTE APPLICANT**

**VERSUS**

**1. COMMISSIONER GENERAL**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**2. COMMISSIONER, CUSTOMS &**

**EXCISE DEPARTMENT – K.R.A.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before this court is a chamber summons application dated 16<sup>th</sup> November, 2018. The applicant seeks the following orders:

*a) That leave be granted to the ex parte applicant to seek by way of Judicial Review, that an order of certiorari do issue, to remove to this court for the purpose of being quashed, and to quash the respondents' decision to illegally shut down the applicant's cosmetics production factory along Mombasa Road and the said leave do operate as stay of the respondents decision herein closing*

*down the applicant's cosmetics production factory along Mombasa Road.*

*b) That leave be granted to the ex parte applicant to seek by way of Judicial Review, that an order of certiorari do issue, to remove to this court for the purpose of being quashed, and to quash the respondents' decision to illegally seize the applicant's cosmetics products and the said leave do operate as stay of the respondents' decision.*

*c) That leave be granted to the ex-parte applicant to seek that an Order of Mandamus do issue compelling the respondents to issue the applicant with prior and adequate notice before undertaking any administrative actions in reference to their cosmetics factory premises and operations therein and the said leave do operate as stay of the respondents' decision herein closing down the applicant's cosmetics production factory along Mombasa Road.*

*d) That leave be granted to the applicant to seek that an order of Mandamus do issue compelling and directing that the respondents do give the applicant herein an opportunity to be heard and to make representations in relation to any administrative action to be undertaken by the respondents provided such administrative decision shall not affect its quiet possession and utility of its assets, premises and cosmetic production factory along Mombasa Road and the said leave do operate as stay of respondents' decision closing down the applicant's factory.*

*e) That leave be granted to the applicant to seek that an order of Prohibition do issue against the respondents, their agents or representatives, prohibiting them from seizing the applicant's products or in any way interfering and or shutting down and or in any way dealing in the applicant's cosmetic production factory along Mombasa Road and the said leave do operate as stay of the respondents' decision herein.*

*f) That leave hereby operates as a stay barring the respondents their agents, representatives or proxies from in any way whatsoever interfering with the applicant's cosmetic production, distribution, dispatching and management facilities, customer management and payment services at the applicant's cosmetic production factory along Mombasa Road.*

*g) That all necessary and consequential orders or directions be given.*

*h) That costs be in the cause.*

2. It is the applicant's case that it is a small medium enterprise licensed to operate a small industrial plant for the production of cosmetics and their license to operate as such is valid. That the applicant's products being hair and beauty products, are duly approved as fit for human consumption by the Kenya Bureau of Standards. That the applicant operates with 100% commitment to and in compliance with all applicable law and regulations. That on 14<sup>th</sup> November, 2018, some officers who are agents of the Respondents and who know the applicant's Managing Director, unlawfully entered into the applicant's facility along Mombasa Road and caused an immediate shutdown of the production factory and the entire premises, on grounds that the said project was being run illegally without an Excise Duty License. That no prior notice had been issued to the applicant to this effect. That on the same day, the Respondents' agents seized some products from the applicant's factory including; Mikalla Shampoo, Mikalla Conditioner, Mikalla leave-in hair treatment, Mikalla hair mayonnaise, Mikalla styling gel, Mikalla braids spray, Mikalla hair protein treatment, Mikalla curl gel, Mikalla hair food, Mikalla nourishing hair food, Mikalla anti-dandruff hair cream and nuvera body lotion. That after causing closure of the applicant's cosmetic production factory and business premises along Mombasa Road and seizing the mentioned products, the respondents' officers later issued the applicant with a notice of seizure requiring the applicant to appear at the Times Tower Building on 19<sup>th</sup> November, 2018. That the applicant was neither issued with any prior notice at their registered address and nor did the respondents' officers give time to the applicant's quality control and production technicians to professionally shut down the production process.

3. That the applicant's cosmetic production takes at least five days to process the final product after the raw products are mixed and left to mature under moderate but controlled temperatures. That as such, there are raw mixtures that are still heating under temperatures and are expected to mature in the course of the week the application was made. That if left unattended, the same will interfere with the form and structure of the final product and/or cause more chemical harm to the factory and the environment at large. That leaving the production process unattended with raw materials under heat may eventually cause a complete breakdown of the production unit in the factory.

4. It is the applicant's case that the respondent's officers acted ultra vires by causing a closure of the applicant's cosmetics production factory and seizing the applicant's goods for lack of an Excise Duty License, which penalty is not provided for in the Excise Duty Act, the parent statute on Excise Duty compliance. That the respondents' action and decision to seize the applicant's goods and shut down the factory is illegal as the said drastic enforcement measures are not provided for as part of the sanctions to be imposed on a person or entity for Excise Duty Tax compliance.

5. The applicant lamented that the respondents' officer applied grave unreasonableness and irrationality by causing the closure of a production factory without issuing adequate notice of the same and disregarding the fact that production was on going. That the respondents' actions are clearly aimed at frustrating and intimidating the applicant by condemning them unheard and crippling them financially despite the applicant having shown good will to comply with the respondents' regulations. That the respondents are acting with malice by applying their enforcement mechanisms partially and discriminatively as they have neither not shut down nor enforced Excise Duty Tax compliance against manufacturers of bottled water, sodas, juices, non-alcoholic drinks and other cosmetic product manufacturers most of whom are yet to apply for the Excise Duty License as the matter is still a subject of determination by the Court of Appeal. That unless the respondents, their officers, agents and or proxies are restrained by this court, the applicant and its customers shall continue to suffer albeit unjustifiably and unfairly at the hands of the respondents.

6. In opposition thereto, Veronica Ngugi who is an officer in the Respondents' Enforcement Division swore an affidavit filed on 21<sup>st</sup> November, 2018. She contended as follows. That the applicant is manufacturing excisable goods without an excise license. That under section 15 of the Excise Duty Act No. 23 of 2015, a person shall require a license from the respondents if carrying any of the following

activities; the manufacture of excisable goods in Kenya, the importation into Kenya of excisable goods specified by the Cabinet Secretary under section 28 as requiring an excise stamp, the supply of excisable services, the use of spirit or illuminating kerosene to manufacture goods in Kenya that are not excisable goods or the carrying out of any other activity in Kenya for which the Commissioner, by notice in the Gazette, may impose a requirement for a license.

7. That the applicant deals with cosmetics, specifically hair and beauty products, which are excisable goods under the First Schedule of the Excise Duty Act and therefore an excise license is required. That the applicant is also required to be registered by the respondents when dealing with excisable goods and services pursuant to section 8 (1) of the Tax Procedures Act No. 29 of 2015. That under the latter section, a person who expects to manufacture or import excisable goods or expects to supply excisable services shall apply to the respondents to be registered. That the applicant has neither registered itself with the respondents nor applied for registration as required under the said section.

8. She contended that the applicant has not paid taxes to the respondent in the form of Excise duty. That the tax which had been paid by the applicant is Value Added Tax and not Excise Tax. That there is Excise Duty to be charged under section 5 of the Excise Duty Act No. 23 of 2015. That the applicant has therefore contravened the provisions of the Excise and Tax Procedures Act by manufacturing excisable goods without a license, as well as not registering with the respondents and failing to pay Excise Duty as required. That it is an offence under the section 39 (5) and (6) of the Excise Duty Act to operate without an excise license which can lead to penalties and forfeiture of the plant and the excisable goods. That this being a Judicial Review matter, injunction cannot issue and that the respondents were justified to issue a seizure notice to the applicant. It was stated that the applicant is right to point out the correct position by stating that there is a stay of the judgment in Petition No. 532 of 2017.

9. It is the applicant's submission that the only issue for determination is whether or not leave to institute Judicial Review proceedings granted to the applicant should operate as stay. Order 53 rule 4 of the Civil Procedure Rules was cited and the applicant submitted that this court has the discretion on whether or not to direct that the order granting leave to institute Judicial Review proceedings do operate as stay of the respondents' decisions and actions. It was submitted that the main purpose of granting stay orders in Judicial Review proceedings is to preserve the status quo of the subject matter. That the aim is to prevent a situation where the court's time is wasted by proceeding in a suit where the subject matter is interfered with substantially. To support the argument, the applicant relied on **Judicial Review No. 269 of 2018; Munir Sheikh Ahmed v. Capital Markets Authority (2018) eKLR** in which the court quoted **R (H) v. Ashworth Special Hospital Authority (2003) 1 WLR 127** and **Judicial Review No. 622 of 2017; Pravin Galot v. Milimani Law Courts & 3 others (2017) eKLR**.

10. It was submitted that Order 53 is not couched in mandatory terms and as such it gives the court discretion. That the court also has inherent power under section 3A of the Civil Procedure Act to make such orders as may be necessary for the ends of justice and to prevent an abuse of court process. It is argued that in exercising its discretion, the court should be alive to the fact that it has inherent power that is unlimited and should be exercised for the ends of justice and that the same should be exercised sparingly. In this regard **Miscellaneous Application No. 158 of 2006; Taib Ali Taib v. The Minister for Local Government & 3 others (2006) eKLR** was cited in reliance. It was submitted that the respondents in an attempt to enforce a Tax Administration Act, illegally and unreasonably caused an immediate closure of the applicant's factory, seized some of the applicant's products and summoned the applicant for a meeting in five days. That as a result of the same, the applicant's factory and its operations were halted and is not operating to date. That the decision to cause an immediate closure of the factory and seizing of the goods as an enforcement measure is illegal and unreasonable.

11. That the stay is for purposes of maintaining status quo. That to prevent the decision-making authority from continuing with the decision-making process or the implementation of the decision, hence the point at which stay orders are issued is relevant to avert a situation where the stay orders become irrelevant or inconsequential. It is submitted that the applicant will be subjected to grave injustice that will culminate into substantial financial loss if stay is not granted. That the respondents' decisions had been implemented completely but that implementation is a continuous process which ought to be suspended pending the hearing and determination of the Judicial Review proceedings herein. It is submitted that the applicant's contention is that the respondents' actions of seizing the products from the factory, causing an immediate and complete closure of the applicant's factory without notice and issuing a notice of seizure after the products had already been seized is both unreasonable and illegal. That the applicant's case is arguable for reasons that the factory produces hair and beauty products that are processed through five days before the complete product is achieved. That the respondents ordered an immediate closure of the factory despite the fact that there were raw products under heat in the manufacturing plant that were yet to complete the process. That the applicant had not been issued with any notice of closure or non-compliance and neither were they given an opportunity by the respondents' officers to clear the processing plant. It was submitted that the said actions were unfair, unreasonable and irrational. Secondly, that the respondents seized the applicant's products as a way of enforcing an administrative action to recover tax and that the seizure is thereby an illegality. In this regard the applicant cited section 15 (2) and (3) of the Excise Duty Act. That section 44 and 60 of the Tax Procedures Act, 2015 were declared unconstitutional, invalid null and void in **Petition No. 412 of 2016; Dr. Robert K. Ayisi v. Kenya Revenue Authority & another (2018) eKLR**. It was submitted that the above sections that empowered the Commissioner to seize goods and secure properties/business premises were declared unconstitutional on 16<sup>th</sup> March, 2018. That the respondents' officers caused closure of the applicant's factory and seizure of the goods on 14<sup>th</sup> November, 2018, eight months after the said provisions were declared a nullity. That there is no appeal that has been preferred against the latter judgment to date. That the respondents cannot feign ignorance of the above decision. That the respondents went ahead and seized the applicant's goods and closed down its factory under the guise of enforcement mechanism that had already been declared bad in law. It was submitted that the same forms the basis of the applicant's case which is prima facie arguable and it is in the interest of justice that the parties be given an opportunity to ventilate and advance their arguments. That the orders of stay of the respondent's decision would in the circumstances be very efficacious for the ends of justice.

12. It was submitted that the need for administration is one of the key considerations that the court ought to consider in granting stay orders. That the case of **Judicial Review No. 36 of 2017; Republic v. Anti-counterfeiting Agency & another ex parte FRM (E.A.) Packers Limited (2017) eKLR** gives this court an avenue to deal with any doubts. That if the court is not convinced that the applicant should be granted stay, then the court ought to consider the aspect of good administration and grant the stay order. That if stay is not granted, the applicant will continue being a victim of illegal administrative actions by the respondents. That the final verdict of this court will be rendered a mere academic exercise, should the court not find in favor of the applicant. That all this will be against the spirit of good administration.

13. That it has been demonstrated in the verifying affidavit dated 16<sup>th</sup> November, 2018 that the applicant lost sales estimated at KShs. 700,000.00 on 15<sup>th</sup> November, 2018 when the factory was closed by the respondents. That the products seized should have been sold out and

earn income but the said products are being held by the respondents. That should stay not be granted then the applicant stands to lose more income from sales as well as have their brand's reputation in the market tainted. That whether or not the applicant has complied with the Excise Duty Act is immaterial in this suit since Judicial Review is not concerned with compliance but fair administrative actions.

14. The applicant submitted that it should be awarded costs of the suit for having gone through the trouble of filing the current suit. In support of this argument, the applicant relied on **Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others; Petition No. 4 of 2012.**

15. The respondents on the other hand submitted that it is a legal requirement under section 15 of the Excise Duty Act that a person dealing in manufacturing of excisable goods should have a license. That the applicant is not licensed and has not made any application to deal with excisable goods. That offences relating to licensing and excise control are provided for under section 39 of the Excise Duty Act in particular sub section 5 and 6. That section 39 was amended by section 31 of the Finance Act, 2018 and subsection 6 was inserted. That the applicant was operating illegally without an excise license. That the respondents therefore were justified in seizing the applicant's goods for the purpose of forfeiture vide the seizure notice dated 14<sup>th</sup> November, 2018 by invoking section 39 (6) of the Excise Duty Act. That if the applicant will be given a stay, then the applicant will continue in manufacturing excisable goods without a license contrary to section 15 of the Excise Duty Act. That it should be noted that the factory was not closed as only goods described on the seizure notice were seized. That section 15 and 39 of the Excise Duty Act are still operative and have not been declared unconstitutional. That the applicant has not invoked any of the provisions of the Tax Procedures Act which it claims to have been declared unconstitutional. That the respondents invoked only section 15 and 39 of the Excise Duty Act in their operations. The respondent cited **Machakos High Court Miscellaneous Application No. 11 of 2014; Bridge International Academies Limited v. The District Education Officer – Loitoktok** where the court denied parties stay orders because they were operating without a license and **Nairobi High Court Miscellaneous Civil Application No. 325 of 2012; Marura Nursing Home v. District Medical Officer of Health Kiambu East District** in which stay orders were denied. It was submitted that it is clear that where there is an issue of legal requirement of a license, the courts are not persuaded to grant stay.

16. I have considered the application as well as the submissions tendered thereto. Leave having been granted, the issue for determination is whether or not such leave can operate as stay of the respondents' decisions. Order 53 Rule 1(4) of the Civil Procedure Rules which is the applicable law provides as follows:

*“The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.”*

17. The main factor to be considered is whether or not the decision or action sought to be stayed has been fully implemented. See **Taib A. Taib v. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** where the Judge held as follows:

*“As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited...The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted.”*

Again in the case of **Republic v. Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) eKLR** the court was of the opinion that it is only where the decision in question is complete that the court cannot stay the same. It follows therefore that where a decision has been implemented, there is need for the court to consider the completeness or continuing nature of such implementation such that it can still be suspended if it is continuing in nature. It is clear that the meeting to which the applicant was summoned has not yet been held. Further, the alleged unpaid taxes are computable and therefore recoverable in the event it is found to be owed to the respondents. Indeed the respondents' interest lies in collection of taxes on behalf of the national government which is used for the running of the government activities and programs. Such taxes once exacted can easily be quantified and hence an order that the leave do operate as a stay will not prejudice the Respondents in any way pending the determination of the substantive application. On the other hand, the applicant stands to suffer loss of business from the closure of the plant as well as lead to massive job losses. Weighing the two situations, I find that the applicant stands to suffer irrecoverable loss if the leave does not operate as a stay pending the determination of the substantive application. Indeed the decision making process being challenged is still continuing and hence an order that leave so granted do operate as a stay. The administrative action by the respondent in seizing goods as well as closing the applicant's factory without giving the applicant adequate notice is capricious and tantamount to crippling the applicant's operations. The stay will act as efforts at good administration and meant to act as a status quo pending the determination of the substantive application. If stay is not granted at this stage then the determination of the substantive application will only be an academic exercise.

18. In the result, it is my finding that the Ex-parte Applicant is deserving of a stay order pending the determination of the substantive application. Consequently I order that the leave granted shall operate as a stay of the respondents' decision herein. The parties are now directed to set down the substantive application dated 18<sup>th</sup> November 2018 for hearing as a matter of priority. Costs hereof shall be in the cause.

Orders accordingly.

**Dated and delivered at Machakos this 18<sup>th</sup> day of June, 2019.**

**D.K KEMEI**

**JUDGE**