



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW MISC. APPL. NO. 50 OF 2014**

**IN THE MATTER OF THE CUSTOM AND EXCISE ACT, CHAPTER 472 LAWS OF KENYA**

**AND THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004**

**BETWEEN**

**KEYNOTE LOGISTICS LIMITED.....APPLICANT**

**AND**

**THE COMMISSIONER CUSTOM (KRA).....1<sup>ST</sup> RESPONDENT**

**BOAZ MAKOMERE.....2<sup>ND</sup> RESPONDENT**

**KENYA INT. FREIGHT &**

**WAREHOUSE ASSOCIATION.....3<sup>RD</sup> RESPONDENT**

**KENYA REVENUE AUTHORITY.....4<sup>TH</sup> RESPONDENT**

**JUDGEMENT**

1. By an amended Notice of Motion dated 16<sup>th</sup> July, 2014, the *ex parte* applicant herein, **Keynote Logistics Limited**, seeks the following orders:

1. **This application be certified as urgent.**

2. **The court do issue an order of certiorari to remove from this court and quash the decision for the 1<sup>st</sup> and 4<sup>th</sup> Respondents to suspend the Applicant’s Password due to communication from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

3. **The honourable court do issue and order of prohibition to prohibit the 4<sup>th</sup> Respondent, whether by itself, its officers, employees and/or agents, from withdrawing, cancelling and/or suspending the Password and/or DC License of the Applicant on account of communication from either the 2<sup>nd</sup> or 3<sup>rd</sup> Respondent.**

4. **The honourable court do issue an order do operate as stay of the purported suspension dated 6<sup>th</sup> January 2014 issued to the Applicant pending the hearing and determination of the application for the judicial review orders. In particular and for the**

avoidance of doubt the 4<sup>th</sup> Respondent, whether by itself, its officer, employees and/or suspend the Applicant's Password pursuant to the said demand from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent

5. The honourable court do issue an order of certiorari to remove from this court and quash the decision of 2<sup>nd</sup> Respondent to suspend the Applicant's membership from the 3<sup>rd</sup> Respondent.

6. The Honourable court do issue an order of prohibition to prohibit the 3<sup>rd</sup> Respondent, whether by itself, its officers, employees and/agents, from withdrawing, cancelling and/or suspending the membership and/or DC License of the Applicant from the 3<sup>rd</sup> Respondent.

7. The order granting leave do operate as stay of the suspension dated 6<sup>th</sup> January 2014 issued to the Applicant by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent pending the hearing and determination of the application for the judicial review orders. In particular and for the avoidance of doubt the 3<sup>rd</sup> Respondent, whether by itself, its officers, employees and/agents, be stopped from taking any steps to cancel, withdraw and/or suspend the Applicant's membership.

8. The costs of the application be provided for.

#### Ex Parte Applicant's Case

2. The said application was supported by a supporting affidavit sworn by **William Ojonyo**, the Applicant's director on 5<sup>th</sup> February, 2014.

3. According to the deponent, the Applicant has since 2006, been duly licensed by the 4<sup>th</sup> Respondent to operate as Clearing and Forwarding Company.

4. According to the deponent, there was a disquiet in the 3<sup>rd</sup> Respondents Association, (KIFWA) with regard to its branches autonomy and the members were angered with the move by the branches hence directed the officials of the National office, including the 2<sup>nd</sup> Respondent and the deponent to seek courts guidance. Sometime in 2012 after the 2<sup>nd</sup> Respondent took over as chairman of the 3<sup>rd</sup> Respondent, members were concerned, including the deponent on how the affairs of the association were being run and the applicant and the 2<sup>nd</sup> Respondent and other officials filled judicial review miscellaneous Cause No. 33 of 2012 with regard to the same.

5. By a consent order issued by the Honourable court on the 21<sup>st</sup> of November 2013, the court directed that office bearers on record do vacate office and the affairs of the 3<sup>rd</sup> Respondent be run by a Board of Trustees. It was deposed that the 2<sup>nd</sup> Respondent was one of the Applicants in the suit and further was fully active and engaged in the deliberations that led to the consent order aforementioned.

6. Subsequent to the said order of the court, the deponent deposed that the 2<sup>nd</sup> Respondent started witch-hunting the deponent and having a personal vendetta against him. It was however asserted that the said Board of Trustees is still in place and runs the affairs of the 3<sup>rd</sup> Respondent Association.

7. Despite the foregoing, the 2<sup>nd</sup> Respondent, knowing too well that there is a court order, and after vacating office on the 21<sup>st</sup> of November 2013 pursuant to the said court order, purported on the 6<sup>th</sup> January 2014 to write to the Applicant allegedly issuing suspension notice from the 3<sup>rd</sup> Respondent's Association yet the 2<sup>nd</sup> Respondent had no powers to act for or on behalf of the 3<sup>rd</sup> Respondent.

8. It was the deponent's contention that the 2<sup>nd</sup> Respondent's acts, purporting to be the chairman of KIFWA after 21<sup>st</sup> November 2013 is illegal, null and void. It was further averred that the said court order was communicated to the 1<sup>st</sup> Respondent, who was well aware of its existence at the time of acting on the communication by the 2<sup>nd</sup> Respondent. To the deponent, the 2<sup>nd</sup> and 1<sup>st</sup> Respondent deliberately disobeyed the court order and acted illegally by purporting to suspend the Applicant's membership from the 3<sup>rd</sup> Respondent association and Password respectively. That notwithstanding, the 1<sup>st</sup> Respondent, acted on the communication from the 2<sup>nd</sup> Respondent, and went ahead to suspend the Password and/or license of the Applicant and despite inquiries from the Applicant, the same has been in vain. Further, the 1<sup>st</sup> Respondent has not officially communicated or given any reason whatsoever for the revocation of the Applicant's Password as required by law.

9. On 27<sup>th</sup> January 2014, the 3<sup>rd</sup> Respondent's Executive Officer did write to the Applicant ascertaining the membership and clearance of the applicants certificate which letter was copied to both the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent's Board of Trustees. According to the deponent, as a result of the suspension of the Applicant's Password there is the risk that the 4<sup>th</sup> Respondent will move to cancel, and or revoke the Applicant's license.

10. It was the deponent's case that the circumstances of this case warrant the grant of an order for leave to apply for judicial review orders in that: the decision to suspend the Applicant membership by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents was been made in bad faith; the 1<sup>st</sup> and 4<sup>th</sup> Respondents' decision to suspend the Password of the Applicant is irrational and unreasonable under the circumstances; the 1<sup>st</sup> and 4<sup>th</sup> Respondent were required by law to officially communicate to the Applicant the Reasons for the revocation of their Password; it is against the natural rules of justice for both the 1<sup>st</sup> and 4<sup>th</sup> Respondent to act against the Applicants without giving them a chance to be heard or being informed on why they are being punished.; and that the decision of the Respondents to the supervisory jurisdiction of this court. The Applicant was therefore apprehensive that unless stopped by an order of the court, the respondents would proceed to cancel its membership and License to its detriment.

### **Determinations**

11. Despite the Respondents having sought and secured time respond to the application, no response to the application was eventually filed. It follows that the factual averments in the affidavit sworn in support of the application remained wholly uncontroverted.

12. It was deposed that the impugned action was taken pursuant to information emanating from the 2<sup>nd</sup> Respondent who had vacated office and therefore had no powers to issue such instructions as he had no power to act for or on behalf of the 3<sup>rd</sup> Respondents. It was contended that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents further acted illegally by purporting to suspend the Applicant's membership from the 3<sup>rd</sup> Respondent's Association and password in violation of an existing Court order.

13. In support of its case the Applicant exhibited a copy of the Court order issued on 21<sup>st</sup> November, 2013 in which the affairs of Kenya International Freight & Warehousing Association (KIFWA) were directed to be run by a Board of Trustees. However by a letter dated 6<sup>th</sup> January, 2014, the 2<sup>nd</sup> Respondent purported to suspend the Applicant.

14. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

15. Where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993.**

16. As this Court held in **Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013:**

**“In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void.”**

17. Where it has been brought to the Court’s attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres this Court cannot turn a blind eye to the same. If we show disrespect to the supreme law of the land and fail to punish or penalise those who violate important provisions we will be encouraging such violation.

18. Since it is contended which contention is not disputed that the impugned action was conceived by actions taken in violation of an order of the Court, such action must be tainted with illegality and was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300:**

**“Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.”**

19. One of the principles of law is the need to act within the rule of law which dictates that orders of courts of competent jurisdiction be obeyed. It follows that the Respondents’ impugned actions were illegal.

20. Accordingly, I find merit in the amended Notice of Motion dated 16<sup>th</sup> July, 2014. It is however my view that grant the orders in the manner sought would have the effect of permanently prohibiting the Respondents from taking any action against the applicant in future notwithstanding their merits. Since it is not contend that the Respondents intend to embark on another unlawful action, there is no justification for granting the orders of prohibition as sought. In my view once the impugned decision is quashed the next course of action is left to the authority concerned which course is of course expected to be lawful. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court of Appeal expressed itself as follows:

**“The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court’s consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law.....Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari*, prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable.”**

**Order**

21. Consequently, I grant the following orders:

1. **An order of certiorari is hereby issued removing into this court for the purposes of being quashed the decision of the 1<sup>st</sup> and 4<sup>th</sup> Respondents to suspend the Applicant's Password due to communication from the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**
2. **The costs of this application are awarded to the applicant to be borne by the 1<sup>st</sup> and 4<sup>th</sup> Respondents.**

**Dated at Nairobi this 20<sup>th</sup> day of November, 2014**

**G V ODUNGA**

**JUDGE**

*Delivered in the absence of the parties*

*Cc Patricia*