



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 276 of 2010

In the matter of an application by Callfast Services Limited, Time Fast Freight Ltd, Cargo World Conveyors Ltd, Waki Clearing and Forwarding Agents Ltd, Real Systems Ltd, Superior Conveyors, Realtime Logistics Ltd, Swift Link Freight Services Ltd, Bright Field Freight Ltd, Fast Lane Freight Forwarders Ltd, Onward Cargo System Co. Ltd, GimbcO Freight Ltd, Solid Vegetables Ltd, Jaspa Logistics, Charleston Freight Ltd, Nzoia Freighters ltd, Total Plus Bureau Co. Ltd, Urgent cargo handling Ltd, Mardav Logistics Ltd, Chesaka International Co. Ltd, Pentagon Logistics Ltd, Realtime Performance Ltd, Maps Investment Services Ltd, Rift Cargo Handling Ltd, Corporate Services Ltd, Bem Importers & Exporters Ltd, Bestwing Cargo Ltd, Maraca Enterprises Ltd, Air-Go Consultants, Well Cargo Movers, Airwings Ltd, Access Freight Services Ltd, And Transfreight Logistics for judicial review proceedings for orders of prohibition and certiorari

AND

In the matter of Kenya Airports Authority Act, Cap. 395 laws of Kenya and the Local Government Act Cap 265 Laws of Kenya

AND

In the matter of the decision of the City Council of Nairobi to Levy And/Or Single Business Permits Upon The Callfast Services Limited, Time Fast Freight Ltd, Cargo World Conveyors Ltd, Waki Clearing and Forwarding Agents Ltd, Real Systems Ltd, Superior Conveyors, Realtime Logistics Ltd, Swift Link Freight Services Ltd, Bright Field Freight Ltd, Fast Lane Freight Forwarders Ltd, Onward Cargo System Co. Ltd, GimbcO Freight Ltd, Solid Vegetables Ltd, Jaspa Logistics, Charleston Freight Ltd, Nzoia Freighters ltd, Total Plus Bureau Co. Ltd, Urgent cargo handling Ltd, Mardav Logistics Ltd, Chesaka International Co. Ltd, Pentagon Logistics Ltd, Realtime Performance Ltd, Maps Investment Services Ltd, Rift Cargo Handling Ltd, Corporate Services Ltd, Bem Importers & Exporters Ltd, Bestwing Cargo Ltd, Maraca Enterprises Ltd, Air-Go Consultants, Well Cargo Movers, Airwings Ltd, Access Freight Services Ltd, And Transfreight Logistics for the duration 2004 -2010

BETWEEN

REPUBLIC.....APPLICANT

AND

THE CITY COUNCIL OF NAIROBI.....RESPONDENT

EX PARTE

Callfast Services Limited, Time Fast Freight Ltd, Cargo World Conveyors Ltd, Waki Clearing & Forwarding Agents Ltd, Real Systems Ltd, Superior Conveyors, Realtime Logistics Ltd, Swift Link Freight Services Ltd, Bright Field Freight Ltd, Fast Lane Freight Forwarders Ltd, Onward Cargo System Co. Ltd, Gimbc Co Freight Ltd, Solid Vegetables Ltd, Jaspa Logistics, Charleston Freight Ltd, Nzoia Freighters Ltd, Total Plus Bureau Co. Ltd, Urgent cargo handling Ltd, Mardav Logistics Ltd, Chesaka International Co. Ltd, Pentagon Logistics Ltd, Realtime Performance Ltd, Maps Investment Services Ltd, Rift Cargo Handling Ltd, Corporate Services Ltd, Bem Importers & Exporters Ltd, Bestwing Cargo Ltd, Maraca Enterprises Ltd, Air-Go Consultants, Well Cargo Movers, Airwings Ltd, Access Freight Services Ltd, And Transfreight.

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 14th September 2010 filed in this Court on 15th September 2010, the ex parte applicants herein seek the following orders:

1 That an order of certiorari do issue to remove in to this court and to quash the decision by the City Council of Nairobi to levy trade licenses fees and/or single business permits upon the ex-parte applicants business operating and/or situate within Jomo Kenyatta International Airport.

2 That an order of prohibition do issue prohibiting the respondent from levying and/or charging trade license fees and/or single business permit upon the ex-parte applicants businesses operating and/or situate and/or operational within Jomo Kenyatta International Airport.

3 That the Honourable Court be pleased to give further orders and directions as it may deem fit and just to grant.

4 That the cost of this application be provided for.

EX PARTE APPLICANT'S CASE

5 The application is based on the Statement filed on 19th August 2010 and the affidavit verifying facts sworn by **Morris Wambua**, a Director of the 1st ex parte applicant herein, **Callfast Services Ltd** on 18th August 2010.

6 According to the deponent all the ex-parte applicants herein have businesses and operating within the **Jomo Kenyatta International Airport** within the jurisdiction of the Kenya Airport Authority (hereinafter referred to as the Authority) and have license agreements entered between it and the Authority for periods set out in the relevant license agreement.

7 According to the deponent, the said Kenya Airport Authority is a body corporate with perpetual succession and a common seal capacity in its corporate name to sue and be sued and to acquire, hold and dispose of movable and immovable for the purposes under the Kenya Airport Authority Act, Cap 395, Laws of Kenya (hereinafter referred to as the Act). Under section 8(2)(d) of the said Act, it is deposed that the Authority has the mandate to grant on such terms and conditions as the Authority deem fit, authority to carry on any trade or business at aerodromes and in section 12(3)(e) of the said Act the Authority shall have power to determine, impose and levy rates, charges, dues or fees for any services performed by the authority, or for the grant to any person of license, permit or certificate subject to the approval by the minister among others as set out under the provision including the power to prohibit, control or regulate the use by any person of the services performed or the facilities provided by the Authority. According to him the area within the aerodrome and/or the premises situate thereat are vested in or placed at the disposal of the authority for the purposes of the Authority under the said Cap. 395 Laws of Kenya and therefore once the Kenya Airport Authority has procured the business services as stated above, the city Council of Nairobi have no jurisdiction to exercise regulatory oversight powers within the aerodromes in relation to business carried out therein.

8. According to the ex parte applicants it is therefore illegal and inappropriate for the City Council as they are currently attempting or doing to seek licenses from the ex-parte applicants as that would not only be unlawful but would occasion double jeopardy by virtue of double payment in respect of the same business. In support the deponent has exhibited a bundle of demand notices for single business permit or trade license fees by the respondent and the attendant summons requiring attendance in court of the ex-parte applicants to answer charges for carrying out business in a non-licensed premises which demands and notices are backdated to years back as shown in the said demand notices. Pursuant thereto directors/managers to the various ex-parte applicants have been arraigned in the City Court to answer charges of carrying on a business on a non-licensed premises and are now out on cash bail pending trial while other ex-parte applicants are awaiting to attend court.

9. It is the ex parte applicants' case that despite protests by the Authority to the City Council of Nairobi against the said acts of the respondent the protests and/or objections have gone unheeded by the respondent who has gone ahead undeterred to levy the said charges and on occasions issue summons to the ex-parte applicants directors/managers attend court for the offence of allegedly carrying out business in a non-licensed premises yet in all cases all the ex-parte applicants are under licenses from the Authority.

10. Having been expressly excluded by an act of parliament the local authority and in this case the City Council of Nairobi cannot impose any other license fee or the single business permit as the case may be upon the ex-parte applicants and hence the decision by the respondent to levy and/or impose the additional license on the ex-parte applicants was done in breach of the law, is without jurisdiction and is *void ab initio*, it is irrational, unreasonable and should not see the light of the day. Further, it is contended that at no time before and during the carrying of the acts complained of has the respondent given the ex-parte applicant a fair treatment and that the whole exercise is a clear case of harassment of the ex-parte applicants yet the Authority has been around since the year 1978 and over the period the tenants therein in shoes of the ex-parte applicants have always obtained their licenses from the Kenya Airport Authority without reference and interference from the City Council of Nairobi.

11. In the applicants' view the respondent is duty bound to lead by example by complying with the written law and the failure to abide by the law exposes their decisions to judicial review proceedings and that if a local authority does not fulfil the requirements of laws, the court should see that it does fulfil them. It is, according to them imperative that the procedure laid down in the relevant statutes should be observed and in this sense the respondent should not be allowed to proceed in total defiance of the Act and usurp the powers of the Authority.

RESPONDENTS' CASE

12. The respondent opposed the application by way of an affidavit sworn **A J Owuor**, the Acting Deputy Director, Legal Affairs of the Respondent on 29th October 2010.

13. According to him, and based on his consultation of the relevant departments in the City Council of Nairobi and study the available records thereof and wish to make the following reply that the Applicants' Notice of Motion has no merit, is premature and ill-conceived, fatally defective, unfounded and otherwise an abuse of the court process. In his view, the Respondent is mandated by the Local Government Act under Section 163 A to control trades and occupations through licensing and issuance of business permits. Pursuant to the aforesaid section and along with the powers conferred to the Respondent under Section 201 of the said Act, the Respondent is permitted under By-law 3 (1) of the City Council of Nairobi (Licensing of Premises and Trades) By-laws, 2007 to issue permits and licenses to all trades, occupation, business or professions and enforce any contravention thereof. The requirement by the respondent for payment of Business Permit by the Applicants is premised on the aforesaid By-laws which the applicants are not challenging neither have they demonstrated any excess of jurisdiction as the provisions and procedures under the Local Government Act and By-laws made pursuant thereto bear out the Respondent's actions as being within the purview of its mandate under the said Act and By-laws.

14. According to the Respondent, based of legal advice, the court cannot prohibit that which is statutorily

ordained in the interest of the public and for the proper regulation of business engagements, if the same is done within the provisions of the relevant Act and the subsequent laws thereof. Further it is deposed that the Applicants are squarely within the ambit and regulations envisaged under the aforesaid By-laws and therefore any claim of illegality is spurious and untenable since the provisions on licensing under the Kenya Airports Authority are subjected to compliance with the trade regulations under the Local Government Act and the subsequent By-laws made pursuant thereto.

15. It is further contended that the application does not identify the decision subject of quashing and/or the offending decision for court's determination. In any case prohibition looks into the future and since the demand notices have been issued to the Applicants and the criminal proceedings are ongoing, the orders of prohibition are untenable in the circumstances. In his view, the Respondent's powers cannot be fettered in exercise of its mandate under the law where the same is exercised in accord with the provisions of a Legislation donating those powers.

16. The Applicants, it is deposed were vide the said demand notices given sufficient notice of the offences and the same required them to atone for their recalcitrance to the Respondent's By-laws and since the Applicants' premises are within the city of Nairobi which city is under the jurisdiction and authority of the Respondent and their trade or business and/or profession is not exempt from remittances or payment of Business Permit/Trade License Fees under the said By-laws and the Kenya Airport Authority Act and hence the Respondent's actions are justifiable and within its legal mandate. Therefore, the Applicants' interpretation of the exercise of authority by the Kenya Airports Authority in relation to the Applicants' and the exercise of authority by the Respondent *vis a vis* the Applicants'' is misplaced and misguided as both authorities exercise their mandate thus distinguishing it from other trades while the latter's function is to regulate and oversee all forms of businesses, trades and occupations regardless of which class or profession they fall under and the same is anchored on a wide public interest and as part of Government obligations

APPLICANTS' RESPONSE TO THE REPLYING AFFIDAVIT

17. The ex parte applicants confronted with the said replying affidavit filed a further affidavit on 21st February 2011 sworn by the said **Morris Wambua** on 8th February 2011. While reiterating the contents of the verifying affidavit, it is deposed that whereas it could be true that the respondent is mandated by the local Government Act under section 163A to control trade and occupations through licensing and business permits, the same cannot be said to apply to the ex-parte applicants as they are carrying their business within the Kenya Airports Authority for the purposes of the said Authority. Accordingly, since the Authority has the power inter alia to issue licences, once it has procured the business services or issued licenses as stated above, the City Council of Nairobi have no jurisdiction to exercise regulatory oversight powers within the aerodromes in relation to business carried out therein. The jurisdiction exercised therein is exclusive of the provisions of Local Government Act Cap 265 Laws of Kenya and the by-laws made there under and that having been expressly excluded by an act of parliament, the local authority and in this case the City Council of Nairobi cannot impose single business permit licence upon the ex-parte applicants as that authority vests upon the Kenya Airports Authority in terms of the provisions of the Kenya Airports Authority Act Cap 395 Laws of Kenya.

18. In the deponent's view the City Council of Nairobi (Licensing of premises and Trade) by laws 2007 are not applicable and do not apply to the ex-parte applicants who are operating and/or conducting their business at the aerodrome and/or the premises occupied by the Kenya Airports Authority and/or property of the authority vested in the Authority for the purposes of the Authority and that the respondents action of demanding for payment of single business permit and subsequent arraignment in court of the ex-[arte applicants directors constitute an act of illegality, irrationality, procedural impropriety, the respondent acting so unreasonable, failure to act fairly, engaging in an error of law, acting in excess of its jurisdiction, warranting that an order of certiorari does issue. Indeed he Notices issued by the respondent were backdated to the year 2000 or thereabout yet the by-laws being applied were gazetted on 6th July 2007 with no provisions that the same are applicable to be period before the said date.

19. To the applicants, an administrative or executive authority entrusted with the exercise of discretion

must direct itself properly on the law and that the respondent are duty bound to lead by example by complying with the written law and failure to abide by the law exposes their decisions to the judicial review proceedings. In view of the foregoing the respondent misdirected itself properly in the law and in this case the respondent misdirected itself as to the law applicable, it therefore engaged in an illegality, irrationality and in a matter in excess of its jurisdiction. It acted so unreasonably that no reasonable authority in their shoes could make such decision to invoke its by laws, backdate its application, pursue single business permit in an area exclusively vested in the hands of Kenya Airport Authority. Indeed the ex-parte applicant's premises and business transacted therein are outside the jurisdiction of the Local Government Act Cap. 265 Laws of Kenya and respondent by-Laws made pursuant thereto. To him the offending decision has been adequately identified, documents exhibited in the verifying affidavit accompanying the application for leave and therefore this is a proper matter for the issuance of an order of certiorari and that prohibition operates to prevent unlawful specific Acts intended to be perpetrated in the future and that being the case the respondent has already demanded and will continue to demand single business permits from the ex-parte applicants now and even in future unless an order do issue. In any event the criminal cases are pending before the trial court. To the applicants the issue is not that the Respondent is not exempt from demanding the payment of the Business permit/trade license fees under its by-laws but the issue is that the ex-parte applicants business licensing and its regulation are under the Kenya Airports Authority Act Cap. 395 Laws of Kenya and the provisions thereunder and therefore the ex-parte applicants are outside the jurisdiction of the City Council of Nairobi. To the applicants the Authority established under the Kenya Airports Authority Act have all the arrays of mandates, functions and the jurisdiction and every provisions of the Kenya Airports Authority Act Cap 395 Laws of Kenya serves to reaffirm and reiterate that theirs is an exclusive jurisdiction.

SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANTS' APPLICATION

20. The application was prosecuted by way of written submissions. While reiterating the contents of the supporting affidavit, the *ex parte* applicants submitted based on **Associated Provincial Pictures vs. Wednesbury Corporation [1948] 1 KB 223** that in the present case the respondent is guilty of an error of law, due to having acted so unreasonably that no reasonable authority could make such a decision and having failed to act fairly. It is further submitted that the respondent failed to appreciate the limits of its own jurisdiction and failed to apply the law as it is. It is submitted that this is a case of the respondent acting outside and/or in excess of its mandate and thereby acting ultra vires its mandate hence its actions amount to intruding in an exclusive jurisdiction of the Kenya Airport Authority as set out in the Act hence attracting an order of certiorari. It is submitted that it could not have been intention of Parliament to enact the Act and the Local Government Act Cap 265 Laws of Kenya and grant it an overlapping mandate in matters of licensing of the persons carrying out the business within the Kenya Airport Authority premises. For the ex parte applicants to be asked to pay licences twice is to occasion a double jeopardy.

RESPONDENTS' SUBMISSIONS

21. On the part of the respondents, it is submitted that the object of judicial review is not to look at the merits of a decision but rather the process in which the decision is made. In the instant case, it is submitted, the main question for determination is whether the Respondent has power and authority to require businesses that operate within its jurisdiction to obtain trade licences and single business permits. The Respondent, it is submitted is a creature of statute and operates and exercises powers that are donated to it by Local Government Act Cap 265 Laws of Kenya. Since all the applicants have and operate businesses within the area of jurisdiction of the Respondent section 163A(1) of the Cap 265 empowers the Respondent to issue business permits to persons so that they can conduct their businesses, trade or occupation within the area of jurisdiction while subsection (2) empowers the Respondent to charge fees for obtaining business permits and subsection (3) imposes penalties for late payment of permits. Pursuant to section 201 of the same Act, it is submitted the Respondent has promulgated ***The City of Nairobi (Licensing of Premises and Trades) By-Laws 2007*** whose import is that all businesses, trades and professions that operate within the area of jurisdiction of the respondent have to obtain Business permits. It is submitted that the Act permits the Respondent to arrest and prosecute defaulters hence the Respondent was within its rights to demand payment for single business permits since the licences obtained by the ex parte applicants from the Authority does not oust the express provisions of section

163A(1) of the **Local Government Act**. It is submitted that a reading of section 163(1) shows that Parliament anticipated a situation where a business might be regulated by different Acts and that is why it is enacted that before a local authority grants a business permit, the trader or business must first satisfy the requirements of that other Act. It is therefore submitted that the Authority and the Respondent exercise their mandate with varied purposes. In the Respondents' view there is no provision in the Act that ousts the application of Cap 265 in aerodromes and specifically **Jomo Kenyatta International Airport**. It is therefore submitted that the decision to demand payment of single business permits fee is statutorily ordained and an order of prohibition ought therefore not to issue.

REJOINDER BY THE APPLICANT

22. In his rejoinder, the applicants submitted that the issue is not the merits of the decision in question, but whether the Respondent had the authority and legal powers to proceed in the manner in which they did, to demand trade licence fees and/or single business permits from the ex parte applicants' businesses operating under the jurisdiction of the Authority. Further it is submitted that there is a disturbing element in the Respondent's action which warrants the grant of the orders sought herein and that is the fact that although the Respondent's By-laws were enacted in the year 2007, its application to the ex parte applicants' businesses is backdated to the year 2000 which is unconstitutional, abuse of its powers and in excess of its jurisdiction, in bad faith, unreasonable and in breach of the cardinal rule of natural justice

DETERMINATIONS

15. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

16. If I understood the ex parte applicants' dispute correctly, they do not contend that the imposition of the impugned levies by the Respondent is inherently illegal. Their case is that since they are paying levies to the Authority, for the Respondent to seek that they pay similar levies amounts to double jeopardy and since the Authority is legally empowered to levy the said charges, the Respondent has no legal authority to similarly levy the said charges. Further it is their case that the levy of the said charges has been backdated to a period before the Regulations empowering the Respondent to levy the same had taken effect.

17. This position comes out clearly in paragraph 17 of the further affidavit sworn in support of the application in which it is deposed as follows:

“.....the issue is not that the Respondent is not exempt from demanding the payment of the Business permit/trade license fees under its by-laws but the issue is that the ex-parte applicants business licensing and its regulation are under the Kenya Airports Authority Act Cap. 395 Laws of Kenya and the provisions thereunder and therefore the ex-parte applicants are outside the jurisdiction of the City Council of Nairobi. I invite Honourable court to read the entire Kenya Airport Authority Act Cap. 395 Laws of Kenya and see that the City Council of Nairobi have no role in the operations of the aerodromes including the parking spaces situate therein.”

18. That the Respondent is legally empowered to demand the payment of the Business permit/trade license fees under its by-laws is not disputed by the ex parte applicants. It is therefore not correct that the Respondent has no jurisdiction to demand payment of the said fees but the mode in which they are exercising the said powers with respect to the ex parte applicants who are already paying similar fees is

what is being challenged. However section 163A(1) of the Local Government Act Cap 265 provides:

***“Provided that in the case of a business, trade, profession or occupation regulated by the provisions of any other written law, a person shall prior to the submission of an application for a business permit pursuant to this subsection, satisfy all the requirements of that other written law.*”**

19. Therefore the mere fact that certain conditions are stipulated under an Act of Parliament to be fulfilled by particular business, trade, profession or occupation does not necessarily oust the provisions of the ***Local Government Act*** and the Regulations made thereunder. One might correctly question the rationale and the policy behind the imposition of several tax regimes under different pieces of legislation and such question may be merited. However, judicial review as opposed to ordinarily civil suits or even Constitutional References, in which declaratory orders may be sought and obtained, is not concerned with the merits of a particular action but is more concerned with the process and the legality of the action. Once the body concerned proves that its action is hinged upon a particular piece of legislation whose legality is not under challenge and that the process has been followed the Court would not be justified in quashing the said decision. As was held in **Kamani vs. Kenya Anti-Corruption Commission [2007] 1 EA 112:**

“The remedy of judicial review is concerned with the reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is not part of that purpose to substitute the opinion of the Judiciary or individual Judges for that of the authority constituted by law to decide the matters in question.... Section 31 vests the power to make the decision and to impose conditions on Kenya Anti-Corruption Commission. The mandate of the Court is to ascertain if the implied duty to act fairly has not been discharged and if the implied duty to act fairly has not been discharged the court would have the power to quash the decision so that KACC can make it again in accordance with the law. The Court cannot, however substitute its own decision and impose its own conditions, as this would be a usurpation by the Court of the power clearly vested in KACC. Similarly, KACC’s decision an conditions can be attacked on being unreasonable or that irrelevant considerations taken into account or relevant considerations having been ignored.”

20. In this case the By-laws under which the Respondent anchors its impugned action is not under challenge. What the ex parte applicants are challenging are actions taken pursuant to the said By-laws. In my view, those actions are being taken in order to implement the provisions of the said By-laws. As was held in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd** (supra):

“Where a decision is made and its making has been made known to the Respondents who did not challenge the same within 6 months of its being made by way of *certiorari* to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision maker has evinced an intention to act contrary to law.”

21. Therefore where what is challenged is not the decision or the By-laws but the implementation thereof, unless it is shown that the said implementation is contrary to the legislation or the decision or that in its implementation the Rules of natural justice have been contravened the Court would not grant the remedies contemplated under judicial review.

22. However, as was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240.**

“.....legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and

acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. In this case the applicant did not expect an abrupt change of tariff where the process of manufacture or its products had not changed. Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. In this case imposing a liability of 1 billion on the applicant to be paid within 14 days though attractive in terms of enhanced public revenue and perhaps for the zeal of meeting annual tax targets, I find is not such an overriding interest for the reasons set out in this judgment including failure to satisfy the principle of legality. In order to ascertain whether or not the respondents decision and the intended action is an abuse of power the court has taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness and the *quantum* of the amount of tax imposed retrospectively and its potential to irretrievably ruin the applicant. All these are traits of abuse of power. Thus I hold that the frustration of the applicants' legitimate expectation based on the application of tariff amounts to abuse of power."

23. Therefore whereas the demand of payment of fees by the Respondents may not be in excess of its jurisdiction, the fact that the said fees has never been demanded by the Respondent in the past which has given the *ex parte* applicants legitimate expectations that they are only liable to pay the taxes to the Authority is a ground for restraining the Respondent from demanding such payment with respect to the taxes that accrued in the past unless and until the Respondent gives a reasonable notice of the change in their past policy. To suddenly demand such payments amounts to abuse of power on the part of the Respondent.

24. It is further, contended by the *ex parte* applicants that the implementation of the said By-laws is being done retrospectively in that the same is being effected to include the period before the said By-laws were promulgated. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others** (supra) the learned Judge further expressed himself as follows:

Statutory power must be exercised fairly. Perhaps it is important to recall the observations made in the English case of *Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531* as follows: "The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural." The unilateral change of tariff indicate that this change was done nearly nine (9) years after its use by the applicant company with its predecessors who shared the same licence that was based on tariff 22.04. The applicant has over this period arranged its business affairs in reliance with the principle of certainty of law – and that should there be a change it will only apply to the future. I hold that the applicant is entitled to hold the taxman to its bargain and its business expectations based on the principle of legality ought not to be thwarted. The respondents should have exercised their power to change the tariffin a spirit of legality and fairness. The retrospective application of the tariff was done: (a) without notice or adequate notice; (b) without allowing the applicant to explain its position. There is correspondence to the effect that the respondents decision on tariff would remain – and the applicant was shut out; (c) The change of tariff according to the respondents own report was intended to block the payment of a refund of a Kshs 36 million (appx) valid refund due to the applicant; (d) The exercise of the power to change the tariff was not admittedly based on the respondents addressing the law on tariff. ...As reflected above the change of tariff was unilateral and abrupt and no evidence has been given concerning whether legal advice was sought and given before the change over....One other reason why the respondents conduct in changing the tariff and making its effect retroactive is illegal, is that it became penal and penal laws should not be retroactive. The applicant has in the circumstances of this case the right to protect its reliance on legitimate expectations as elaborated elsewhere in this judgment. The applicant in conducting its affairs is entitled to rely on certainty and regularity of

law. The capriciousness, oppression and arbitrary application of the tariff retroactively is the antithesis of certainty and regularity of law. ... This is the reason why our Constitution prohibits *ex-post facto* laws. Although the tariffs were in existence and not new laws, their arbitrary imposition in a retroactive manner has the same effect as the *ex post facto* laws. Moreover isolating the applicant is discriminatory and I would reject the tariff on this ground as well. Despite its antiquity nothing expresses the principles involved in the above holdings than the American case of *Hurtado vs. California* 110 US 51-0535-36 (1884): "Law is something more than mere will exerted as an act of power. It must not be special rule for a particular person on a particular case but ..., the general law ..." so that every citizen shall hold his life, liberty property and immunities under the protection of the general rules which govern society, and this excluding as not due process of law acts of attainder bills of pains and penalties acts of confiscation ...' and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects is not law, whether manifested as the decree of a personal monarch or an impersonal multitude.".....The fact that the respondents have arbitrarily and without notice imposed, the tariff, goes against governmental regularity and the rule of law as well. One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our Constitution and it is an important pillar of the rule of law. No one including a zealous taxman should be allowed to violate these principles. In short burdening otherwise the lawful activities of the applicant in relying on tariff 22.04 automatically converts the switch over to a higher tariff 22.06, into a law, that is discriminatory in its effect. It is no good answer for the taxman to proclaim that Kshs 1 billion (appx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due. It stems from illegality, improper exercise of law, disregard of legitimate expectation, in violation of Government regularity, in breach of the rule of law, abuse of power and in total disregard of constitutionism. All these are proper grounds of intervention by this court....Imposing another tariff retrospectively is punitive and our courts ought to frown upon any such practice because the effect of such imposition is the same as retroactive laws. A change of tariff just like most laws must be prospective to be fair. In *Philips vs. Eyre* (1870) LR QB 1 *Exchequer Chamber*, the legislature of Jamaica had passed an Indemnity Act following the suppression of a rebellion in the colony. If the Act was valid it would prevent the claimant suing for assault and false imprisonment, Willes J held:

"Retrospective laws are no doubt prima facie of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts and ought not to change the character of past transactions carried on upon the faith of the then existing law: Accordingly, the court will not ascribe retrospective force to new laws affecting rights unless by express words or necessary implication it appears that such was the intention of the legislature."

Although the law under which the tariffs are imposed is not a new law which is being applied retrospectively as in the illustrations above there is nothing in the Customs & Excise Act or the other relevant Acts which supports expressly the retroactive operation of the tariff and such application is patently illegal. There are no express words or necessary implication by the legislation to support that a new tariff could be applied retrospectively. This also goes against the principle of certainty of law....On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his landregardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive

law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.....Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings - what matters is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead it is what if anything, is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court must uphold the right of recovery regardless of its consequence to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things to uphold both the law the integrity of the rule of law. The respondents' argument that the applicant came to court prematurely without exhausting the internal tax objection process as regards each category of tax, is a serious misdirection because as it has been stated elsewhere in this judgment the issues raised were greater than any of the internal tribunals could handle. The task before the court is not, and has not been that of counting the shillings, it has been one of adjudicating on illegality, the doctrine of *ultra vires*, irrationality, procedural impropriety, Wednesbury unreasonableness, oppression, malice, bias, discrimination and abuse of power. Based on the turning points, outlined above the Court finds that the applicant has demonstrated that the respondents have acted *ultra vires* their powers to assess and levy tax in relation to the applicant.when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance. In the case cited by the leading counsel for both parties in this matter, namely, *Regina vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Businesses Ltd (1982) AC 617 at 652* Lord Scarman emphasised the same point in these apt words:- "The duty of fairness as between one taxpayer and another is clearly recognized in these (and other passages) in the modern caselaw. Is it a mere moral duty, a matter of policy but a rule of law? If it be so, I do not understand why distinguished judges allow themselves discuss the topic: they are concerned with laws not policy. And is it acceptable for the courts to leave matters of right and wrong, which give rise to genuine grievance and are justiciable in the sense that they may be decided and are effective remedy provided by the courts to the mercy of policy? Are we in the twilight world of "maladministration" where only Parliament and the Ombudsman may enter, or upon the commanding heights of the law? The courts have a role long established, in the public law. They are available to the citizen who has a genuine grievance if he can show that it is one in respect of which prerogative relief is appropriate. I would not be a party to the retreat of the courts from this field of public law merely because the duties imposed upon the revenue are complex and call for management decisions in which discretion must play a significant role."... Independent decision making power of the Judiciary also comprises jurisdiction over all issues of a judicial nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law. No organ other than the courts themselves should decide on its own competence as defined by law. The jurisdiction as set out above is recognized even under international law – see Article 36(6) of the Statute of the International Court of Justice and Article 32(2) of the European Convention on Human Rights...While this court has due deference to the Tribunals, the applicant in this matter had a genuine apprehension that the respondents were bent to take drastic actions against it, in a manner contrary to the applicable law and they were just about to abuse their powers. These are certainly not issues the Tribunals would have had the competence or jurisdiction to deal with, determine or give relief. I reject the argument that the applicant came to the court prematurely. It was under a threat which only this court could prevent or avert. It is for the courts of law to define the limits of their competence. Even in the field of tax law judicial issues cannot be left to the tax bureaucrats. If the courts were to do this, it would be serious abdication of their core

role or duty... From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors. Imposition of a different tariff, to that an investor contemplated when setting up an industry is reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law. Such a style of decision making cannot offer a conducive business or investment climate. The courts have a role in keeping public authorities within certainty of law. To enable them to do this the frontiers of judicial review have to expand. For now let it suffice to state and hold that the actions and decision of public authorities must be questioned directed and shaped by the law and, if not the courts must intervene. This is the essence of this decision...The court has in each case analysed the relevance of each ground to the outcome herein. Of great significance is the principle of certainty of law especially on taxation in a democratic state such as ours. Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. While the applicants are evidently successful on all the judicial review grounds as indicated above, I think it is significant to stress on the ground of certainty of law as an ingredient of the rule of law because it is easy for public authorities and bodies to overlook it in their decision making processes, as has happened in this case. The respondent's argument that the applicant should not have come to court before exhausting the internal objection arrangements in respect of each tax regime should also be considered from the standpoint of the rule of law. While judicial review could be a collateral attack, the right of access to court is a fundamental principle and cannot be taken away except in exceptional cases. It is the basis of an orderly society and the rule of law. The rule of law is the cog upon which all the provisions of the Constitution turn. For example, the intended tariff change has clearly been shown to have been discriminatory in its effect contrary to s 82 of the Constitution. I hold that the public bodies decisions and activities should always turn on this cog as well, failing which the courts are entitled to intervene where this is overlooked, as I have done in this case.... My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – see *Benett* case (*supra*). Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law. The courts conclusion that the change of tariff and its retrospective application are a threat to the rule of law and the principle of legitimate expectation and constitutes abuse of power, is supported by the House of Lords' decision in the case of *Bennett v Horse Ferry Road Magistrate's Court and anor [1993] 3 All ER at page 150* where the following significant observations were made by Lord Griffiths: 1. ...”there is a clear public interest to be observed in holding officials of the State to promises made by them in full understanding of what is entailed by the bargain” 2. ...if the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to

refuse to countenance behaviour that threatens either basic human rights or the rule of law. My lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law. The great growth of administrative law during the latter half of this century has occurred because of the recognition by the Judiciary and Parliament alike that it is the function of the High Court to ensure that executive action is exercised responsibly and as Parliament intended. So also should it be in the field of criminal law and if it comes to the attention of the court, that, there has been a serious abuse of power it should, in my view, express its disapproval by refusing to act upon it.”.....I hold that where there is proof of abuse of power and a violation or threat to the rule of law, the court must wholly stop what the perpetrator of those ills intended to do. I apply the principle in the *Benett case* above. The reason for this is that only the might and majesty of law can prevent or act as a deterrence against the temptation to abuse power and also, send the right signals, that public administration must adhere to the rule of law. In the result, I find that the applicant company is entitled to the reliefs claimed. The judicial review orders sought to forthwith issue as prayed with costs to the applicant. “

23. On my part I concur with the sentiments of the learned Judge in the above case. The Respondents cannot be allowed to suddenly wake up and demand payment of levies which they have in the past several years not demanded. Whereas the said levies, based on the Local Government Act and the Regulations are not illegal and in demanding the same the Respondents cannot be said to be acting outside their jurisdiction, the said demand should take into account the principle of fairness in order to allow the ex parte applicants time to alter their course of conducting business in order to take into account the changed circumstances.

24. I do not consider notices demanding payment of the said fess to constitute reasonable notices in the circumstances of this case.

ORDER

25. Consequently, I find merit in the Notice of Motion dated 14th September 2010 and in the result:

- 1. An order of certiorari is hereby issued removing in to this court to quash the decision by the City Council of Nairobi to levy trade licenses fees and/or single business permits upon the ex-parte applicants business operating and/or situate within Jomo Kenyatta International Airport and the same is hereby quashed.**
- 2. An order of prohibition is hereby issued prohibiting the respondent from levying and/or charging trade license fees and/or single business permit upon the ex-parte applicants businesses operating and/or situate and/or operational within Jomo Kenyatta International Airport without giving adequate notice.**
- 3. The costs of this application awarded jointly to the ex parte applicants.**

Dated at Nairobi this day 18th day of March 2013

G V ODUNGA
JUDGE

Delivered in the presence of Miss Ngari for the Respondent and Miss Ongati for the Applicant.