



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**PETITION NO 297 OF 2012**

**KENYA TRANSPORTERS ASSOCIATION.....PETITIONER**

**VERSUS**

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

**COMMISSIONER OF CUSTOMS & EXCISE**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**COMMISSIONER GENERAL KENYA**

**REVENUE AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The petitioner has brought this matter to challenge the powers of the respondent to seize its members' vehicles for carrying local goods in trucks licensed to carry transit goods in alleged breach of regulations governing the transport of transit goods. The petition was filed on 16<sup>th</sup> July 2012 together with a Chamber Summons application seeking various conservatory orders.

2. The petitioner is an association of companies involved in the business of transport of goods in Kenya and elsewhere. It alleges that Motor vehicle/trailer registration No. KBG 216K – ZD 01239 (hereinafter the vehicle) which belongs to Siginon Freight Limited (hereafter '**Siginon**'), a member of the association, had been seized and detained at the Gilgil check point by the respondents' officers pursuant to the provisions of regulation 229(c) made under the East African Community Customs Management Act (**EACCMA**). On 17<sup>th</sup> July 2012, the court (Majanja J) granted an order for the immediate release of the vehicle upon deposit in court of the sum of Ksh200,000.00 to be held pending the hearing and determination of the petition.

**The Petition**

3. In the petition dated 16<sup>th</sup> July 2012 and supported by the affidavit of **Ms. Jane Njeru**, the Secretary of the petitioner association, sworn on the same date, the petitioner seeks the following orders:

*a) A declaration that the decision by the Respondents to impound and detain motor vehicle KBG 216K ZD 0239 and the goods carried without due process is a violation of Article 49(1)(f) unlawful, unconstitutional, null and void.*

***b) A declaration that the Vehicle Licence (Transit Goods) Condition 2 requiring that licensed vehicles shall be used exclusively for the carriage of goods in transit and for no other purpose unless otherwise authorised by the Commissioner is unreasonable, ultra vires the East African Community Customs Management Act, unlawful, null and void.***

***c) A declaration that no law prohibits vehicles licensed to carry transit goods from transporting goods within the country and that the imposition of such condition is ultra vires, unlawful, unconstitutional null and void.***

***d) An order for compensation for unlawful detention of motor vehicle KBG 216K ZD under Article 23(3) of the Constitution.***

***e) The costs of this constitutional Petition be granted to the Petitioner.***

***f) Such other or further relief as the Honourable Court shall deem fit to grant in the circumstances.***

4. The respondents oppose the petition and have filed a replying affidavit sworn on 24<sup>th</sup> October 2012 by Mr. James Were, a Revenue Officer 1 of the respondent, based in Gilgil. The parties also filed written submissions and lists of authorities, and the petition was canvassed before me on 28<sup>th</sup> May 2013.

#### **The Petitioner's Case**

5. In presenting the petitioner's case, Mr. Kabahati relied on the petition, the affidavit of Jane Njeru sworn on 16<sup>th</sup> July 2012 and the petitioner's submissions dated 4<sup>th</sup> December 2012.

6. The petitioner describes itself as a membership association duly registered in Kenya for the purpose of representing the rights and interests of road transport operators in Kenya. In her deposition on its behalf, Ms. Njeru avers that prior to 2007, vehicles used for transportation of goods locally were required to take out Transport Licencing Board (TLB) licenses under the Traffic Act, Chapter 403 of the Laws of Kenya. However, the practice of taking out TLB licences was outlawed by the Minister for Finance in 2007 and no licences were thereafter required for the transport of goods locally.

7. She avers further that the EACCMA requires that Transit Goods Licences be procured from the respondents for all vehicles transporting transit goods; that such licences are issued by the respondents on application and payment of requisite fees and remain in force for a period of 12 months.

8. According to the petitioner, on 4<sup>th</sup> July 2012, the respondents impounded Sigimon's vehicle while it was carrying tea headed to Mombasa; that the respondents detained the vehicle together with the goods of the third party it was carrying by the roadside at Gilgil and failed to subject the vehicle, the goods or the owners to court process in blatant violation of the provisions of Article 49(1)(f) of the Constitution; and that the respondents' actions had exposed the vehicle and the goods carried to waste and depreciation thereby exposing the owner to underserved loss and detriment. As mentioned earlier, however, Majanja J issued an order for the release of the motor vehicle so the matters averred to with regard to the alleged losses are now moot.

9. The petitioner states that the reason given for the detention of the vehicle is that the vehicle has been carrying local goods while licensed to transport transit goods. It contends that the condition that once a vehicle is licensed to carry transit goods should be used exclusively for carrying transit goods and for no other purpose unless otherwise authorised by the respondents is unreasonable and ultra vires the EACCMA; and that it is subject to abuse, is unlawful and therefore null and void.

10. Mr. Kabahati submitted on behalf of the petitioner that it is not a criminal offence under any law for a vehicle licensed to carry transit goods to be used to transport goods for local consumption; that goods which enter the country for local consumption can be transported by any truck, including those trucks

marked for transit goods; that section 60 of the EACCMA talks only of such goods being removed from the warehouse within 14 days for sale or consumption locally; and that it does not go further to say how such goods should be transported.

11. The petitioner alleges that the respondents have been arbitrary in the enforcement of the conditions with regard to use of vehicles for transit goods; that their actions are a violation of the property rights of the owner of the vehicle and a violation of their right to fair administrative action and are likely to lead to colossal losses for the petitioner's members.

12. Mr. Kabahati submitted further that the respondents have no power under sections 85(1) and (2) of EACCMA to make regulations with regard to goods entering the country for local consumption, and any regulations made with regard to transport of local goods is *ultra vires* the Act. In support of this contention, Mr. Kabahati relied on the case of **Modern Coast Builders and Contractors Limited –vs- Kenya Revenue Authority Nakuru High Court Petition No 5 of 2012** and submitted that the court held in that case that the condition for removal of goods from a warehouse is that they are for local consumption and it is irrelevant that they are carried in trucks marked for transit; and that it should not matter how they are transported once they are released from the warehouse in accordance with section 60 of EACCMA. He contended further that Regulations 104 of the East African Community customs management (EACCM) Regulations is *ultra vires* the parent Act and should be declared null and void.

13. In response to a question by the court with regard to the purpose of distinguishing the manner of transporting goods intended for transit and goods for the local market, Mr. Kabahati submitted that the purpose was to avoid dumping of goods in the local market in order to avoid tax evasion. He contended, however, that the law does not impose a condition on the manner of carrying local goods and maintained that the respondents should not use section 85 of EACCMA to impose such conditions.

## **The Response**

14. The respondents' case is that when Signion's vehicle was impounded and detained by the respondents, it had contravened regulation 104(5)(b) of EACCM Regulations and conditions 1,2,4 and 6 of its licence. They therefore assert that they did not violate any of the vehicle owner's constitutional rights as alleged.

15. In presenting the case for the respondents, Mr. Twahir relied on the affidavit of Mr James Were sworn in opposition to the petition and the written submissions dated 10<sup>th</sup> December 2012. In his deposition, Mr. Were states that Signion's truck was impounded on 5<sup>th</sup> July 2012 and detained at Gilgil Customs Transit Check Point by the respondents for carrying local goods yet the truck was required to carry only transit goods; that Signion had also erased the inscription "**TRANSIT GOODS**" from the truck contrary to Regulation 104(5)(b) and condition number 4 on the vehicle's licence for carrying transit goods; and that in contravention of condition 1 of its licence, it had failed to display the licence in a prominent position where it is visible at all times.

16. The respondents contend that Signion had applied for the licence for the truck in accordance with Regulation 104(9) of the EACCM Regulations, and the licence had been granted. Under Regulation 104 (5) (b), the vehicle was required to bear the words "TRANSIT GOODS" printed boldly and clearly on both sides; and Signion was required to comply with all the conditions contained in the licence issued to it.

17. The respondents state that under Regulation 219 (2), the 2<sup>nd</sup> respondent is authorised, upon granting a licence, to attach to that licence such conditions as he or she may deem fit; that Signion was fully aware of the provisions of regulations 104(5)(b) and all the conditions and the special condition contained in the licence before it made the application for the licence; and that it was also aware that once its truck is licenced to carry transit goods, the truck is not allowed to carrying local goods.

18. The respondents contend further that Signion was fully aware that should it wish to ferry local goods in a truck licensed to carry transit goods, it was at liberty to apply for authority to do so from the 2<sup>nd</sup>

respondent; and during the time such consent was granted, the licence to carry transit goods would be suspended. They submit that Condition 2 of the licence is not unreasonable or ultra vires the EACCMA as regulation 219 (2) empowers the Commissioner, upon granting licence, to attach to that licence such conditions as he or she may deem fit for the purpose of protecting revenue from leakage.

19. With regard to the petitioner's averments on the Transport Licencing Board Licence, it is the respondents' case that the licence that was initially issued under the Transport Licensing Act, and which was abolished, was a different licence from the one issued under the EACCM regulations, whose purpose is to protect revenue from leakage.

20. In his oral submissions, Mr. Twahir submitted that the case of **Modern Coast Builders and Contractors & Another –vs- Kenya Revenue Authority & Others** (supra) relied on by the petitioner was overruled by Justice Emukule in a later ruling in the same matter issued on 19<sup>th</sup> April 2013. He argued that the conditions imposed on transporters do not prohibit carriage of local goods, but they require that the transporter obtains the consent of the respondents before so doing. He maintained that the conditions imposed in the licences are neither restrictive nor *ultra vires* the Act and called in aid the decision of Majanja J in **Modern Coast Builders –vs- Kenya Revenue Authority Judicial Review No. 631 of 2009** in which the court found that the EACCM Regulations are not ultra vires the Act. The respondents asked that the petition be dismissed with costs.

### **The Petitioner's Rejoinder**

21. In his reply to the respondents' submissions, Mr. Kabahati sought to make a distinction in the two rulings by Justice Emukule in **Modern Coast Builders –vs- Kenya Revenue Authority Nakuru High Court Petition No 5 of 2012**. He submitted that in the latter ruling, which was an application for orders of contempt, the court was not dealing with the substance of the matter, and the observations of the court in the later ruling cannot be said to have overruled the earlier decision which he maintained still stands.

### **Analysis and Determination**

22. The crux of the petitioner's grievance in this matter is that the EACCM Regulations on the basis of which the motor vehicle belonging to Siginon was impounded are ultra vires the EACCMA. As I understand it, the petitioner's basic contention is that a transporter licensed to carry transit goods in a specific truck should be allowed to also carry goods destined for the local market in the same truck without seeking the 2<sup>nd</sup> respondent's consent. It views the requirement that its members should not carry goods for the local market in vehicles licensed to carry transit goods without such consent as being unreasonable and arbitrary and a violation of its members' rights under Articles 40 and 47 of the Constitution. It also alleges violation of Siginon's rights under Article 49(f) of the Constitution.

23. In its written submissions, it proposes several issues for determination. In my view, these issues can be reduced to three main issues:

**a) Whether the EACCM Regulations 2010 are ultra vires the provisions of EACCMA and therefore null and void;**

**b) whether the Vehicle Licence (Transit Goods) Condition 2 requiring that licensed vehicles shall be used exclusively for the carriage of goods in transit and for no other purpose unless otherwise authorised by the Commissioner is unreasonable ultra vires EACCMA and therefore null and void.**

**c) Whether the respondents have violated the provisions of Articles 40, 47 and 49(1)(f) of the Constitution by impounding the subject motor vehicle.**

24. The starting point in determining these issues is to consider the provisions of the EACCMA and the regulations made thereunder. The provision at issue is Section 85, with sub-sections 1 and 2, which are relevant to this judgment, providing as follows:

**85. (1) *The Commissioner may allow imported goods that are entered for transit or transshipment, to be removed under Customs control without payment of import duties, subject to such conditions as the Commissioner may prescribe.***

**(2) *Where goods are entered under subsection (1) the Commissioner may require the owner of such goods to furnish security in the prescribed form and in such amount as the Commissioner may deem fit.***

25. Section 85 therefore gives the Commissioner power to impose conditions for the removal, without payment of import duties, of goods in transit, subject to the imposition of conditions for such removal by the Commissioner. The Commissioner may also require the furnishing of security with regard thereto.

26. The EACCM Regulation are made pursuant to Section 251 of the EACCMA, which empowers the Council of Ministers to make regulations. Regulation 104(5)(b) imposes conditions with regard to the carriage of goods in transit. Such conditions include the requirement that the vehicle carrying such goods shall bear the words “**TRANSIT GOODS**” printed boldly and clearly on both sides. Regulation 104(5)(b) states:

**“Goods in transit shall only be carried through the Community in sealed vehicles except in the case of exceptional loads as defined in sub-regulation (6) or any other special circumstances authorized by the Commissioner; and in the case of goods carried by road, the carrying vehicle shall bear the words “TRANSIT GOODS” printed boldly and clearly on both sides as specified in Form C. 32 and for the purpose of this paragraph, reference to a carrying vehicle means, in the case of an articulated vehicle, the semi-trailer and not the motive unit”.**

27. The Commissioner is also authorised by regulations 219(2) to grant licences in respect of goods carried in transit, and in so doing, he may attach to the licence such conditions as he or she deems fit. Regulation 219(2) is in the following terms:

**“The Commissioner upon granting a licence may attach to that licence such conditions as he or she may deem fit”.**

28. The petitioner concedes that such a licence had been issued in the case of Siginon with respect to the impounded truck, and that it contained the following conditions:

*1. The licence shall be permanently affixed to the licensed vehicle in a prominent position where it is visible at all times.*

*2. The licensed vehicle shall be used exclusively for the carriage of goods in transit and for no other purpose, unless otherwise authorised by the Commissioner.*

*3. The licensed vehicle shall travel through the Republic of Kenya only upon those routes appointed in accordance with the provisions of the Customs & Exercise Laws.*

*4. The licensed vehicle shall be distinguished by the following inscription in yellow painted letters, not less than 31 cm. high, on both sides of the vehicle: **TRANSIT GOODS***

*5. The licensed vehicle carrying goods in transit shall be sealed by the Proper Officer, except in the case of “exceptional loads” as defined in regulation 96, or in any particular case otherwise authorised by the Commissioner.*

*6. (any other special conditions) **Not to carry local goods.***

29. It is condition no. 2 that it deems unconstitutional. The respondents have submitted that Siginon had contravened Regulation 104(5)(b) and conditions 1,2,4 and 6 of its licence set out above. It was carrying

local goods in a truck licensed to carry transit goods without having obtained the consent of the 2<sup>nd</sup> respondent, had not displayed its license prominently, and had erased the words ‘Transit Goods’ from its truck. These facts are tacitly admitted by the petitioner. Its argument, however, is that the conditions are unreasonable, and its members should be allowed to carry goods destined for the local market in trucks licensed to carry transit goods, without having to seek authorisation from the Commissioner.

30. Which then leads to a core issue in this matter: what is the purpose behind requiring that transit goods should be carried in clearly marked and sealed trucks, with the words ‘Transit Goods’ marked prominently thereon? In response to this question from the court, Mr. Kabahati stated that the reason was to avoid dumping of goods in the local market in order to avoid tax evasion. This response is in line with the reasons given by the respondents-that the conditions imposed on trucks licensed to carry transit goods is to ensure that there is no revenue leakage.

31. I note from the provisions of section 85 that the Commissioner may release goods intended for transit through Kenya **without payment of import duty**. If the carriage of such goods is not controlled through the imposition of conditions such as are imposed by the licences issued under Regulation 104, how would the loss of revenue be controlled? How would the Commissioner know which goods are intended for transit, and which are for local consumption? What would stop a transporter from having goods released without payment of duty ostensibly because they are transit goods, and then promptly off-loading them in the local market?

32. In my view, there is nothing unreasonable in the conditions imposed by the licences set out above, or in the requirement that trucks licensed for carrying goods in transit should carry goods for local consumption only with the authorisation of the Commissioner.

33. Similarly, I cannot find a basis for impugning the EACCM Regulations. Like the Act, they are intended to ensure that there is no leakage of revenue by controlling the manner of transportation of transit goods.

34. In **Republic –vs- Kenya Revenue Authority ex parte Modern Coast Builders and Contractors Limited High Court JR. Misc. Appli. No. 631 of 2009**, Majanja J underscored the statutory underpinning of the EACCM regulations when he stated at paragraphs 21, 22 and 24 thereof as follows:

*21. The regulations governing transit of goods are to be found in the East African Community Customs Management Regulation, 2006 (“EACCM Regulations”). Regulation 104 which set out how transit goods are to be treated for the protection of the revenue. These regulations provide inter alia, for the licensing of vehicles carrying transit goods by the Commissioners, the mode of identification of trucks licensed to carry transit goods and the manner in which transit goods are conveyed.*

*22. These regulations are made pursuant to section 251 of EACCMA, 2004 which empowers the Council of Ministers to make generally for giving effect to the provisions of the Act. Under section 251(2) any regulations made under subsection (1) may provide that any person contravening any of the provisions thereof commits an offence and may provide a penalty for the infraction. Such a penalty is enacted under Regulation 215 which provides that a person who commits an offence under the regulations is liable to a fine not exceeding five thousand dollars.*

*23. ....*

*24. It is now abundantly clear that the applicant misapprehended the Commissioner’s powers under EACCMA, 2004. Contrary to the assertions by the applicant, the Commissioner’s powers and offences for which it was accused have a firm legal foundation and there is no basis for impugning them. Specific violations of the Act and the regulations were disclosed to the applicant and the respondents were entitled to impound the vehicles. The vehicles could not be permitted to contravene the conditions of licence nor breach the regulations for the carriage of transit goods for the specific offences which I have set out at paragraph 12 above.*

35. The petitioner has relied on the ruling of Emukule J in **Modern Coast Builders and Contractors Limited -vs- Kenya Revenue Authority** (supra) made on 23<sup>rd</sup> March 2012 to support its argument that it should not matter whether or not goods intended for local consumption are carried in trucks licensed to carry transit goods. However, I am unable to agree with the petitioner's arguments. While it is true that the manner of dealing with local goods is addressed in section 60 of EACMA, that section cannot be read in isolation and in disregard of the purpose of the Act as contained in the other provisions.

36. Indeed, as is evident from the orders of Emukule J of 23<sup>rd</sup> March 2012 in **Modern Coast Builders and Contractors Limited -vs- Kenya Revenue Authority** (supra), the respondents were restrained from impounding the petitioner's trucks in that matter on condition that the petitioners and their crew complied with the provisions of the Act and regulations. Emukule J had, in his order no. 2, directed as follows:

***'In order to protect the revenue, the Petitioners shall ensure they and other crews adhere to all the provisions of EACMA and EACM Regulations.'***

37. In his later ruling dated 19<sup>th</sup> April 2013 in the same matter which counsel for the petitioner sought to distinguish, the learned Judge stated at paragraph 17, 18 and 19 as follows:

***17. In my Ruling of 23.3.2012 at p.11 therefore stated inter alia that-***

***"In order to protect the revenue, the Petitioners shall ensure; they and their crews adhere to all the provisions of EACMA and EACM Regulations."***

***I also stated at p.8-***

***"Section 60 requires goods entered for home consumption or sold in accordance with the Act to be removed from a warehouse within fourteen days after such entry or sale as the case may be.***

***It is thus clear to me that once goods have been entered for home consumption or sold in accordance with the EACMA, then the conditions of their removal or release from a warehouse would be such that they are for home consumption or sale. It is really irrelevant thereafter if such good are conveyed with a vehicle licensed to carry transit goods. The conditions of their release would already have been established, that they are for local consumption, or sale. They cannot in my humble opinion be subjected to the provisions of section 85 which clearly apply to transit goods"***

***18. What was not then clear and is now clear from submissions of counsel for the Respondents is that the use of transit vehicles is not in fact prohibited by the Respondents. All that the Applicants are required to do is to seek and obtain the consent of the Respondents in writing for trucks licensed to transport transit goods, to ferry local goods. Further the condition allow the Applicants to inform the Respondents of their intention to carry local goods by transit vehicles and where permission is granted, then the transit licence shall be suspended temporarily for that purpose.***

***19. It does therefore seem to me that the Applicant want their cake and eat it at the same time. My orders of 23<sup>rd</sup> March 2012 did not allow them any such latitude. They were that so long as the Applicants adhered to the terms of their licence, the EACMA and EACM Regulations, the Respondents would have no cause to interfere with or detain their vehicles. It pays to add that revenue statutes are construed strictly and unless so construed the Respondent's function in the collection and enforcement of the integrity of that law would be highly prejudiced to the detriment of the country.'(Emphasis added)***

38. I fully agree with the sentiments of the Honourable Judge. The petitioner and its members do indeed want to eat their cake and have it. They want to obtain licences to transport transit goods, but they do not want to comply with the conditions thereof. They find the simple requirement that they seek the

authorisation of the respondents to carry local goods in trucks licensed to carry transit goods burdensome.

39. However, in my view, the greater burden would be on the respondents if their work of collecting revenue was hobbled by giving transporters the leeway to transport transit goods, on which no import duty is charged, in the same vehicle(s) that they use to transport local goods which are subject to import duty. To allow such a situation would be to work against the public interest as there would be tax evasion and revenue leakage.

40. I therefore find and hold that there is no basis for impugning the EACCM Regulations and find also that they are in consonance with the provisions of the Act.

41. The petitioner has alleged violation of Siginon's rights under Articles 40, 47 and 49(f) of the Constitution. As I have already found above, the EACCMA regulation are in accordance with the parent Act, and the petitioner has acknowledged that Siginon had violated the conditions of its transit licence. In such circumstances, where a party has violated laws or regulations that are binding, there can be no basis for alleging violation of either the provisions of Article 40 which protects the right to property, or Article 47 on the right to fair administrative action. It was therefore perfectly lawful for the respondents to impound the truck carrying local goods in violation of the EACCMA and the EACCM Regulations. In addition, Siginon was fully aware of the conditions under which its truck was licenced to carry transit goods, and what it was required to do if it wished to carry local goods in its truck.

42. With regard to the alleged violation of Article 49(f), which requires that a person charged with a criminal offence should be brought before a court within 24 hours, there is clearly no violation demonstrated. No criminal charges were brought against Siginon and its crew, and none of them had been arrested.

43. For the above reasons, I can find no merit in this petition. It is hereby dismissed with costs to the respondents.

**Dated, Delivered and Signed at Nairobi this 16<sup>th</sup> day of August 2013**

**MUMBI NGUGI**

**JUDGE**

**Mr. Kabahati instructed by the firm of Peter Kaluma Lumumba, Mumma & Kaluma & Co. Advocates for the Petitioner**

**Mr. Twahir instructed by the firm of Twahir Alwi Mohamed & Co. Advocates for the Respondent**