



**REPUBLIC OF KENYA**

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

**Miscellaneous Civil Application 80 of 2012**

**IN THE MATTER OF: KENYA INTERNATIONAL FREIGHT AND WAREHOUSING  
ASSOCIATION (KIFWA)**

**AND**

**IN THE MATTER OF: THE PROTOCOL ON THE ESTABLISHMENT OF THE EAST  
AFRICAN CUSTOMS UNION**

**AND**

**IN THE MATTER OF: THE EAST AFRICAN COMMUNITY MANAGEMENT ACT 2004 AND  
THE SUBSIDIARY LEGISLATION EDITION, 2011**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010 BILLS OF RIGHTS**

**AND**

**IN THE MATTER OF: THE REVENUE AUTHORITY**

**AND**

**IN THE MATTER OF: NOTICE FROM THE KENYA REVENUE AUTHORITY DATED 1<sup>ST</sup>  
AUGUST 2012 TO STAKEHOLDERS OF KENYA INTERNATIONAL FREIGHT AND  
WAREHOUSING ASSOCIATION (KIFWA)**

**BETWEEN**

**REPUBLIC .....**

**..... APPLICANT**

**AND**

**KENYA REVENUE AUTHORITY .....**

**..... RESPONDENT**

**AND**

**COMMISSIONER OF CUSTOMS .....**

**INTERESTED PARTY**

**EX-PARTE**

BOAZ MAKOMERE .....	1 <sup>ST</sup> EX-
PARTE APPLICANT	
HEZRON AWITI .....	2 <sup>ND</sup> EX-
PARTE APPLICANT	
WILLIAM OJONYO .....	3 <sup>RD</sup> EX-
PARTE APPLICANT	
KENYA INTERNATIONAL FREIGHT AND WAREHOUSING ASSOCIATION (KIFWA).....	
4 <sup>TH</sup> EX-PARTE APPLICANT	

### RULING

1. When, on 24<sup>th</sup> September 2012, this Court granted the Applicants leave to commence Judicial Review proceedings it directed that the question of stay be heard separately and inter partes. That limb on stay is what I am asked to determine in this decision. The order requested by the Applicants, as amended by agreement of the parties in the course of hearing, was as follows-

***“That the Grant of leave to operate as a stay of the said decision and pursuant decision (sic) made after the Notice dated 31<sup>st</sup> August 2012 pending the hearing and determination of the intended Judicial Review Application.”***

2. The 4<sup>th</sup> Applicant is an association, whose objects, inter alia, is “to promote and protect the legitimate trade of Clearing and Forwarding Agents, Freight Agents, Warehousemen and such other traders as may be or may become closely allied thereto” (The Constitution of the Applicant), while the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants are its officials. The Members of the 4<sup>th</sup> Applicant are in the business of Clearing, Forwarding and Warehousing of transit goods at the Seaport of Mombasa.

3. The Applicants told Court, through the affidavit of Boaz Makomere sworn on 24<sup>th</sup> September 2012, that amongst the conditions previously imposed by the Respondent for the clearing of transit goods was the execution of a Bond with either a Bank or an Insurance Company. The Applicants explained the rationale for the requirement in the following words-

***“This bond is meant to ensure that all goods on transit and or destined to countries do actually cross through the boarder (sic) of Kenya to the other country of destination.”***

4. But the Applicants are aggrieved by some recent changes. That grievance, from the affidavit of the 1<sup>st</sup> Applicant, is not too clear. This is what he says in paragraph 9 and 10 thereof-

***“9. That, on the 1<sup>st</sup> of August 2012, the Respondent through the department of Commissioner of Customs unilaterally altered conditions of work and service on members of the 4<sup>th</sup> Ex-parte Applicant, by including among others one could get a Bond from a selected number of insurance companies namely, APA, FIRST ASSURANCE, LION OF KENYA, FIDELITY, CANNON ASSURANCE and CHARTIES. I annex herein a true copy of a Memo from Deputy Commissioner of Customs and mark it as “BM III”.***

***10. That, suddenly without notice or consultations, the Respondent herein has altered the rules of business by putting requirements that goods being sugar and motor vehicles on the capacity of 2000 CC and above, for them to be cleared from the Port of Mombasa, one must make cash deposits of value worth of the goods before of release of the same from the Port of Mombasa.”***

Let me surmise. The complaint is twofold; the requirement to obtain insurance bonds from the selected

companies and the need for cash deposits.

5. The Notice containing the decision sought to be impeached was annexed to the 1<sup>st</sup> Applicants affidavit and is reproduced below-

***“NOTICE TO ALL STAKEHOLDERS***

***CLEARANCE OF TRANSIT SUGAR/MOTOR VEHICLE UNITS (2000CC) THROUGH KENYA***

***The following are the requirements for the above subject.***

***Requirements for sugar in Transit***

***1. Sugar in transit shall be covered by a PARTICULAR BOND issued and guaranteed by reputable Insurance Companies.***

***2. Companies recommended are:***

- ***APA***
- ***First Assurance***
- ***Lion of Kenya***
- ***Fidelity***
- ***Cannon Assurance***
- ***Chartis***

***Any other Insurance company falling outside the above list will require the personal approval of the Commissioner.***

***3. Bank Guaranteed Bonds***

***These measures are effective from 18<sup>th</sup> September, 2012.***

***4. Transit entries for sugar that had already been registered in the SIMBA System by 17<sup>th</sup> September, 2012 shall be processed.***

***Requirements for Transit Motor Vehicles over 2000cc***

- 1. Insurance Bonds to be executed from reputable Insurance Companies mentioned above.***
- 2. Movement of this category of vehicle units to take not more than 3 days after release.***
- 3. Confirmation of units received at the Border Stations should be communicated to DC-Port Operations and DC-Enforcement on weekly basis.***

***These measures are effective from 18<sup>th</sup> September, 2012.***

***DEPUTY COMMISSIONER – PORT OPERATIONS***

6. On the part of the Respondent, evidence was led through the affidavit of Hadi Sheikh Abdullahi swore on 1<sup>st</sup> October 2012. He is a Senior Assistant Commissioner with the Interested Party. The details

of that evidence is not necessary at this interlocutory stage. It is conceded by the Respondent that the decision to impose a cash bond instead of Insurance or Bank Guaranteed Bonds attracted hue and cry. Responding to this, the Respondent reconsidered the matter in a meeting held on 17<sup>th</sup> September 2012 and lifted the need for cash bond and revised the requirements to those published in the Notice annexed to the Applicant's affidavit and reproduced in paragraph 5 above.

7. The decision that the Applicants seek to stay is the decision said to have been made on 31<sup>st</sup> August 2012. That decision is said to include a requirement for cash deposit. The Notice displayed by the Applicants in the affidavit of Mr. Makomere is undated but of significance does not require the payment a cash bond. That Notice has been confirmed by the Respondent to be communicating the decision of the Respondent made on 17<sup>th</sup> September 2012. It is infact doubtful that it is the decision of 31<sup>st</sup> August 2012 intended to be impugned in these proceedings. This confusion on the part of the Applicants will prove costly.

8. The Respondent emphasized that the earlier decision which imposed a cash deposit was revised on 17<sup>th</sup> September 2012. The decision now implemented is that of 17<sup>th</sup> September 2012 and communicated to the Public on 18<sup>th</sup> September 2012. The Applicants however insisted that the Respondent was still imposing the decision of 31<sup>st</sup> August 2012. The 1<sup>st</sup> Applicant sought to demonstrate this by annexing to his supplementary affidavit sworn on 4<sup>th</sup> October 2012 a document which is entitled "**Viewing of Trade and Message.**" The pertinent part of that message is reproduced below-

***"RECOMMENDED COMPANIES FOR BOND EXECUTION ARE AS FOLLOWS APA, FIRST ASSURANCE, LION OF KENYA, FIDELITY, CANNON ASSURANCE OR CHARTIS. ANY OTHER COMPANY FALLING OUTSIDE THESE WILL REQUIRE APPROVAL FROM THE COMMISSIONER."***

As can be seen there is no requirement for a cash bond or deposit. So is this in the implementation of the decision of 31<sup>st</sup> August 2012 or that of 17<sup>th</sup> September 2012?

9. I have to reach a conclusion that although the Applicants seeks to impugn the decision dated 31<sup>st</sup> August 2012 whose core requirement was a cash bond, they did not show a copy of that decision to Court. The decision shown by them to this Court is that of 17<sup>th</sup> September 2012. Although the Applicants grieve that the Respondent is still imposing the decision of 31<sup>st</sup> August 2012 what they have shown Court in prove of their grievance is a document consistent to the decision of 17<sup>th</sup> September 2012. That document does not call for a cash bond. There lies the Applicants difficulty! They are asking this Court to stay the decision of 31<sup>st</sup> August 2012 when what they display as the offending decision is that of 17<sup>th</sup> September, 2012. Surely, this Court cannot grant that order. The decision to be stayed must be that which is the subject of the Judicial Review proceedings! If however I was to grant the orders as couched in the application for stay then my orders would be superfluous. This is because the decision requiring cash bond is not under implementation. The Applicants own document shows that the terms, now imposed by the Respondent are those of the decision of 17<sup>th</sup> September 2012. The Court need not make orders that are sterile, futile or moot.

10. But let the Court assume, for a moment, that the application properly seeks to stay the decision communicated in the notice annexed to the 1<sup>st</sup> Applicants affidavit (which is the decision of 17<sup>th</sup> September 2012). This Court has already granted leave to the Applicants to commence Judicial Review proceedings. At the leave stage, all the Applicants needed to do was to persuade the Court that there exists an arguable case which merited the grant of leave. And the Court was persuaded. The bar on that occasion is low. This is what the Court of Appeal said in Njuguna –Vs- Ministry of Agriculture Case No. 144 of 2000- (unreported)

***"It cannot be denied that leave should be granted, if on the material available, the Court considers, without going into the matter in depth, that there is an arguable case for granting leave."***

But this does not mean that an Applicant who has been granted leave then deserves stay as a matter of course. The test for stay is much more stringent. There are many factors which must be considered at stay proceedings. I now turn to discuss some of them.

11. First and foremost the Court must only grant stay if it is efficacious to do so. In **Taib A. Taib –Vs- Minister for Local Government & 3 Others, Misc. Civil Application No. 158 of 2006** Maraga J (as he then was) said as follows-

***“I also want to state that in Judicial Review Applications like this one the Court should always ensure that the Ex-parte Applicant’s application is not rendered nugatory by the acts of the respondent during the pendency of the application. Therefore where the order of stay is efficacious the Court should not hesitate to grant it.”***

Simply put the order must be effective and must be able to achieve the desired effect or result. The very reason this Court would have refused to grant the stay as couched in the application is that the decision of 31<sup>st</sup> August 2012 (which the application sought to stay) had been rescinded by another decision of 17<sup>th</sup> September 2012. The grant of stay would be in vain as it would be targeting a decision which is not under implementation.

12. The Court will also consider effects of not granting the order of stay-

- Does it cause the main application to be rendered nugatory, useless or moot by the acts of the Respondents during the pendency of the proceedings?
- What is the effect of the decision on the Applicant? The Court will assess whether the refusal to grant the stay will lead the Applicant to suffer irreparable damage or whether the implementation of the decision sought to be stayed places an extremely onerous burden or unreasonable responsibility on the Applicant?

13. Importantly and at all stages of any Judicial Review proceedings involving a matter of Public Interest, the Court must weigh Public Interest vis-à-vis the rights of the Applicants. Judicial Review is a remedy in the realm of public law. Often the right of the Applicants will be competing with public interest. Although deciding a Constitutional matter, the decision of the Privy Council in **Attorney General –Vs- Sumair Bansraj (1985) 38 WLR 286** quoted by Ibrahim, J (as he then was) in **Petition No. 7 of 2011 Muslims for Human Rights (MUHURI) & 2 Others –Vs- The Hon. Attorney General & 2 Others** explained the need to strike the correct balance. In my view the following passage from that decision is as true to Judicial Review proceedings as it is to Constitutional matters-

***“.....The Constitutional Court must hold the scales of justice evenly between the Claimants and the State. There are competing and powerful interests at stake in this case. The right of the Claimants to their liberty and the freedom of movement on the one hand and on the other the public interest in the prosecution of the crime, the comity of the nations, attendant obligations under International treaties with foreign nations.***

***.....***  
***This Court must therefore be astute to balance these competing interests in the interim while it deals with the substantial complaint of the Claimants.”***

14. Both sides, as I understood them, do not question the rationale for imposing a security in respect to transit goods. The imposition of security by the Commissioner of Customs is expressly sanctioned under the provisions of Sections 106 and 107 of the East African Community Customs Management Act. Those provide-

***“106. The Commissioner may require any person to give security for the due compliance by that person with this Act and generally for the protection of the Customs revenue; and, pending the giving***

**of such security in relation to any goods subject to Customs control, the Commissioner may refuse to permit delivery or exportation of such goods or to pass any entry in relation thereto.**

**107.(1) Where any security is required to be given under this Act, then that security may be given to the satisfaction of the Commissioner either-**

**(a) by bond, in such sum and subject to such conditions and with such sureties as the Commissioner may reasonably require; or**

**(b) by cash deposit; or**

**(c) partly by bond and partly by cash deposit;**

**(d) any other form of security that the Commissioner may allow.”**

15. The Exparte Applicants did concede that they previously executed a bond with either a Bank or Insurance Company. They concede as much in the affidavit of Mr. Makomere sworn on 24<sup>th</sup> September 2012.

**8. That members of the Ex-parte Applicant have been Trading and or doing business through the bond above mentioned in paragraph 7 above to expedite business between them and customers from the other foreign countries herein mentioned.”**

16. The Applicants grievance is that the Respondent has now handpicked the

Insurance Companies which are eligible to issue the bonds. This, they claim, is a travesty to their constitutional right to associate with persons of their choice (Article 36). The explanation given by the Respondent for this action is that the Companies were chosen because of their liquidity strength and a favourable history of compliance. What however is accepted by both sides is that the Commissioner has statutory power to impose a security. Whether or not the Commissioner's action can be justified will have to await the full hearing. The Commissioner will have to prove that his action is lawful and reasonable. In addition he will have to explain the criteria used in listing the Companies. To say more at this moment will be to pre-judge the main motion.

17. I did not hear the Applicants complain that the recommended Insurance Companies have imposed exploitative, unreasonable or unaffordable premiums or terms. This Court is not told that it is onerous to obtain the Bonds from the Companies or that there are practical difficulties in dealing with them. This must be contrasted with the Applicants complaint over the cash deposits. They said-

**“The said action has paralysed (sic) operations and business at the Mombasa Port as it is practically impossible for one to deposit value in cash of goods destined for a foreign country and the same time maintain and/or pay for the Trading Bond with an Insurance Company.” (my emphasis)**

The cash deposit hamstrung the Applicants Operations. This was not said of the Insurance Bonds. The inconvenience that was emphasized was that the Applicants are forced to deal with Companies which are not of their choice. But even more dire, the requirement abridged their fundamental right to free association.

18. It was, however, the argument of the Respondent that other Companies were not entirely locked out as the Applicants could deal with any other Insurance Company as long as it was approved by the Interested Party. That is, an exemption to the rule was possible. This Court was not told that the Applicants had requested such exemption and that the Commissioner had turned it down.

19. That is the scenario I must deal with. The Court must balance the interests of the Applicants vis-à-vis that of the State. It is always an intractable task! The concern of the state is that weaknesses in the previous system led to loss of Import duty. This was explained in the affidavit of Mr. Abdullahi-

***“12. That over a period of time, transit goods passing through Kenya have been diverted and/or dumped into the country but when the Interested Party calls upon the Security Bond Guarantors to realize the Bond she has been faced by various challenges including lack of sufficient liquidity of some of the guarantors of the Transit Bonds.***

***13. That failure to realize the said Bonds, translates to import duty lost.***

Annexed to that affidavit, and as proof of that loss, was a list of unaccounted goods. This concern by the Respondent must be weighed against forcing the Applicants to deal with selected Insurance Companies. When I put these interests on a scale it tips firmly on the side of the State for the following reasons-

- The reasons advanced by the Respondent and Interested Party for limiting the Companies eligible to issue Bonds do not seem to be a trifle. Past practice is said to have led to loss to the country.
- It has not been stated or proved that the new requirements impose an impossible, onerous or impracticable burden on the Applicants.
- It has not been demonstrated that the window to use Companies outside the list is notional or cosmetic.

20. The result. The prayer for stay is declined. Costs to the Respondent and Interested Party. The Ex-parte Applicant can move Court for an early hearing of the main motion.

***Dated and delivered at Mombasa this 12<sup>th</sup> day of October, 2012.***

**F. TUIYOTT  
JUDGE**

**Dated and delivered in open court in the presence of:-**

**Gomba for Ex-parte Applicants**

**Wafula for Matuku for the Respondent**

**Wafula for Matuku for the Interested Party**

**Court clerk - Benta**

**F. TUIYOTT  
JUDGE**