



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 267 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**ORDERS OF CERTIORARI, PROHIBITION AND MANDAMAUS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

**EX PARTE: .....UNIQUE DISTRIBUTORS KENYA LIMITED**

**RULING**

By an application dated 6<sup>th</sup> September, 2010, Unique Distributors Kenya Limited, hereinafter referred to as **“the applicant”**, sought the following orders:

**“1. That this honourable court be and is hereby pleased to issue a Judicial Review for an order of certiorari to issue and to remove to this honourable court and to be quashed the respondent’s decision to impound and detain the applicant’s motor vehicle registration number KBH 617V Mitsubishi Canter vide Notice dated 11<sup>th</sup> August 2010.**

**2. That this honourable court be and is hereby pleased to issue a judicial review for an order of mandamus to issue to compel the respondent unconditionally release the applicant’s motor vehicle**

registration number **KBH 617V Mitsubishi Canter**.

**3. That this honourable court be and is hereby pleased to issue a judicial review for an order of prohibition to issue prohibiting the respondent from, further holding the applicant's motor vehicle registration number KBH 617V Mitsubishi Canter.**

**4. That the costs of this application be provided for."**

The application was supported by a statutory statement and an affidavit sworn by **Simon Mukiri**, a director of the applicant. He stated that the applicant is the beneficial owner of a motor vehicle registration number **KBH 617V**, hereinafter referred to as "**the motor vehicle**". On 1<sup>st</sup> April, 2010 the applicant entered into an agreement with Unique Distillers Limited to take over a hire purchase agreement in respect of the motor vehicle between that company and the NIC Bank. The motor vehicle was being used by the applicant for distribution of its goods to various places.

On 2<sup>nd</sup> August, 2010, while the motor vehicle was loaded with the applicant's goods for distribution at Machakos Town, it was stopped by the respondent's officers and towed to Machakos Police Station. On 11<sup>th</sup> August 2010 the motor vehicle was driven to the respondent's warehouse at Jomo Kenyatta International Airport, Nairobi, and a **Notice of goods deposited in Customs Warehouse** issued. The applicant demanded its release but the respondent refused.

The applicant contended that it was not accorded an opportunity to be heard before the respondent impounded the motor vehicle and the goods therein. The applicant added that the respondent's officers' action was intended to frustrate its business and the actions were malicious as they were instigated by its business competitors. In its view, the respondent's action is unlawful and *ultra vires*.

The respondent filed a replying affidavit that was sworn by **Joelex Mogoka Orora**, a Senior Revenue Officer, whose duties include, *inter alia*, investigation of tax evasion and administration of the Revenue statutes generally in accordance with the **Kenya Revenue Authority Act, Cap 469 Laws of Kenya**.

He stated that on 2<sup>nd</sup> August, 2010 he received information that the said motor vehicle was on its way to Machakos conveying spirits without the requisite excise stamps attached to them as per the requirements of the Customs Law. Together with another officer, one James Njoroge Murage, an Assistant Commissioner, they proceeded to Machakos town and managed to intercept the said lorry. When they asked the driver for the documentation of the consignment they were carrying, the driver produced a delivery note but fled from the scene. The respondent's officers had the motor vehicle towed to Machakos Police Station where it was opened and photographed by police officers from Scenes of Crime division. It was found to be expertly packed with 20 x 750ml "**Sherry Ken**" cartons. The cartons in which the spirits were found bore the words – "**Blended and Parked by UDL P.O. Box 22900-00200 Nairobi, Tel 0720 931 361**".

The bottles in which the spirits were packed did not have the requisite excise stamps affixed on them as is required by the Customs and Excise Act, the deponent stated. The absence of excise stamps on the bottles meant that there was duty evasion. The goods and the lorry were consequently detained to enable further investigations and a Notice of deposit was accordingly issued.

Simon Mukiri filed a supplementary affidavit and stated, *inter alia*, that "**Sherry King**" is an alcoholic

beverage whose alcohol content does not qualify to be classified as a spirit as alleged by the respondent and as evidenced by the Kenya Bureau of Standards laboratory tests hence there was no need to affix the excise stamps. In paragraphs 9 and 10 of the further affidavit, Mr. Mukiri deponed as follows:

**“9. That since the applicant is a distributor and the goods found in the lorry were not spirits, the issue of duty evasion does not arise at all and in any event the applicant is not bound to pay excise duty as it is not the manufacturer.**

**10. That the respondent’s agents’ actions were malicious and unlawful and blatant contravention of the principles of natural justice hence the only remedy for the applicant is by way of a judicial review intervention.”**

Mr. Ongegu for the applicant and Mr. Ado for the respondent filed their respective clients’ submissions and highlighted the same, albeit briefly. I have carefully considered the submissions.

Let me start by restating that the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself. See The Supreme Court Practice 1997, Volume 1 14/6. That commentary further states:

**“The court will not, however, on a judicial review application act as a “court of appeal” from the body concerned, nor will the court interfere in any way with the exercise of any power or discretion which has been conferred on that body, unless it has been exercised in a way which is not within that body’s jurisdiction, or the decision is Wednesbury unreasonable. The function of the court is to see that lawful authority is not abused by unfair treatment. If the court were to attempt itself the task entrusted to that authority by the law the court would, under the guise of preventing the abuse of power be guilty itself of usurping power.”**

The respondent relied on the provisions of **Section 116 B (1)** of the **Customs and Excise Act** which provides that:

**“The Minister may, by notice in the Gazette, specify the excisable goods to which the requirement for the affixing of excise stamps under this Section applies.”**

Pursuant to the said provision and **Section 234** of the **Act**, the Minister issued **Legal Notice No. 84 of 2008** of 12<sup>th</sup> June, 2008 **“The Customs of Excise (Excise Duty Stamps) Regulations, 2008**, which made wines and compounded spirits, among others, to be excisable goods.

The Customs of Excise (Excise Duty Stamps) Regulations, 2008 provides at paragraph 2 thereof that:

**“Every package of wines, compounded spirits; to excise and cigarettes manufactured in Kenya shall have affixed thereon an excise stamp in the manner prescribed in these regulations.”**

It is an offence for any person to possess excisable goods on which excise stamps have not been affixed and which are not destined for export. The applicant does not state that the **“Sherry King”** that was in its vehicle had excise stamps affixed thereon. Its contention is that **“Sherry King”** is an alcoholic beverage whose alcohol content does not qualify to be classified as a spirit and thus it is not subject to the aforesaid regulations. That is denied by the respondent who states that alcoholic beverage is a general term for drinks with alcoholic content and includes among others, compounded spirits which are excisable goods.

In the context of this matter, it is not the function of the court to determine whether the alcohol content in “Sherry King” qualifies it to be classified as a spirit or not. The court cannot, looking at the laboratory test report referred to by the applicant, make a determination to that effect. That is technical work that is best handled by the respondent. But *prima facie*, it appears more likely than not that “Sherry King” is excisable. That may be gleaned from a close reading of **Section 2** of the **Customs and Excise Act**.

**Section 153 (1)** of the **East African Community Customs Management Act, 2004** empowers the respondent through its officers to stop and search any vehicle suspected of conveying uncustomed goods.

The Act contains various provisions which empower the respondent to impound a vehicle that is suspected to be conveying uncustomed goods. The procedure for forfeiture of such goods is also well stipulated under the Act and no notice is required if anything liable to forfeiture is seized in the presence of the owner.

The applicant contended that it is merely a distributor of the said goods and not the manufacturer and therefore it is not liable to pay excise duty. Under **Section 2** of the **Customs and Excise Act**, the applicant is deemed to be the owner of the lorry and its contents. The section defines “**owner**” to include a person other than an officer acting in his official capacity, who holds himself out to be the owner, manufacturer, licensee, importer, exporter, consignee, agent, or the person in possession.

In view of the foregoing, I do not agree that the respondent’s acts complained of by the applicant was illegal or done in violation of the rules of natural justice. It was also not demonstrated that the respondent acted *ultra vires* its powers. The applicant also failed to prove that the respondents’ actions were actuated by malice.

I find no merit in the applicant’s application and dismiss the same with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF MARCH, 2011.**

**D. MUSINGA**

**JUDGE**

**In the presence of:**

**Nazi – court clerk**

**Miss Mbaka for Mr. Ongegu for the applicant**

**Mr. Nganga for Mr. Ado for the respondent**