



**REPUBLIC OF KENYA**

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

**MISC CIV APPLI 520 OF 2006**

**IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF: THE LAW REFORM ACT**

**AND**

**IN THE MATTER OF: THE EACT AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT (2004)**

**AND**

**IN THE MATTER OF: THE KENYA REVENUE AUTHORITY ACT CHAPTER 469 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE TRAFFIC ACT CAP 503 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE SECOND HAND MOTOR VEHICLES**

**PURCHASE TAX ACT CHAPTER 484 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: PUBLIC NOTICE PUBLISHED IN THE STANDANRD AND NATION NEWSPAPERS OF 26<sup>TH</sup> MAY 2006 AND 28<sup>TH</sup> MAY 2006**

**RESPECTIVELY**

**AND**

**IN THEMATTER OF: COMMISSIONER FOR CUSTOMS SERVICES,  
THE KENYA REVENUE AUTHORITY AND THE REGISTRAR OF MOTOR VEHICLES,**

**THE RESPONDENTS**

**BETWEEN**

**REPUBLIC .....APPLICANTS**

**VERSUS**

**THE COMMISSIONER OF CUSTOMS.....1<sup>ST</sup> RESPONDENT**

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

**THE REGISTRAR OF MOTOR VEHICLES.....3<sup>RD</sup> RESPONDENT**

**EXPARTE: AMIT SHOK DOSHI**

**ASHOK DOSHI**

**MEHIL PATEL**

**AND**

**AHMEDSAID AHMED .....1<sup>ST</sup> INTERESTED PARTY**

**AHMED JAFFAR TAIBAL .....2<sup>ND</sup> INTERESTED PARTY**

**R U L I N G**

Pursuant to leave granted by this court on 14<sup>th</sup> June 2006, the exparte applicants herein Amit Shok Doshi, Ashok Doshi and Mehil Patel, took out a motion dated 22<sup>nd</sup> June 2006 pursuant to the provisions of Order LIII rules 3(1) and 4(i) of the Civil Procedure Rules. In that motion the exparte applicants sought for the following orders:

*(a) An order of certiorari to remove into this court for purposes of quashing the public notice published in the standard and Nation of 26<sup>th</sup> May 2006 and 28<sup>th</sup> May 2006 respectively*

*(b) An order of prohibition to prohibit the Commissioner of Customs, the Kenya Revenue Authority and the Registrar of Motor Vehicles, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein from seizing for forfeiture the applicants Motor Vehicles namely:*

- (i) KAU 333K - Toyota Jeep*
- (ii) KAU 200T - Mercedes Benz*
- (iii) KAU 430M - Toyota Lexus*
- (iv) KAU 600K - Porsche Cayenne*

*(c) All necessary and consequential orders or directions be given.*

*(d) Costs of the application.*

The motion is supported by the affidavit of Amit Shok Doshi, Ashok Doshi and Mehil Patel.

When served with the motion, the Respondents resisted the same by filing the Replying Affidavit of James Karanja and Japhet Opande. The Respondents in an attempt to scuttle the motion also sought for an order to discharge or set aside the exparte order directing leave to operate as a stay in a motion dated 31<sup>st</sup> July 2006. The two motions were heard together. The parties to this dispute agreed that the outcome of this matter do apply to two other cases namely Mombasa H.C. Misc. Civil Application Nos. 521 and 523 of 2006.

The background of this dispute can easily be ascertained from the pleadings placed before this court. The exparte applicants had purchased the affected motor vehicles (hereinbefore mentioned) from importers of second hand motor vehicles.

In respect of this matter the importer is named as Soud Abdalla Soud Omar Ali. The applicants aver that they purchased the aforesaid motor vehicles after ascertaining from the Respondents, the status of the aforesaid motor vehicles. According to the averments and documents annexed to the supporting affidavits it is quite clear that the applicants were made to believe by the Respondents that there was no import duty outstanding in respect of the aforesaid motor vehicles. The respondents even went ahead to effect the transfers thus entering into the logbook the names of the applicants as prima facie legal owners of the effected motor vehicles. To the utter surprise of the applicants, the Respondents caused to be advertised in the Daily Nation and the East African Standard of 26<sup>th</sup> and 28<sup>th</sup> day of May 2006 respectively requiring them and other owners to furnish them with the importation documents for verification. It is the submission of the applicants that it is unreasonable for the 1<sup>st</sup> Respondent to require import and registration documents from the applicants yet he has in his power and custody all the original documents tendered by the importer who is well known to the 1<sup>st</sup> Respondent. It is the firm belief of the applicants that the Respondents acted capriciously and unreasonably in their demand and yet they are the assessors of duty, receivers of the same and the legal custodians of all records relating to all motor vehicles, hence they cannot turn around and demand from innocent purchasers of such motor vehicles who purchased on their advise as to the correctness of the records held by them.

In that notice the Respondents have threatened to seize the advertised motor vehicles for purposes of forfeiture if those affected do not furnish the demanded records.

The Respondents on their part admit that they caused the notice to be published after detecting upon carrying out investigations that duty and tax payments due from the advertised motor vehicles were not settled. The Respondents also accused the importers of having forged bank receipts as proof of payments of duties and taxes. The Respondents further averred that the importers used receipts to fraudulently obtain customs and clearance as well as registration of aforesaid motor vehicles. It is the submission of the Respondents that they exercised their statutory power under Sections 234 and 236 of the East African Community Customs Management Act (2004) to issue the public notice. It is the submission of the Respondents that they are entitled to seize the motor vehicles and demand payment of duty. The Respondents held the view that they are entitled to pursue for duty the person in possession of the un-customed goods and not the importer. It has been further averred by the Respondents that the applicants should have been diligent enough in such transactions in that they should have requested for authentic import documents from the persons who sold the motor vehicles to them.

I have carefully considered the submissions of both sides. I have also read the material placed before this court. What is before this court is a dispute in which the applicants are seeking for a public law remedy in the nature of certiorari and prohibition. The main reason advanced in support of the remedies sought is that the Respondents have been accused of exercising their statutory power unreasonably. There is a subtle admission by the applicants that the Respondents in issuing the notice and threats, they exercised the powers donated by statute. On the other hand the Respondents have not denied that they encouraged the applicants and actually effected transfers in which they became prima facie legal owners of the motor vehicles mentioned in the pleadings. What comes out clearly is that some employees within the Respondents' employment did not perform their duties as required. The Respondents have admitted that their servants received forged documents from importers of the motor vehicles. These importers are well known to the Respondents. None of the applicants have been accused of having participated the alleged economic crime and criminal activities. They have only been accused of not being vigilant. The Respondents have not categorically stated what steps the applicants never followed to have the motor vehicles registered in their names. The Respondents have not denied the assertion by the applicants that they are innocent purchasers for value. In short, the Respondents are saying that they have a problem with the importer whom they have conveniently not bothered to pursue. After a careful consideration, I am of the view that the Respondents have acted in bad faith. I say so because the act of the alleged fraud appears to have been done by the importer in collusion with the Respondents' employees. There is no evidence whether or not these employees have been disciplined. It is possible that those who carried out the investigations are the same employees who perpetrated the alleged fraud now being visited upon innocent purchasers for value. I find that the applicants were vigilant and not indolent as alleged. Where the motive in performing a statutory duty have the effect of distorting or unfairly biasing the decision maker's approach to the subject of the decision then the decision is invalid hence amenable to judicial review. My view in this matter is that the reasons advanced by the Respondents in issuing the notice appear to be good but they are unreasonable in that there is no connection between the evidence and the applicants. Consequently there is no adequate justification for the decision vis a vis the applicants.

In the end I am convinced that the motion dated 22/6/2006 has merit. The same is allowed as prayed. I see no merit in the motion dated 31/7/2006. The same is dismissed with costs to the applicants. This decision applies to Mombasa H.C.Misc. Civil Applications No. 521 and 523 of 2006.

**Dated and delivered at Mombasa this 30<sup>th</sup> day of March 2007.**

J.K SERGON

J U D G E

In open court in the presence of Omulele and N/A Matuku for the Respondent.