



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC APPLI 103, 120 & 136 OF 2007

IN THE MATTER OF: AN APPLICATION SEEKING JUDICIAL REVIEW UNDER ORDER LIII, CIVIL PROCEDURE RULES

AND

IN THE MATTER OF :THE SUGAR ACT NO. 10 OF 2001 AND CUSTOMS & EXCISE ACT, CAP 472, LAWS OF KENYA, AND LEGAL NOTICE NOS. 12 OF 1ST MARCH, 2004 AND GAZETTE NOTICE NO. 296 OF 12TH JANUARY, 2007, 1005 OF 1ST DECEMBER, 2006 AND PUBLIC NOTICE BY KENYA REVENUE AUTHORITY OF 2ND FEBRUARY, 2007 AND 6TH

FEBRUARY, 2007

B E T W E E N

1. REPUBLIC APPLICANT

AND

KENYA SUGAR BOARD.....1ST RESPONDENT

MINISTRY OF FINANCE.....2ND RESPONDENT

KENYA REVENUE AUTHORITY.....3RD RESPONDENT

(H.C. MISC. APPLICATION NO. 103 OF 2007)

Ex parte: The Commodity House Ltd.

AND

2. H.C. MISCELLANEOUS APPLICATION NO. (120 OF 2007)

Between

REPUBLIC

-VS-

(1) Kenya Revenue Authority

(2) Kenya Sugar Board

Ex parte: Transouth Conveyors Ltd.

3.H.C. Miscellaneous Application No. 136 of 2007

Between

REPUBLIC

-Vs-

Commissioner of Customs Services

EX Parte: Stuntwave Limited.

BENAJMIN M. WAMBUA

MOSES MOGENI JOHN

ROSEMARY CANDIDAH CHITAYI

DANIEL M. MBURU.....AFFECTED PERSONS

J U D G E M E N T

This short judgement relates to three (3) applications brought by way of Notice of Motion brought by the following companies, and the following dates and for the following orders-

1. The **Notice of Motion** dated 28.02.2007, and filed on 1.03.2007 **H.C MISC. APPLICATION NO. 103 OF 2007** between **REPUBLIC -VS- THE SUGAR BOARD (2) MINISTRY OF FINANCE (3) KENYA REVENUE AUTHORITY** Exparte **Commodity House Ltd.** and it sought the following orders-

(a) an order of certiorari to quash the decision of the Kenya Revenue Authority (***the 3rd Respondent***), published in the Daily Nation and Standard Newspaper of 2nd and 6th February, 2007 as null and void and of no legal consequence.

(b) an order of prohibition to prohibit the Respondents from issuing any further publications whether in the Daily Newspaper or the Kenya Gazette which contradicts Gazette Notice No. 296 of 12th January, 2007, issued by the Kenya Sugar Board (the first Respondent) hereafter called "***KSB***").

(c) an order of prohibition prohibiting the Ministry of Finance, or Kenya Revenue Authority (KRA) from allowing the release of any other sugar imported under the Common Market for Eastern and Southern Africa (***COMESA***) 2007/2008 year quota tariff terms until the determination of this matter;

(d) an order of Mandamus to compel the Respondents to process the ex parte Applicant's importation of 2000 metric tons of Sugar ***together with*** any other sugar being imported by the ex parte Applicant under the COMESA tariff rates for the year of 2007/2008, year quota pursuant to Gazette Notice Number 296 of 12th January, 2007 and for the said importation to be released to the Applicant ;

(e) an order of ***mandamus*** to issue that the release shall be free of warehousing charges that would have accrued pending the disposal of this matter. The monetary value of the sugar was Kshs.79 million;

2.A NOTICE OF MOTION dated and filed on 22-02-2007 by the firm of Mogaka Omwenga & Mabeya Advocates H.C. Misc. Application No. 120 of 2007 between **REPUBLIC –VS- (1) KENYA REVENUE AUTHORITY and (2) KENYA SUGAR BOARD Ex parte Transouth Conveyors Ltd.** for the following orders-

(a) an order of ***Certiorari***

(i) to quash the decision of the KRA made by the 1st Respondent published in the Standard Newspaper, and the Kenya Times and Daily Nation Newspapers of 6th February, 2007 respectively;

(ii) to quash the decision of KRA directing that the COMESA imports of sugar the 2007/2008 quota commences on 1st March, 2007,

(iii) to quash the decision of KRA contained in its e-mail of 19th February, 2007, in respect of Import Entry No. 614748 dated and lodged on 19th February, 2007 directing that all taxes due and payable be paid at 100%;

(b) **An order of Prohibition:**

(i) to prohibit the 2nd Respondent, (KSB) from withdrawing Gazette Notice Number 296 of 11th January, 2007;

(ii) to prohibit KSB from in any way publishing any other Gazette Notice that contradicts Gazette Notice No. 296 of 11th January, 2007, which may change the effective date of importation of 2007/2008 sugar quota duty from ***COMESA*** from 1st February, 2007.

(c) **An Order of Mandamus**

(i) to direct the KRA to process the ex parte Applicant's importation of the consignment of 5,000 M.T of Sugar from COMESA and to clear the said consignment only of Customs Entry No. 614866 and 614748,

(ii) to clear any other consignment of sugar imported by the Applicant from COMESA after 1st February, 2007, duty free, in terms of Gazette Notice No. 296 of 11th January, 2007 and

(iii) release the said sugar to the ex parte Applicant free of any charges that would have accrued pending the disposal of this matter.

3. A NOTICE OF MOTION dated and filed on 26-02-2007 H.C. Misc. Application No. 136 of 2007 between **REPUBLIC –VS- KENYA REVENUE AUTHORITY – COMMISSIONER OF CUSTOMS SERVICES**, Ex parte ***Stuntwave Limited***, and ***Kenya Sugar Authority*** – Interested party, through the firm of ***Asige Keeverenge and Anyanzwa*** Advocates for the following orders-

(a) An order of Certiorari to quash the decision of KRA altering the commencement date of importation of duty free sugar from ***COMESA FTA*** from 1-02-2007 as published by the Kenya Sugar Board in Gazette Notice Number 296 of 2007 to 1st March, 2007, and published ***inter alia*** in the Daily Nation and Standard Newspapers on 2nd February, 2007 in addition to other publications contained in the Kenya Times, the People and the East African Newspapers.

(b) **An order of Prohibition**

To prohibit the Respondent from processing, clearing or releasing any consignment of sugar imported by any ***other importer*** until the Applicant's sugar consignment of 5000 MT. imported on 9th to February, 2007 pursuant to Kenya Sugar Board Gazette Notice No. 296 11th January, 2007 is cleared and released

free from payment of any penalty, storage, demurrage or accrued customs warehouse rent.

(c) **An order of Mandamus**

commanding and compelling the Respondents to process clear and release the Applicant's 5000 MTS, Sugar imported on 9th February, 2007 pursuant to Kenya Sugar Board's Gazette Notice Number 296 dated 11th January, 2007 under the **COMESA** mutual Tariff concession free from payment of any penalties demurrage charges, storage charges or accrued customs warehouse

(d) any other consequential directions deemed necessary to give;

(e) Costs of the Application

For the purposes of this judgement, I shall refer to the three Motions of the **Commodity House Limited**, **Transouth Conveyors Ltd**, and **Stuntwave Limited collectively** as the "**Applications.**" Looked at collectively the Applications raise the same issue, or put differently they pray for similar orders, that they are entitled to import duty free of any customs duty, the respective imports of sugar from **COMESA** Free Trade Area (FTA) from 1st February, 2007, following the announcement by the Kenya Sugar Board per Gazette Notice No. 296 of 2007 of 11th January, 2007 purporting to bring forward by one month, the importation of duty free sugar from COMESA sugar producers, from 1st March, 2007 to 1st February, 2007.

Upon the arrival of this sugar imports into Kenya, KRA refused to clear the sugar without payment of 100% duty due and payable. The Applicants cried foul. They told me in various words, but to the same effect that KRA refused to clear their sugar imports because KRA allegedly favours one importer, **Mat International Limited an Interested Party in H.C. Misc. Application No. 136 of 2007, Republic –Vs. Kenya Revenue Authority – Commissioner of Customs Services.**

In this cry, the Applicants were joined by a group of concerned citizens, they called themselves, affected persons. I allowed them to address the court through their Counsel, Mr. Kibe Muigai. They did not persuade me as to how the release or otherwise of the Applicant's sugar without payment of duty would alleviate their plight either in the shortage, or price of that sweet commodity. In the words of Mr. Ontweka, learned Counsel for KRA, and Mr. Makongo learned Counsel for the Ministry for Finance, the affected persons were purely **busy bodies**. I agree with that submission and I will give my reasons later on why I think so called affected persons were indeed busy bodies, and only managed to prolong the proceedings herein.

In the course of the hearing of these Applications, Counsel for three Applicants, namely, Gikandi Ngibuini for the **Commodity House Limited**, Mogaka Omwenga for **Transouth Conveyors Limited**, while Mr. Japheth Asige, for **Stuntwave Limited**, all argued with passion and vigour and sought to persuade me that the power to control imports of duty free quota of sugar from **COMESA** lay entirely with the Kenya Sugar Board, a statutory body established under Section 3 of the Sugar Act (**No. 10 of 2001**), and not either with Ministry of Finance or the Kenya Revenue Authority (H.C. Misc. Application No. 103 of 2007), or the Kenya Revenue Authority and Kenya Sugar Board Services (in H.C. Misc. Application No. 120 of 2007), or (**in H.C. Misc. Application No. 136 of 2007**) the Kenya Revenue Authority Commissioner For Customs Services.

In no less than 1½ weeks of hearing of these Applications, the court and no less the Advocates for the various Respondents, that is to say again, Mrs J.W. Kamande for the KRA, Mr. Makongo State Counsel for the Ministry of Finance, and Mr. Okubo for the Kenya Sugar Board (**in H.C. Misc. Application No. 103 of 2007**), and Mr. Ontweka (for KRA in H.C. Misc. Application NO. 120 of 2007 and Mr. Okubo for Kenya Sugar Board), and Mr. Ontweka for KRA Commissioner of Customs Services, Mr. Kagiri representing the firm of M/S Muthoga Gaturu & co. Advocates, for Matt International Limited the 2nd Interested Party (in H.C. Misc. Application No. 136 of 2007, were taken through a veritable forest of Affidavits Verifying Facts sworn on behalf of the three Applicants, Replying Affidavits on behalf of the

various Respondents. The Amazon of papers, included **Replying Affidavits of Joseph Kinyua, the Permanent Secretary Ministry of Finance** sworn on 21st February, 2007, and filed on 22nd February, 2007, the **Replying Affidavits of Charles Esonga Onduso sworn and filed on 22-02-2007 and the Replying Affidavit of the said Charles Esonga Onduso** sworn on 28-02-2007 and filed on 1-03-2007 in relation to H.C. Misc. Application No. 120 of 2007, and that again of the said Charles Esonga Onduso sworn on 7th March, 2007 in relation to H.C. Misc. Application No. 136 of 2007).

Whichever forest I wandered through and indeed it was generally agreed among Counsel at the beginning of the hearings of these three applications, the issue was to determine which was the principal or primary tree between the trees called, **Legal Notice Number 12 of 2004** issued by the Minister for Finance pursuant to the provisions of Section 118 of the Customs and Excise Act, (**Chapter 472, Laws of Kenya**), and Gazette Notice Number 296 of 2007, issued by A.O. Otieno, the Chief Executive Officer of the Kenya Sugar Board purportedly pursuant to the provisions of Legal Notice Number 12 of 2004, and Regulation 6 of the Sugar (**Imports, Exports and By Products**) (**Amendments**) Regulations 2006.

I was treated to many definitions or meanings of words and expressions used in the title to, and the various provisions of the Sugar Act, and in particular those establishing the Kenya Sugar Board, its functions, and powers, and how the Finance Minister had tried to whittle down those powers under Section 61 of the Finance Bill 2006, and how that attempt came accroper. I was also treated to many authorities, which were correct in their particular contexts but really none of them cited by the Applicants' Counsel help to determine the primary issue in these applications. I will consider those authorities in my detailed reasons to be done in the new term.

For the purpose of this short judgement the issue is whether there is a decision to be quashed by Orders of Certiorari, or whether there is any act which is illegal or contrary to law, which is threatened to be done by any of the two principal Respondents namely the Minister for Finance wrongly referred to as the Ministry of Finance or the Kenya Revenue Authority for which an order of Prohibition would issue. There is to my knowledge no provision of law conferring any power upon the Ministry of Finance – the powers are always conferred upon the Minister for Finance, the Minister for the time being responsible for matters relating to Finance and the Kenya Revenue Authority. Reference to the Ministry of Finance in H.C. Misc. Application No. 103 of 2007 is therefore incompetent.

The offending decision to be quashed and prohibited are the notifications by the Commissioner for Customs Services published in the various Daily and Weekly papers of mass circulation of 2nd and 6th February, 2007 reminding the public and in particular sugar importers that the effective date of importation of the 2007/2008 sugar quota to be imported duty free from **COMESA** was 1st March in accordance with Legal Notice No. 12 of 2004 (dated 28th February, 2004), and not 1st February, 2007 as earlier published by the Kenya Sugar Board in the Kenya Gazette Notice of 296 of 2007 dated 11th January, 2007.

Much ado was made on alleged delay of 20 days from the date of publication of Gazette Notice No. 296 of 2007 to the publication by the Commissioner of Customs Services of the said notice to the public. Let us assume that KRA or the Commissioner of Customs Services did not publish that notice, would the Applicants have imported their various consignments of sugar duty free? In light of Legal Notice No. 12 of 2004, any registered sugar importer who imported sugar from **COMESA** outside the sunrise limits set by the Legal Notice Number 12 of 2004 would have been liable to pay full duty on such sugar and that is, irrespective of whether or not there was Gazette Notice No. 296 of 2007 by the Kenya Sugar Board.

Whereas the Kenya Sugar Board may have or has power to register sugar imports, and issue them with licences – it certainly has no power on matters of the fiscal or monetary regime of Kenya. To purport to do so, as the Kenya Sugar Board did by Gazette Notice No. 296 of 2007 is to usurp a power it does not have, and is not likely ever to have, for matters of erecting and maintaining tariff regimes is the world over the legitimate preserve of the Ministries of Finance, or sometimes, of the Treasury, under which fall the various services or departments for levying and collection of revenue, and enforcement of the tax regime generally.

The short answer to the three applications is that the press announcements were made by **KRA** in the public interest, and breached no law, and such an announcements are incapable of being quashed. The notification did not determine that **COMESA** duty free sugar should not be imported from any date, but rather reminded the public and sugar importers of the existence of the Legal Notice No. 12 of 2004, which as I have stated above, set out both the sunrise and sunset dates for importation of **COMESA** duty free sugar, and that Gazette Notice Number 296 of 2007 had not revoked it, and I should perhaps add, it was incapable legally of revoking it, and neither was the Kenya Sugar Board capable of exercising any power under it by the use of such words as “pursuant to Legal Notice No. 12 of 2004.” The said Legal Notice never gave the Kenya Sugar Board power to alter the sunrise or the sunset dates or as Mrs Kamande put it, time limits set thereunder, let alone to issue any Gazette Notice under it.

What I have attempted to say in very many words is well summarized in the submissions of Mr. Makongo, learned State Counsel, dated 14th March, 2007 and filed on 15th March, 2007 (***In H.C. Misc. Application No. 103 of 2007***). Counsel’s thesis was that quashing the announcement in the local dailies will not lead to any changes since Legal Notice No. 12 of 2004 is still valid, it has neither been revoked nor otherwise amended. KRA is an agency of the Government of Kenya under the general supervision of the Minister for Finance as provided for under Section 5 of the Kenya Revenue Authority Act, and the Kenya Sugar Board has no legal mandate of determining duty on imports.

Again the legal position is well captured in the submissions of Mrs Kamande filed on 12th March, 2007, but summarized in the submissions of Muthoga Gaturu & Co. Advocates for ***Mat International Limited***, an Interested Party (in H.C. Misc. Application No. 136 pf 2007). That position with which I entirely agree is this –

(1) The various laws set out in the schedule to the Kenya Revenue Authority Act donate all power with respect to the assessment and collecting revenue and the administration and enforcement of all the laws relating to government revenue to the Kenya Revenue Authority.

(2) The Sugar Act or its regulations with respect to the regulation and control of the production, manufacturing, importation or exportation of sugar and its by-products cannot lawfully extend to the determination of the taxes that may be levied on such sugar or its by-products.

(3) The powers of the Kenya Sugar Board (*a party in the three applications*) to facilitate the importation of raw mill white and refined sugar by registered sugar importers and millers on a non discriminatory and liberalized basis, cannot legally extend to the determining the taxes payable as this is by law the sole preserve of the Kenya Revenue Authority.

(4) By virtue of Section 27 of the Sugar Act, Sugar imports into Kenya are subject to the prevailing import duties, taxes and other tariffs, and the power to determine such import duties and taxes remain by law the sole prerogative of the Kenya Revenue Authority no doubt in consultation with the Ministry of Finance through the Permanent Secretary to the Ministry of Finance.

(5) The decision of the Kenya Sugar Board or Chief Executive Officers of local sugar manufactures, to which the three Applicants refer in their Gazette Notice No. 296 of 2007 which the Applicant in H.C. Misc. Application No. 136 of 2007 calls Legal Notice No. 296 of 2007) (*quite wrongly so*) is entirely in conflict with various primary and subsidiary legislation, including Legal Notice No. 12 of 2004, Section 118 of the Customs and Excise Act Cap 472 of the Laws of Kenya and Sections 33 & 37 of the Interpretation and General Provisions Act (Cap 2 Laws of Kenya), for acts done under subsidiary legislation are deemed to be under the principal Act which authorizes it, and performance of duties by a Minister or public officer designated by the President or the Minister.

The Kenya Sugar Board has not been designated by any authority or its own enabling Act to purport to issue any notice under the Customs and Excise Act or any other revenue statute.

All the three Applicants sought orders of Certiorari, prohibition and mandamus. This calls for a little inquiry into what each of these prayers entails in law.

It is said that an order of Certiorari will go to quash a decision of an inferior court or tribunal, or an authority or body exercising either a power, it does not have, that is to say it lacks jurisdiction to do so or exercises that power in excess of its authorized jurisdiction. In the esoteric Latin, language of the ancient Romans, the inferior court, tribunal, authority or body is said to be acting *ultra-vires* outside or without such jurisdiction.

In my considered view, a notification to the public by an inferior court, tribunal, authority or body of an existing piece of legislation, whether principal or subsidiary is not a decision capable of being quashed. Such notification is merely a restatement in the public interest of the existence of the law or state of things. A notification by KRA that all Tax returns are due by 31st March, of every year, or that a tax amnesty is extended to all taxpayers who file their returns by that date, is mere information to the tax paying public. No right thinking tax payer would rush to court and seek orders of certiorari.

There was no direction in any of the press announcement which could remotely be construed as a direction by **KRA** that **COMESA** imports of sugar for the 2007/2008 quota commences on 1st March, 2007, as suggested by the ex Parte Applicant Transouth Conveyors Ltd. (*in H.C. Misc. Application No. 120 of 2007*). Neither did KRA breach any law by its decision of 19th February, 2007, in respect of import Entry No. 614748 dated and lodged on 19th February, 2007 directing that all taxes due and payable be paid at 100%.

Again, KRA did not under the press announcements alter the commencement date of importation of duty free sugar from COMESA FTA from 1-02-2007 to 1-03-2007. The publication by KRA on 2nd and 6th February, 2007 in the Standard, Kenya Times, the People and East African Newspapers were mere reminders to the public of the existence of Legal Notice Number 12 of 2004, which had set out time limits for the importation of duty free mill white sugar and refined sugar from COMESA FTA.

No orders of Certiorari would therefore lie to quash a public notice issued by a public body in the public interest for information of the public, in this case the sugar importation lobby.

On the other hand an order of prohibition looks to the future. It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal authority or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence or lack of it, but also for departure from the rules of natural justice. It does not lie to correct the course practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings. See *HALSBURY'S LAWS OF ENGLAND 4th Edition Vol 1 at page 37, paragraph 128*, cited in Civil Appeal No. 266 of 1996, *KENYA NATIONAL EXAMINATIONS COUNCIL -Vs- REPUBLIC*.

It is the public duty of the Minister for Finance to maintain the fiscal and monetary policy of Kenya so as to ensure that there is certainty and predictability in the collection of revenue more so from imports to maintain both the macro and micro-economic development of Kenya and the sustainability of our nascent agri-based industries and also in conformity with Kenya's bilateral and multi-lateral obligations or arrangements on mutual tariff application.

The principal agency for maintaining that predictability and certainty in the collection of revenue and the enforcement of the mutual tariff regime is the Kenya Revenue Authority, and unless such body overreaches its mandate in terms of the enabling statutes (under the Schedule to the Kenya Revenue Authority Act, Chapter 469, Laws of Kenya) and in this case, the Customs and Excise Act, Chapter 472, Laws of Kenya) and the East African Community Customs Management Act, 2004, (and the KRA has not overreached its mandate in the matters of these Applications) there is no basis in law for an order of prohibition.

A prayer to prohibit the Kenya Sugar Board from withdrawing Gazette Notice Number 296 of 2007 dated 11th January, 2007, and from publishing any other Gazette Notice which may change the effective date of importation of the 2007/2008 sugar quota from COMESA from 1st February, 2007 is an extraordinary prayer. It is an extraordinary prayer because the Applicant ***Commodity House Ltd.*** is inviting the court to take the chair of the Minister for Agriculture and the Kenya Sugar Board who alone under Section 33 of the Sugar Act 2001 (***in respect of the Minister***) and regulation 6 of the Sugar (***Imports, Exports and By-products***) (***Amendment***) Regulations 2006 (L.N. No. 2 of 13th January, 2006) (in respect of the Kenya Sugar Board) is empowered ***“to facilitate the importation of raw or mill white and refined sugar by registered importers and millers on a non-discriminatory and liberalized basis.”*** Only Parliament would amend the law (Section 33) to prohibit the Minister for making such regulations as would facilitate the importation of raw or mill white and refined sugar. The court cannot and will not prohibit that which has been sanctioned by Parliament. It will only annul such regulation if it were inconsistent with the provisions of the parent or principal legislation. That is not the case with regard to regulation 6 of the said Sugar Regulations.

It would therefore be absurd for the court to prohibit that which Parliament through the Minister’s regulations, has sanctioned to be done. The Kenya Sugar Board has before published, and revoked many Gazette Notices under the said Sugar Regulations, and the Court will not interfere with its power to revoke Gazette Notice No. 296 of 2007, as indeed that Gazette Notice serves no useful legal purpose. It has been the sole cause of what Mr. Mogaka, learned Counsel for one of the Applicants, Transouth Conveyors Ltd., described as the ***confusion, chaos, and anarchy*** in the sugar industry, and with which comment Counsel for the various Respondents generally agreed.

So no order of prohibition will therefore issue as prayed by Commodity House Ltd. to prohibit the Kenya Sugar Board from revoking its Gazette Notice Number 296 of 2007.

An order of ***Mandamus*** is a command, a mandate from the High Court to an inferior court, or tribunal or public authority or body charged or invested with a duty to carry out or do what it is by law required to do, or to be done. So an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.

My favourite example is that of the Liquor Licensing Court established under the Liquor Licensing Act (***Chapter 121, Laws of Kenya***). Let us suppose that “***Mama Mboga***” who runs a popular resort called ***Malaika Delights Bar and Restaurant*** applied for a Licence, and the Liquor Licensing Court (usually chaired by the Local District Commissioner), failed to convene and hold a meeting to consider her application, and suppose the authorities from the Trade Department, came and threatened her with an arrest and prosecution for selling liquor at ***Malaika Delights without a Valid Liquor Licence***, and she was forced to come to court for an Order of Mandamus. In my view she would richly deserve an order of mandamus because the Liquor Licensing Court or authority had refused and/or neglected to convene and hold a meeting to deliberate over and determine her application for a Liquor Licence to sell liquor at her ***Malaika Delights Bar and Restaurant***.

The Licensing Court would be commanded by an order of mandamus to convene and consider “***Mama Mboga’s***” application for a Liquor Licence. The court would not of course direct the Liquor Licensing Court how or what to decide. That would be interference with that Court’s or public authority’s or body’s discretion.

In the matters at hand no order of mandamus will issue because there is no statutory duty imposed upon either the Ministry of Finance or the Kenya Revenue Authority which either the Minister for finance (not the Ministry of Finance) or the Kenya Revenue Authority have failed and/or neglected to do.

Similarly, there is no statutory duty imposed upon either the Minister for Finance or the Kenya Revenue Authority to process the importation of 2000.00 or 5000.00 metric tons or other amounts of sugar from ***COMESA*** otherwise than in accordance with the terms of the ***Mutual*** Tariff concessions – Common Market for Eastern and Southern Africa (***COMESA***) as enshrined in Legal Notice Number 12 of 2004

dated 28th February, 2004, but published on 1st March, 2004 which domesticated the COMESA Mutual Tariff arrangements with the countries enumerated in that Legal Notice.

For avoidance of doubt, the sunset date having been set for 28th February, 2008, the sunrise date for a year circle of twelve months could only mean 1st March of any one year of the circle commenced on 1st March, 2004 when Legal Notice Number 12 of 2004 was published and therefore came into operation.

Certainly no order of mandamus would issue for the release of any sugar or other dutiable commodity without payment of warehousing charges except only as by law provided.

For all those reasons, the Applicants' various **Notices of Motion** as first outlined at the beginning of this judgment namely-

(1) For Ex Parte Applicant Commodity House Ltd – H.C. Misc. Application No. 103 of 2007, (1) Republic -Vs- Kenya Sugar Board (2) Ministry of Finance (3) Kenya Revenue Authority,

(2) For Ex parte Applicant Transouth Conveyors Ltd, Republic –Vs- Kenya Revenue Authority and Kenya Sugar Board,

and

(3) For Ex Parte Stuntwave Ltd., (H.C. Misc. Application No. 136 of 2007) Republic –Vs- Kenya Revenue Authority and Kenya Sugar Authority ,

have no basis in law, and are dismissed with costs to the Respondents, and Interested Parties, but not the affected persons.

There shall be orders accordingly.

Dated and delivered at Nairobi this 30th day of March, 2007.

M.J. ANYARA EMUKULE

JUDGE