



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 60 of 2006

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY
ATHUMANI JUMA GANZORI, AHAMED JAFFAR TAIBALI, MOHAMHINDI
MOHAMMED KASSIM AND NICHOLAS OCHIENG' FOR LEAVE TO APPLY
FOR AN ORDER OF PROHIBITION AND CERTIORARI
IN THE MATTER OF THE COMMISSIONER GENERAL OF KENYA REVIEW
AUTHORITY
IN THE MATTER OF MOTOR VEHICLES REGISTRATION NUMBERS KAU
500F, KAU 500T, KAU 005H AND KAU 171C**

ATHUMANI JUMA GANZORI

AHAMED JAFFAR RAIBALI

MOHAMHINDI MOHAMMED KASSIM

NICHOLAS OCHIENG'
APPLICANTS

VERSUS

THE COMMISSIONER GENERAL KENYA REVENUE AUTHORITY RESPONDENT

RULING

Both parties have agreed that as regards application dated 13th February 2006 the court determines the security to be offered by the applicant (ex-parte).

I have taken into account the replying affidavits filed in connection with the point by Counsel and the authorities cited to the court.

The applicants contend that the duty payable in respect of each of the four vehicles namely KAU 500F, KAU 520T, KAU 005H and KAU 171C should be the duty which the Respondents expected to receive from the Bank and as per the initial assessment by the Respondent and which is as under:

KAU 500F - 1,364075

KAU 500T - 1,472837

KAU 005H - 1,531646

KAU 171(c) - 1,676882

On the other hand the Respondent contends that the above assessments were based on material misrepresentations as to the value of the vehicles. In addition the Respondent contends that even the above amounts have not been paid as alleged through the National Bank of Kenya as arranged. The Respondent allege that the applicants have forged essential documents concerning the vehicles including the receipts for payment and other documents touching on the material particulars of the vehicles. Of course the applicants have denied this and further contend that the Respondents prove the forgeries to the required standard of proof which is between the balance of probability and the criminal law standard of proof beyond reasonable doubt. The tentative view which the court takes is that even at this stage nothing could be easier on the part of the applicant in proving payments deposited with a reputable bank than explaining how and when the deposits were made and producing the slips. If the bank unreasonably insist that they are forgeries the aggrieved parties could have taken action against the Bank by now. Nothing has been heard of this. Under S 223 of the East African Community Customs Management Act 2004 the onus of proving payment is clearly on the applicants.

It follows therefore that if the initial assessment was based on the alleged forged documents their duty could have been short levied or under assessed. There is a contention that the declarations as regards year of manufacture of the vehicles and the purchase prices of the vehicles are misrepresented. This aspect has so far not been controverted by the applicants.

Following inquiries the respondent has since done fresh valuations based on Current Retail Selling Prices (CRSP) and has sent appropriate demands to the applicants in the total sum of kshs 19,684811.75 which assessment has been based on values given by the local dealers of the vehicles. Although the applicants have challenged the impartiality of the local dealers in assessing the correct value – being competitors of the importers, they have not disputed their expertise in reconstructing the values based on the information available and they appear to enjoy the monopoly as dealers. I find that the local dealers are in a much better position in assisting the court with what could be regarded as fair assessment of the valuer of the vehicles. Apart from challenging their impartiality the applicant have not come up with another alternative expert assessment.

On balance the reassessment has not been seriously challenged with any tangible evidence of other reasonable values based on the same particulars, say for example from other motor experts.

The upshot is that in view of the allegations of possible forgeries of vital documents and particulars concerning the vehicles and the fact that the purpose of levying duty is to have it paid to the Revenue authorities I am not inclined to order that the ordered security be deposited in a joint account to earn interest. Instead I order that the applicant pay directly to KRA duty as reassessed by the applicants in respect of each vehicle all totaling the sum of Kshs 19,684.811.75 within 7 days.

The reason for this is that the respondent is capable of making the necessary refund to the applicants when the main application for Judicial review is finalised. In the view of the court, holding the money in the joint account would defeat the purpose of duty collection and unnecessarily hamper its revenue

collection objectives. Judicial review is not aimed at making decisions for the targeted review bodies but to quash any unlawful decisions so that the bodies targeted can remake the decisions in accordance with the law. Judicial review enhances the adherence to the rule of law and constitutionalism.

The assessed amounts shall be deposited with KRA within 7 days failing which the temporary stay shall automatically lapse.

It is so ordered.

DATED and delivered at Nairobi this 5th day of April 2006.

J.G. NYAMU

JUDGE