



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Misc Civ Appli 60 of 2006

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW

**BY ATHUMANI JUMA GANZORI, AHMED 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 REVENUE
AUTHORITY**

**IN THE MATTER OF: MOTOR VEHICLES REGISTRATION NUMBERS KAU 500F, KAU
500T, KU 005H AND KAU 171C.**

ATHUMANI JUMA GANZORI

AHAMED JAFFAR TAIBALI

MOHAMHINDI MOHAMMED KASSIM

NICHOLAS OCHIENG APPLICANTS

VERSUS

THE COMMISSIONER GENERAL KENYA REVENUE AUTHORITY RESPONDENT

GOPAL DHANJI PATEL 1ST INTERESTED PARTY

BOFFAR LIMITED 2ND INTERESTED PARTY

RULING

The application by way of a chamber summons dated 25th July 2006 is brought by two interested parties (herewith called the IPS’).

The grounds are set out in the application as follows:

1. The dispute as regards the payment of duty and other taxes is settled since the court ordered the applicants (in the main application) to pay the respondents Kshs 9 684, 811.75 following a consent by the parties for the court to determine the duty payable.
2. The IPS bought the motor vehicles relying on the respondents records that the motor vehicles registration No. KAU 171C and KAU 005H (the suit motor vehicles) were imported into Kenya legally and that duty had been paid.
3. The respondent registered the suit motor vehicles in the applicant’s names first and the IPS were registered as second owners.
4. There was compliance by the IPS with the provisions of the Traffic Act Cap 403 Laws of Kenya and Customs and Excise Act Cap 472 of the Laws of Kenya
5. The Applicants in the main application have moved to the Court of Appeal to challenge the order of this court to pay duty and the case may take long thereby jeopardising the proprietary interests of the IPS in the suit motor vehicles.

The IPS rely on the skeleton arguments and submissions filed in court on 31st July, 2006 and the authorities cited therein. Mr Nyachoti for the applicants in the main application supports the position that the onus of paying duty (if any) is on the applicants’ save the IPS have produced documents demonstrating ownership ie log books.

On the other hand the respondents rely on the skeleton Arguments filed in Court on 31st July 2006 and also on the affidavit of June Karanja sworn 28th July 2006.

The IPS contention is that since they are owners of the vehicles under S 10 of the Traffic Act they should be released to them or the threat to detain stopped in respect of the vehicles not yet seized. At the outset the court must therefore consider the importance of the registration of the vehicles in IPS’s name under S 10 of the Traffic Act.

A consideration of the relevant law reveals that duty attached to the dutiable goods and its recovery is not affected by a change of ownership by transfer eg from an importer to a buyer.

The starting point is that it is not seriously denied that the vehicles in question are uncustomed and therefore liable to forfeiture under S 210 of the East African Community Customs Management Act although the IPS contend that the purchase price did include the payment of duty. However on this the onus is on the person claiming the goods to prove payment and this has not been demonstrated to the court by the IPS.

Under S 213 of the Act the respondent has power to seize and detain goods liable to forfeiture. By a letter dated 5th May 2006 “Ex JRW” one of directors of the IPS has acknowledged that duty is payable and had offered to pay upon computation. This court has at the request of the parties set out the extent of the security required to be deposited should any interested party want to have the vehicles released and the IPS know what to do in order to freely use the vehicles pending the final determination of all the issues in the main application. In addition in the skeleton arguments page 2 the IPS clearly acknowledge and “appreciate” that duty payable in respect of things imported including the suit motor vehicles is *in rem*.

The contentions in the main application is that the two vehicles are uncustomed goods and in this regard the respondents argue that uncustomed goods include goods in respect of which incorrect or false declarations have been made see section 210(9) of the Management Act referred to above. Under S 2 of the Act uncustomed goods are defined to include dutiable goods on which full duties have not been paid.

In view of the letter of admission “JRW” mentioned above the IPS have not demonstrated payment of the duty especially in the face of forgery allegations touching on important documents concerning the payment of duty and upon which the transfers of the vehicle were allegedly based. This is for determination in the main application. Pending full determination of the issue of payment of duties in the main application the onus of proving the payment of proper duties or lawful importation rests on the person claiming anything seized under the Act. The onus is on the person claiming the thing seized – see S 223 of the East African Community Customs Management Act (EACCM) Act.

It follows therefore the argument that the IPS are third parties and lawful owners cannot in the view of the court render unlawful any action taken in rem. Thus S 217 of (EACCM) Act provides that the process of seizure, detention, forfeiture and condemnation of goods shall not in any way be affected or impeded by the fact that any owner of the thing seized was not in any way concerned with any act that rendered the thing liable to forfeiture ie. non payment of duty in this case.

In the view of the court, there cannot be any legitimate expectation by the IPS in the face of the allegations of forgeries relating to the documents upon which the ownership of the vehicles are allegedly hinged. Legitimate expectation is about fairness and there cannot be fairness in the event properly due duties for the vehicles have not been paid. There cannot in my view be a protected proprietary interest unless it is demonstrated that there was no forgery of the relevant documents. As regards the IPS reliance on estoppel against the respondents cannot be upheld. I would reiterate my earlier decision *R v KENYA REVENUE AUTHORITY exparte ABERDARE FREIGHT SERVICES LTD HC Mis 946/2004* (unreported) at page 19 and 20 where I held inter alia if full duty had not been paid and was legally due a public authority could not bind itself to accept anything other than full duty. Estoppel would not lie.

It is further demonstrated that the incidence of duty is on the goods and not necessarily on ownership as contended by the IPS in that S 130 of the Act provides that where goods are liable to duty such duty shall be charged on the goods in respect of which duty is payable. In other words duty continues to attach on the two vehicles regardless of the incidence of ownership.

The upshot is that the court does not consider it important to analyse in detail the cases cited by the IPS although it has duly considered all of them in arriving at the decision herein. However in view of the clear statutory provisions based on the relevant Act the decisions cited do not affect the legal position as set out in the Act concerning the payment of duty, or the right of forfeiture and detention.

In addition or alternatively the application is incompetent in that it invokes the Civil Procedure provisions S 3A whereas it should have invoked the inherent powers of this court.

In the result the application is dismissed with costs to the Respondent.

DATED and delivered at Nairobi this 6th day of October, 2006.

J.G. NYAMU

JUDGE