

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 321 of 2001**

FAR EAST CAR BANK LIMITED PLAINTIFF

- VERSUS -

COMMISSIONER OF CUSTOMS & EXCISE DEFENDANT

R U L I N G

The Applicant is in the business of import and sales of motor vehicles which are subject to payment of Import Duty and other levies set by the Government through the Commissioner of Customs & Excise. Among other powers bestowed upon the Commissioner of Customs & Excise in performing the said duties is to seize any goods for which import duty has not been paid and in exercise of this power, the Commissioner did issue two such Notices to the applicant dated 13th June, 2001 in respect of 8 units motor vehicles on the grounds that Duty had not been paid. However on physical removal of the motor vehicles, his officers removed 9 vehicles as opposed to Eight which he has not denied. The said action prompted the applicant to issue a Notice through its lawyers Asige, Keverenge & Anyanzwa disputing the said seizure on grounds that no Duty was due. However the vehicles were not released and thus the claim filed on 21st June, 2001 and together with it the application before Court by Chamber Summons of the same date brought under the Provisions of order 39 rules 1,2, 3 and 9 of the Civil Procedure Rules and Section 3A and 63 of the Civil Procedure Act and Section 205 and 206 of the Customs and Excise Act. Upon the said application the Court on the same date did grant Interim orders of Injunction restraining the Respondent by himself or agents from interfering with the units as well as others in the annexures:

The application is supported by an affidavit sworn by the Applicants managing Director MUHAMMAD AFZAL in which he states that there is no Duty due to the Respondent in respect of any of the motor vehicles stated therein as it was paid in cash and receipts issued and motor vehicles cleared out of the port by the Respondent. Annexed to the affidavit are 9 Customs R3 & Excise Declarations each accompanied by a Receipt issued by the Respondent.

The Respondent on his part did file a Replying Affidavit on 3rd July, 2001 sworn by JAMES MWANTHI NGULI a Chief Inspector on behalf of the Kenya Revenue Authority. He deponed that he was involved in the Investigations involving a Banker's cheque No.014407 for Kshs.37,474,949/= issued on Account of KOBIL PETROLEUM LTD. (KOBIL) on 23rd April, 2001 in favour of the Respondent for payment of Duty on Bulk Oil. Kobil had raised concern that the Respondent had by late May 2001 not presented the cheque for payment. It was in the course of the investigations that the deponent found out that the cheque had been used to pay Duty in respect of the Applicant's motor vehicles and that the receipts issued by the Defendant to the applicant indeed bears the same cheque number 014407. It was on the strength of this discovery that seizure of the motor vehicles was effected.

There is also a very interesting revelation made by the applicants which is not denied by the Respondents is that as a result of the said investigations several persons were arrested and charged before court in with the offence of stealing of cash amounting to Kshs.37,474,949/= Contrary to Section 282 (b), and making of a document without Authority contrary to Section 357(a). Among the persons charged is one Peter Mativo whom the applicant argued and has not been denied as being one and the same P. Mativo a cashier employed by the Respondent who issued the receipts in respect of Duty paid by the Applicant. As I had shown earlier, the applicant is said to have used the cheque issued by Kobil Petroleum Ltd. of Kshs.37,474,949 to pay for the nine units of motor vehicles whose total duty is Kshs.6,276,032/= yet the persons facing the Criminal Charges are charged with stealing cash amounting to the same Kshs.37,474,949/=. The question therefore is whether the Applicants were indeed in a position to have stolen or in any way diverted the proceeds of cheque 014407 on account of Kobil for

Kshs.37,474,949/= to pay Duty amounting to Kshs.6,276,032/=. If this is so, what happened to the Balance of the money? The cheque 014407 is clearly to be paid on Account of Kobil at Kilindini yet the same found it's way to Customs & Excise Long room. The Respondent has not shown the said cheque at any time left its custody. Indeed it is the Respondent to explain how a cheque for such a large amount payable to a specific Account only finds it's way to a different cashing office about 5 kilometers apart. Neither has the Respondent shown that the applicant was in a position to use the said cheque nor does He deny the receipts issued to the applicant are genuine. Mr. Asige for the applicant submitted that from the particulars of the charges against amongst others Mr. Peter Mativo and in the absence of any denial that receipts are genuine documents issued by the applicant, it can only reasonably be considered that the Respondent's officers utilized cash paid by amongst others the applicant and defrauded the Respondent by double using the Kobil cheque. The customs & Excise Act provides as follows in Section 208:-

“In proceedings under the Act –

e) The production of a documents purporting to be signed or issued by the Commissioner in the service of the Government shall be prima facie evidence that the document was so signed or issued,

g) Only information, Communication Certificate, official report or other document purporting to originate from or to be certified under the Hand and Seal or stamp of officer of the principal officer of Customs and excise and produced by the Commissioner shall be received in evidence and shall be prima facie evidence of the matters communicated or recorded therein.”

I would have stopped here but the Respondent did raise the issue of the correct party to be sued. Counsel for the Respondent argued that the provisions of the Kenya Revenue Authority Act Cap 469 clearly shows that it is the Authority which is a corporate body to be sued as opposed to the Commissioner of Customs & Excise who is but one of the officers to whom this Commissioner is General has delegated duties to. He referred to the case of Southern Credit Banking Corporation Ltd. vs. Kings way Tyres & Auto Mart Ltd. & 20 others, HCC 567/1999 (UR) in which the court held that only the Kenya Revenue Authority can be sued. This finding in my view is correct however the court did not say whether a misdescription of a party such as in this case was fatal. It is clear from the pleadings and submissions that the issues in question refer to the acts committed by the Commissioner of Customs Excise whom I have said acts on powers delegated to him by the Commissioner General of the Authority. In my view the misdescription of parties as in this case is not fatal to the application and can be cured by an amendment and will not amount to any extreme injustice on the part of the Respondent.

The last issue raised is that the proceedings herein do fall under the ambit of the Government proceedings Act and therefore no Injunction can issue. Does the Section 16(2) of the Government proceedings Act therefore cover the acts of officers when they disregarded and violet the provisions of the law and operation and Rules laid down? I do not think by enacting the provisions of Section 16(2) of the Government proceedings Act Parliament was out to protect errant Government officers and therefore render the Court powerless against even the very clear arbitrary actions of Government Officers. The courts have given injunctive relief in Judicial Review Matters and in my opinion the end result is no different from that attained through issuance of an injunction. In the well considered decision in the case of M –vs- Home office & Another (1993) 3 ALL ER 537, LORD WOOLF' WONDSON page 548 said:

“The facts of this case illustrate that circumstances can occur where it is in the interests but of a person who is subject to the powers of government and of the government itself that the courts should be in a position to make an order which clearly sets out letters what should or what should not be done by the government”

I have also had the opportunity to read the decision in OLIVE JAUNDOO –VSATTORNEY GENERAL of GUYANA (1971) A.C. 972, which was also referred to in the case of ROYAL MEDIA SERVICES LTD. & ANOTHER –VS- TELKOM KENYA LTD & OTHERS HCC.15/2000. The Privy Council in the Olive case accepted that an Injunction could issue against a Government Officer. This is not the same as

issuing an Injunction against the Government. In the current case the Commissioner of Customs having accepted payment from the applicants and Kobil separately and issued receipts to that effect and having conceded by the action of having amongst others his officers charged with theft of the same money allegedly not paid by the applicant is committing an act of injustice. The applicant has a business which is likely to suffer unquestionable damages if the actions of the Respondent are not stopped.

Having found that an injunction can issue against a government officer, the Applicant must also show that his case does meet the ingredients required before the grant of an injunction. The applicant has shown it has a case with a probability of success and if Damages may be payable, the nature of the business is that such damages will not necessary offer a remedy in full. On the other hand withholding of the Injunction may cause more harm in this case than granting the injunction.

The Courts discretionary powers are to be exercised only for public good and this is one of the cases which invites the intervention of the court. For the reasons herein I grant the order of Injunction as against the Commissioner of Customs not to seize the applicant's motor vehicles detailed in the application until final determination of the suit herein. The costs of the application shall be to the applicant

Dated and Delivered at Mombassa this 20th day of December, 2001.

P.M. TUTUI

COMMISSIONER OF ASSIZE