



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**JR. MISC. CIVIL APPLICATION NO. 56 OF 2015**

IN THE MATTER OF: APPLICATION FOR JUDICIAL REVIEW BY CAR IMPORTERS  
ASSOCIATION OF KENYA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI

AND

IN THE MATTER OF: ARTICLES 10, 47, 159(2)(d) AND 232 OF THE CONSTITUTION OF KENYA  
2010

AND

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53, RULE 1, 2 AND 3 OF THE CIVIL PROCEDURE RULES, 2010  
SECTION 1A, 1B AND 3A OF THE CIVIL PROCEDURE ACT, CAP 21

AND

IN THE MATTER OF: THE INTERPRETATION OF THE EXCISE DUTY ACT, 2015 WITH EFFECT  
FROM 1<sup>ST</sup> DECEMBER, 2015 AND ITS IMPLICATIONS ON THE COST OF IMPORTING MOTOR  
VEHICLES

**BETWEEN**

REPUBLIC.....APPLICANT

VERSUS

CABINET SECRETARY, NATIONAL TREASURY.....RESPONDENT

KENYA REVENUE AUTHORITY.....INTERESD PARTY

CAR IMPORTERS ASSOCIATION OF KENYA.....EX PARTE APPLICANT

**RULING**

1. In the Notice of Motion dated 14<sup>th</sup> December, 2015 and filed on 15<sup>th</sup> December, 2015, Car Importers Association of Kenya (the ex parte Applicants), sought two orders, namely –

1. an order of certiorari to bring before this Court for purposes of having quashed the decision made by the Respondent contained in Legal Notice Number 245 of 2015, published in the Kenya Gazette Supplement Number 188 of 27<sup>th</sup> November 2015 appointing 1<sup>st</sup> December 2015, to be the date when the Excise Duty Act, 2015 came force,
2. an order that the Interested Party shall not change the Applicants' custom warehouse charges and other penalties that have accrued while awaiting hearing and determination of this Application
3. that costs of this Application be provided for.

2. The Notice of Motion was premised upon the Statutory Statement and Affidavit Verifying the Facts filed with the Chamber Summons (for leave to commence judicial review proceedings) dated 9<sup>th</sup> December, 2015 and filed on 11<sup>th</sup> December, 2015. In addition it was buttressed by the written submissions of Counsel for the Applicants dated 27<sup>th</sup> January, 2016 and filed on the 29<sup>th</sup> January, 2016.

### The Applicants' Case

3. The Applicants' case may be broken into four segments; **firstly** the Applicants are aggrieved that they would pay extra excise duty on motor vehicles which they had already imported under the old regime of excise duty. **Secondly**, that such payment would amount to retrospective application of law, **thirdly**, that the decision to operationalise the new Excise Act, upon notice of three days, was unreasonable under Wednesbury principles of unreasonableness, and **fourthly**, there was no public participation on determination of the date for operationalisation of the Excise Act 2015.

4. Though the Cabinet Secretary to the Treasury, (the Respondent) did not itself expressly respond thereto, the Notice of Motion was opposed on all these four grounds, by the Interested Party, the agency of the Respondent on implementation of the Excise Duty Act, 2015. The opposition came **firstly**, by way of the Replying Affidavit sworn on 15<sup>th</sup> January, 2015 by one **HADI ABDAULLAHI**, the Chief Manager in the Interested Party's Customs and Border Control Department, appointed under Section 13 of the Kenya Revenue Authority Act, [Cap 469, Laws of Kenya]. **Secondly** the Notice of Motion was also opposed through the written submissions of Counsel for the Interested Party which are both undated and unsigned, but filed on 8<sup>th</sup> February, 2016.

5. Counsel for all the ex parte Applicants, the Respondent and the Interested Party made oral submissions. The issues both from the pleadings, the written and oral submissions which call for determination are these -

- (1) whether the Excise Duty Act, 2015 and in particular the operationalisation thereof had retrospective effect,
- (2) whether the operationalisation of the Excise Duty Act upon a three days notice was so unreasonable that it defied all logics and moral standards of behaviour,
- (3) whether there was public participation and
- (4) ultimately whether the order of certiorari lies to quash the legal notice by which the Excise Duty 2015 was brought into commencement.

6. I will consider each of these issues in turn along with the arguments by each of the respective Counsel. On the question whether the operationalisation of the Excise Duty Act 2015, had a retrospective effect, Counsel for the Applicants referred to Coke's maxims, **lex prospicit non respicit** (the law looks forward, not backward). Counsel reiterated the cardinal principle of construction of statutes is that every statute is *prima facie* prospective, **unless** it is expressly or by necessary implication made to have retrospective operation."

7. Counsel for the Applicants argued quite correctly that the Excise Duty Act, 2015 was enacted in contemplation of the future. However Counsel argued, by operationalizing the Act while the Applicants had their vehicles either in the bonded warehouses or the high seas, the Applicants were caught by the new law which had high rates of taxation and thus made the Applicants motor vehicles more expensive.

8. Precisely, this if an importer is caught by the application of new rates of taxation before he sells his new wares or in this case his motor vehicles, that with respect, does not make the statute retrospective in operation. It is the classic application of the law, whether taxation or other law **in future** and not **non respicit** (not backwards)

9. The ex parte Applicant is an umbrella body, it ought to have been and is deemed to be aware, of process of legislation upto the enactment stage and ought to have advised its members before entering into new agreements.

10. Note should also be taken, that even if the Act were construed to have retrospective effect which is not the case here, the rule against retrospective application of law is not entirely guarded, and in certain cases where the intention of the legislature is clear, as in this case, the provision may be construed to have retrospective effect. Retrospective operation it has been said, “*is not to per se illegal or unconstitutional.*” The question whether retrospective statutory provisions are unconstitutional was considered by the Supreme Court, in the case of **SAMUEL KAMAU MACHARIA & ANOTHER VS. KENYA COMMERCIAL BANK LIMITED & OTHERS (SCK, Appeal No. 2 of 2011 [2012] eKLR**, where the court stated -

**“[6/.] As for non–criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence, are prima facie prospective and retrospective is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature.”**

11. **Francis Bennion** in his seminal work - Statutory Interpretation, 3<sup>rd</sup> Edition page 235 states:-

**“Retrospectively is artificial deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always the power of Parliament to produce such an effect where it wishes to do so its nevertheless undoubted”** (*added emphasis*).

12. This position is well reiterated and codified in Section 9 of the Interpretation and General Provisions Act, (Cap 2 Laws of Kenya) and states –

**“9. (1) Subject to the provision of subsection (3) an Act shall come into application on the day it is published in the Gazette**

**(2)**

**(3) If it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have come into operation on some other day, the Act or as the case may be, that provision shall come or be deemed to come into operation accordingly.”**

13. Subsection (3) above is exactly what happened in this case. The Excise Duty Act 2015 was assented to on 6<sup>th</sup> November 2015. The date of commencement in future was to be by Notice in the gazette. By Legal notice No. 245 of 2015 the commencement date was published on 27<sup>th</sup> November, 2015 as 1<sup>st</sup> December, 2015, three days from the date of publication. It cannot therefore be argued that the Excise Duty Act came into operation retrospectively. I think it is also worth observing that the role of this court is not determine or dictate how the law should or should not apply retrospectively. That is the province of

the legislature as already observed. Our role as the court is limited to the product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedom of the individual. If it (the legislation) does not impinge any provision of the Constitution, it is the honoured duty of courts to give effect to the will of Parliament so that if the legislation provides for retrospective operation the court could well not impugn it solely on the basis that the law appears “unfair” or defects a “*lack of wisdom*” or applies retrospectively.

14. In light of the foregoing therefore questions whether in the circumstances such an application of the law by the Interested Party, contravenes Article 47 (the right for administrative action) of the Constitution of Kenya 2010, cannot fly. That ground therefore fails.

15. The general principles governing the grant of judicial review orders was clearly laid down by **Lord Diplock** in case of the **COUNCIL FOR CIVIL SERVICE UNION & MINISTER FOR CIVIL SERVICE [1985] AC 374 at 401 D** where he stated –

**“Judicial review has I think developed to a stage today when... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call “illegality”, the second “irrationality” and the third procedural “impropriety”... By “illegality” as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. By “irrationality” I mean what can now succinctly be referred to as “Wednesbury unreasonableness ...it applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it. I have described the third head as “A procedural impropriety” rather than failure to observe basic rules of natural justice to act with procedural fairness towards the person who will be affected by the decision.”**

16. It was submitted by Counsel for the Interested Party and supported by Counsel for the Respondent, and with which submission I entirely agree, that unreasonableness is a subjective test and basing a decision on unreasonableness merely places the court at the risk of determining the matter on merit rather than process. To justify interference with the decision the court must be satisfied that the decision must be so grossly unreasonable that no reasonable authority, person or body, addressing itself to the fact and the law would have arrived at such a decision. The decision must be deemed so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. The decision must meet the test of irrationality to come within the principle of *Wednesbury unreasonableness*.

17. In this case it is clear from the Replying Affidavit for the Interested Party that a year or so before tabling the Bill, it was uploaded on the National Treasury website as part of public participation, and various stakeholders including Price Waterhouse Coopers (PWC), the Kenya Association of Manufacturers (KAM), took part in public participation. This fact was reiterated by the Respondent on 11<sup>th</sup> June, 2015 during the Budget Speech.

18. The Bill itself was tabled before Parliament on 11<sup>th</sup> June 2015 via Gazette Supplement No.79 (National Assembly Bills No.28), in line with enactment of laws under the Constitution and through Parliamentary process where a Committee of Parliament, the Departmental Committee on Finance Planning and Trade, spearheaded the process. There is no dispute that the Committee sat and held deliberations and heard concerns and contributions of the public regarding measures being introduced under the Bill. Sight is often lost of the fact that members of the public at large and stakeholders are also represented by Members of Parliament who deliberated on the measures before enactment of the Bill. This is clearly shown in annexure 14A4 to the Interested Party’s Replying Affidavit [National Assembly, Official Report Thursday 27 August – 2015 pages 27 -29, 30 – 33 – 34 – 35]

19. There is no suggestion that during all the material time prior to its enactment the ex parte Applicants were denied opportunity or access to engage members of Parliament or the relevant Committee and iron

out issues of concern and in particular Section 1 of the draft Bill which made provision on how the Bill if enacted would come into operation.

20. The Excise Duty Bill was passed into law in October 2015, and was assented to in November 2015, with the effective date being by Gazette Notice by the Cabinet Secretary to the Treasury, and this was given as 1<sup>st</sup> December, 2015.

21. Clearly the power to set the date of commencement of the Act was prescribed by Section 1 of the Excise Duty Act, 2015; and the Cabinet Secretary duly exercised the power in appointing the date of operation within the prescribed time limits.

22. With profound respect to contrary view, in setting the commencement date, the Respondent Cabinet Secretary's actions cannot be termed as irrational nor can the Interested Party's implementation of the same be termed Wednesbury unreasonableness since both Respondent and the Interested Party followed laid down procedure in the Excise Duty Act.

23. In **REPUBLIC VS. COMMISSIONER OF CUSTOMS & EXCISE & 2 OTHERS ex parte Mastermind Tobacco Limited [2012] e KLR**, where the Applicant was dissatisfied with the mode of computation set out in the schedule, Majanja J, held *inter alia* –

**“Unfortunately, this is not the appropriate forum for addressing the inadequacies of the tax the legislature has enacted.”**

24. In the Indian case of **MAHARASHTRA STATE BOARD OF SECONDARY HIGHER EDUCATION & ANOTHER VS. KURMARSTHETH [1985] LRC**, the Court said –

**“It is exclusively within the province of the legislature and the delegate to determine as a matter of policy, how the provisions of statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievements of the objects and purposes of the Act. It is not for the court to examine the merits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulations...”**

25. Likewise, Majanja in **BIDCO OIL REFINERIES LTD vs. ATTORNEY–GENERAL & 3 OTHERS, Petition No. (177 of 2012)**, held -

**“It is within the authority of the legislature to enact legislation governing the manner in which a particular form of tax is administered including the manner in which it is imposed, calculated and enforced. The arguments made by the Petitioner concern how the customs duty is calculated that is an issue of the Application of the Act, rather than Constitutionality since statutory application is really the issue here, the consideration whether Article 47 (1) has been violated is dispositive. In any case the collection of tax is through the procedures provided by the law cannot at least in the circumstances of this case, constitute an arbitrary deprivation of property. I therefore find and hold that there has been no violation of article 40.”**

26. I agree with the submission of Counsel for Interested Party that concerns raised by the ex parte Applicants about loss of profit are futuristic concerns that are not supported by evidence. I also accept the Respondent's argument that the levying of tax almost always raises concerns of loss of revenue in the business sector, but this apprehension without evidence is neither a ground for nor sufficient reason to warrant the expunging of a tax. If it were so, every tax payer would seek exemption from the tax for one or other reason. The burden of taxation provided for under Article 201 of the Constitution must be embraced and shared by everyone.

27. On the question of whether the bringing into force of the Excise Act 2015 was subject to public participation, the answer must, in my view be in the negative.

28. I am of the view that once public participation was attained throughout the publication of the Act, has passed through the Parliamentary process and details of the Bill are considered by the relevant Committee of Parliament (in this case, the Departmental Committee on Finance, Planning and Trade) and heard contributions from the public, the power to designate the commencement date of the enacted law, is a matter already debated about, and does require a further round of public debate or participation. In this case, the law gave not only the Respondent but any person, such as the Applicants who may have had an interest in or be affected by the commencement of the Act, to remonstrate with the Respondent (the Cabinet Secretary to the Treasury) before the expiration of the three months before the Act came into excess).

29. The Cabinet Secretary would have failed in his statutory duty if he did not designate the commencement date within the three months **before** which the Act specifically gave or mandated him to do. The fact that the Cabinet Secretary designated 1<sup>st</sup> December, 2015 per Legal Notice Number 245 of 2015, publicized in the Kenya Gazette Supplement No.166 of 27<sup>th</sup> November, 2015 does not mean that the ex parte Applicants were given three days notice before the new Act came into force. The ex parte Applicants had entire three months to raise any concerns, they failed to do so.

30. Consequently I find no ground for the contention that the publication by the Minister of the Legal Notice bringing into force the Excise Act, 2015 were unreasonable within the “**Wednesbury unreasonableness**”. Indeed as **Korir J**, found in **REPUBLIC vs. KENYA POWER & LIGHTING Co. LTD & ANOTHER [2012] eKLR**, the Wednesbury principles, place upon the ex parte Applicants a burden or onus to demonstrate that the decision of the Respondent was so absurd that no sensible person could ever dream that it lay within the powers of the authority. Similar sentiments were expressed by the same learned Judge in **REPUBLIC VS. PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & ANOTHER [2012], eKLR**, and by the Court of Appeal in **KENYA PIPELINE COMPANY LTD VS. HYOSUNG FOARE Co. LTD & 2 OTHERS** (Civil Appeal No.145 of 2011).

31. Professor Wade in his treatise **Administrative Law**, 5<sup>th</sup> Edition page 362 cited with approval in the English case of **BOUNDARY COMMISSION [1983] 2 WLR 458, 475**, says *inter alia*

**“The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness in the area which the deciding authority it has genuinely free discretion. If it passes those bounds it acts ultra vires. The Court must therefore resist the temptation to draw the bound too highly, merely according to its own opinion, it must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.”**

32. Indeed as Lord Diplock stated in **COUNCIL OF CIVIL SERVICE UNION VS. MINISTER FOR CIVIL SERVICE [1984] 3 ALL ER 935**, unreasonableness would only arise if it is alleged that the decision arrived at was in defiance of logic and acceptable moral standards. Clearly the operationalisation of the Excise Act, 2015 by Legal Notice No.245 of 2015 was in accordance with legal mandate, conferred upon the Cabinet Secretary by Parliament when it enacted the said Act. The ground of unreasonableness therefore fails.

33. On whether or not the ex parte Applicant is entitled to waiver of customs warehouse rent, Section 34 and 42 of the East African Community Customs Management Act (EACCMA) mandates the Interested Party to collect warehouse rent which begins to accrue when the goods are not removed from the first point of entry.

34. Regulation 85 of the EACCMA Regulations 2010 empowers the Commissioner of Customs to waive such rent.

**“85. The Commissioner may waive the whole or any**

**part of the rent charges.”**

35. It is unclear from the ex parte Applicant’s pleadings whether its members wish to be exempted from paying Customs Warehouse charges and other penalties thereunder. If that its members desire, they ought to follow the laid down statutory procedures and cannot seek a preemptory order of court to compel the Interested Party to abdicate execution of its statutory duty.

36. This principle of following the procedure as laid down by law was well reiterated by the court in the case of **SPEAKER OF THE NATIONAL ASSEMBLY VS. NJENGA KARUME (C.A.C.A. 92 OF 1992)** where the court said:-

**“There is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance presented by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”**

37. It is up to the ex parte Applicants to adhere strictly to the provisions of the law, that is EACCMA Regulations relating Customs Warehouse Rent. The courts will not aid the ex parte Applicants when they ignore the clear provisions of the law.

### **Final Determination**

38. In **TOWER HAMLETS VS. CHETNIR DEVELOPMENTS [1988] 1 AC 858**, the English Court of Appeal, approved Wades comment. In a system based on the rule of law, unfettered governmental discretion is a contradiction in terms.

39. As Lord Fraser stated in **COUNCIL OF CIVIL SERVICE UNION (CCSU) vs. MINISTER FOR THE CIVIL SERVICE [1985] AC 174**,-

**“Whatever then source, powers which are defined, either by reference to procedure for their exercise, or in some other way, and whether the definition is expressed or implied, are ... normally subject to judicial control to ensure that they are not exceeded.”**

40. In the same case **CCSU VS. Minister of Service** (supra), Lord Diplock summarized into three major grounds for such review as **illegality, irrationality and procedural impropriety**. The ultimate decision to grant judicial review remedies is discretionary. The court must not only establish whether any of these grounds exist in the applicable case, but the court must also look at the efficacy of the remedy sought.

41. In the instant case, the Applicant seeks to impugn Legal Notice Number 245 of 2015. However, the new duty rates for motor vehicles were introduced by the Excise Duty Act 2015. Legal Notice Number 245 of 2015 only sought to implement the Excise Duty Act 2015. To quash Legal Notice No. 245 of 2015 would leave the Excise Duty 2015 intact. Long standing judicial opinion is that where what is sought to be quashed is simply the implementation of a decision which decision itself is not sought to be quashed the judicial review remedy of certiorari will not issue. In **MUNICIPAL COUNCIL OF MOMBASA VS. REPUBLIC & UMOJA CONSULTANTS (Civil Appeal No. 185 of 2001)**, the court said –

**“Where a decision is made and its making has been made known to the Respondents who did not challenge the same under 6 months of being made by way of certiorari to have it moved into the High Court and be quashed, it is not open for them to seek to have the Appellant prohibited from implementing the decision as an order of prohibition would normally issue to stop or pre-empt a contemplated action where such contemplated action is either outside the jurisdiction of the decision-maker, or where the decision-maker has evinced an intention to act contrary to law.”**

42. In the present case, an order of certiorari if it lay, (and it does not on the three grounds, illegality, irrationality or procedural impropriety), would not be efficacious either as the principal legislation, the

Excise Duty Act 2015 which introduced the new duty rates (contested by the ex parte Applicant) would remain intact.

43. In the circumstances, the ex parte Applicant's Notice of Motion dated 14<sup>th</sup> December, 2015 and filed on 15<sup>th</sup> December, 2015 has no merit, and is dismissed with a direction that each party bears its own costs. This is essentially public law litigation.

44. It is so ordered.

**Dated, Signed and Delivered in Mombasa this 7<sup>th</sup> day of April, 2016.**

**M. J. ANYARA EMUKULE, MBS**

**JUDGE**

In the presence of:

Miss Ombogo holding brief Gikandi for Applicant

Miss Mbogho holding brief Chabala for Respondent

Mr. Silas Kaunda Court Assistant