



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 233 OF 2012

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW

FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE KENYA REVENUE AUTHORITY ACT CAP 469 LAWS OF KENYA

AND

IN THE MATTER OF THE CUSTOMS DUTY AND EXCISE ACT CAP LAWS OF KENYA

AND

IN THE MATTER OF DUTY PAYABLE ON MOTOR VEHICLES, NOs. KBC 746M,

KBB 494T, KBB 793F, KAW 776H, KAT 644J, KAZ 108S, KBB 181T, KAU

280Z, KAT 953U, KAV 673A, KAX 659N, KAU 283D, KAW 374K, KBB 852X,

KAW 020Q, KBB 192T, KBA 164G, KBB 552A, KBB 559A, KBC 065D,

KAZ 147Z, KAZ 183B, KBC 137G, KBB 419 M, KBA 813A, KBA 546Z,

KAY 280G, KAW 356G, KBA 633N, KAZ 516G, KAW 354G

BETWEEN

LYDIA WANJIRI MATAMBA & 26 OTHERS.....APPLICANT

AND

THE KENYA REVENUE AUTHORITY.....1ST RESPONDENT

COMMISSIONER OF INVESTIGATION & ENFORCEMENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 25th June, 2012, the *ex parte* applicants herein seek the following orders:

1. **That the honourable court be pleased to grant an order of Certiorari to remove into this court for purposes of quashing the decision of the 1st respondent given vide the notice issued in the Daily News Paper of the 21/5/2012 on page 25 of the Nation Daily newspaper directing that the Motor Vehicles Registration Nos. KBC, 746M KBB 494T, KBB 793F, KAW 776H, KAT 644J, KAZ 108S, KBB 181T, KAU 280Z, KAT 953U, KAV, 673A, KAX 659N, KAU 283D, KAW 373K, KBB852X, KAW 020Q, KBB 192T, KBA 164G, KBB 552A, KBB 588A, KBC 065D, KAZ 147Z, KAZ 183B, KBC 137G, KBB 419M, KBA 813A, KBA 546Z. KAY 280G, KAW 356G, KBA 633N, KAZ 615G, KAW 354G have unpaid duty on them.**

2. **That the honourable court be pleased to grant an order of prohibition prohibiting the 1st respondent from impounding, Levying Distress or in any other way interfering with the applicants possession and usage of motor vehicle registration Nos. KBC 746M, KBB 494T, KBB 793F, KAW 776H, KAT 644J, KAZ 108S, KBB 181T, KAU 280Z, KAT, 953U, KAV 673A, KAX 659N, KAU 283D, KAW 374K, KBB, 852X, KAW 020Q, KBB 192T, KBA 164G. KBB 552A, KBB559A, KBC 065D, KAZ 147Z, KAZ 183B, KBC 137G, KBB 419M, KBA 813A, KAY 280G. KAW 356G, KBA 633N.**

3. **That costs of this application be in the cause.**

Ex Parte Applicant's Case

2. According to the applicants, on or about the 21st May, 2012, the 2nd Respondent issued notice through the daily newspaper indicating the applicants' motor vehicles, to be among the motor vehicles that have outstanding unpaid duty. In issuing the said notice, it was indicated that parties who had complaints and/issues to raise the same with the officer of the 1st respondent. However, the Applicants averred that they were never granted an opportunity to be heard but we were only ordered to pay the duty demanded.

3. The applicants disclosed that except for **John Njoroge Njuguna** and **Nancy Muigai** who are the 1st registered owners to both their said motor vehicles, KBB 793F and KWA 776H, all the other applicants are persons who are innocent purchasers for value without notice, having purchased each of their said motor vehicles from persons who had log books in their names and after conducting due diligence prior to transferring the motor vehicles the 1st respondents records indicated duty to have been paid.

4. The applicants averred that the said **John Njoroge Njuguna** and **Nancy Muigai**, with respect to motor vehicle registration No. KBB 793F and KAW 776H, are the direct importers of the said motor vehicles through local motor vehicles dealer, and upon importation of the same, the vehicles were assessed, rated and duty was charged on them which duty was paid in full and was thereafter issued with a log book.

5. To the applicants, it was therefore curious that the 1st respondent having issued log books indicating the duty to have been paid, now the 2nd respondent turns around and issues notice to the effect that the said motor vehicles have unpaid duty on them. It was the applicants' case that the said notice issued by the 2nd respondent is illegal, unjust and against the tenets of natural justice from reasons that.

a. In giving the said notice, the 2nd respondent did not demand the amount in alleged unpaid duty from the applicants as is required under the customs and excise duty act.

b. The respondent has issued log books out for all motor vehicles indicating that duty on the motor vehicles has been paid, thus for them to now demand unpaid duty, the respondents are contravening

their earlier decision.

c. In arriving at the decision, the applicants' were never granted a fair hearing by the 2nd respondent and has now threatened to exercise the right to distress the motor vehicle for the alleged unpaid duty

6. The applicants contended that they are aggrieved by the said decision as all the applicants had at all material times believed that their motor vehicle had no outstanding duty on them and with the unjust and erratic notice issued, the applicants were genuinely apprehensive that their respective motor vehicles risked being distressed for alleged non-payment of duty.

1st and 2nd Respondents' Case

7. As the third Respondent, the Attorney General, was struck out from these proceedings, the only respondents in these proceedings are the 1st and 2nd Respondents who will hereinafter be referred to as the Respondents.

8. The Respondents' case was that following investigations, they discovered that all the vehicles the subject of these proceedings had outstanding tax issues. The Respondents proceeded to particularise the issues affecting each of the said vehicles.

9. Following the said investigation and discovery, the Respondents issued a Notice for the said motor vehicles to be availed together with the relevant documentation for verification pursuant to sections 234 and 236 of the *East African Community Customs Management Act*, 2004 (hereinafter referred to as "the Act").

10. It was the Respondents' case that under section 130 of the Act, it is imperative that the incident of duty is payable on the goods and it is irrelevant to claim unpaid duty on previous owners of the goods.

11. The Respondents therefore contended that they had exercised their decisions in accordance to the Act hence the prayers sought herein ought to be dismissed with costs.

Applicants' Rejoinder

12. In their rejoinder, the applicants averred that though a mis-declaration and unpaid duty is against the Act, the respondents' actions leading to the institution of this suit were totally in contravention and *ultra vires* to the provisions of the said Act.

13. It was their view that whereas the said Act requires that demand is issued to any person the Commissioner finds to be owing any duty *ad volarem*, no demand notice was ever issued to them save for a notice of forfeiture of their our said motor vehicles. This action, it was their contention, amounted to denial of their right to be heard as under the said Act they were entitled to, upon written request, an explanation as to how the custom duty was arrived, a chance that was never granted to them as they only saw a notice demanding the forfeiture of their motor vehicles.

14. The applicants therefore reiterated that the respondents acted *ultra vires* in giving notice for forfeiture of their motor vehicles.

Determinations

15. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the submissions on record, this is the view I form of the matter.

16. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service**

[1985] AC 2 and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

17. The applicants’ case is that the action of the Respondents’ was tainted with procedural impropriety in that no demand was issued pursuant to which the applicants could put forward their cases before the threat of forfeiture of the subject motor vehicles was made.

18. It is now trite that the purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

19. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through the taking into account of an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

20. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

21. With respect to Article 10 of the Constitution which provides for the National Values and Principles of Governance, the University relied on **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**, Civil Appeal 52 of 2014 in which the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

22. In **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** it was held that:

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See Donoghue v South Eastern Health Board [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action*, Thomson Reuters 2nd edition, at page 272, notes that, ‘Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision’...Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including ‘(c) responsive, prompt, effective, impartial and equitable provision of services’ and ‘(f) transparency and provision to the public of timely, accurate information’...Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken; in this case, the Company should in no uncertain terms have received information as to the implication of the letter and the consequences of its failure to make good the payments demanded in the notice. (See Supreme court decision in TV3 v Independent Radio and Television Commission [1994] 2 IR 439)...In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (See Charkaoui v Canada [2007] SCC 9, Alberta Workers’ Compensation Board v Alberta Appeals Commission (2005) 258 DLR (4th), 29, 55 and Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750).”

23. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

24. In Republic vs. The Registrar of Companies Ex Parte Transglobal Freight Logistics Limited Nairobi HCMA No. 711 of 2005, Emukule, J held *inter alia* that:

“Judicial Review, now regulated by Order 53 provides the means by which judicial control of administrative action is exercised, the subject matter of every judicial review is a decision made by some person or body of persons or else a refusal by him to make a decision. To qualify as a subject for Judicial Review the decision must have consequences which affect some person (or body of persons) other than the decision- maker, although it may affect him too. It must affect such other person either (i) by altering rights or obligations of that person which are enforceable in or against him in private law, or (ii) by depriving him of some benefit or advantage which either (1) he has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which has been given an opportunity or (2) he has received an assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”

25. The general position was restated in *Halsbury’s Laws of England Fourth Edition Vol. 1 page 90 para 74* as follows:

“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available.”

26. In Selvarajan vs. Race Relations Board [1976] 1 All ER 12 is at 19 Lord Denning MR observed that:

“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report.”

23. The importance of fair administrative action as a Constitutional right was, was, appreciated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1**, at paragraphs 135 -136 where it was held as follows with regard to similar provisions as our Article 47 of the Constitution relating to just administrative action in section 33 of the South African Constitution:

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

24. The dictates of the Constitution have found their way into the statutory enactment in the form of section 4(3) of the ***Fair Administrative Action Act, 2015***, itself an Act of Parliament enacted pursuant to the provisions of Article 47 of the Constitution which provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

25. In this case, it is clear from the impugned notice that the Respondents believed that the suit vehicles had what the Respondents termed as “outstanding tax issues”. Whereas the notice indicated that the proprietors of the suit vehicles were required to liaise with the officers of the Respondents and avail the said vehicles as well as the relevant documentation or verification, the applicants contend that they were never granted an opportunity to be heard and instead were ordered to pay the duty demanded.

26. In their response the Respondents have not contended that they in fact accorded the applicants a hearing. The Respondents simply contented themselves by asserting that they were empowered by the law to collect the unpaid duty. Whereas I agree with the decision of the Court of Appeal in Mombasa Court of Appeal Civil Appeal No. 157 of 2007 – **The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel**, that if the process of verification would ultimately result in the applicant being required to pay duty and taxes, the Respondent would not lawfully be estopped from exercising its statutory duty and recovering the duty imposed by the law which should have been paid but for the fraud of the importers and that it would be contrary to public policy to shield the applicant through judicial review from operation of the law and

allow him to retain unaccustomed goods contrary to the law, Article 47(1) of the Constitution of Kenya provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

27. In this case, the action of the Respondent was clearly bound to adversely affect the applicants' rights to property under Article 40 of the Constitution and they ought to have been afforded an opportunity of being heard. There is no evidence on record that this was done.

28. However where the Court finds that a person's constitutional rights have been contravened, the remedies available are not limited to the ones specified under Article 23 of the Constitution.

27. Article 23 of the Constitution provides that a court "may grant appropriate relief, including a declaration of rights" when confronted with rights violations. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Section 11 of the **Fair Administrative Action Act, 2015** provides as follows:

(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in a particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

28. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision.

29. In my view to grant the orders sought herein in the manner sought would curtail the powers of the Respondent to collect any taxes due from the applicants and to do so would be outside the jurisdiction of this Court sitting as a judicial review Court.

Order

30. In the premises the orders that commend themselves to me and which I hereby grant are as follows:

1. An order of Certiorari removing into this Court for purposes of quashing the decision of the 1st respondent given vide the notice issued in the Daily News Paper of the 21/5/2012 on page 25 of the Nation Daily newspaper directing that the Motor Vehicles Registration Nos. KBC, 746M KBB 494T, KBB 793F, KAW 776H, KAT 644J, KAZ 108S, KBB 181T, KAU 280Z, KAT 953U, KAV, 673A, KAX 659N, KAU 283D, KAW 373K, KBB852X, KAW 020Q, KBB 192T, KBA 164G, KBB 552A, KBB 588A, KBC 065D, KAZ 147Z, KAZ 183B, KBC 137G, KBB 419M, KBA 813A, KBA 546Z. KAY 280G, KAW 356G, KBA 633N, KAZ 615G, KAW 354G have unpaid duty on them and that decision is hereby quashed

2. An order of prohibition prohibiting the 1st respondent from impounding, Levying Distress or in any other way interfering with the applicants possession and usage of motor vehicle registration Nos. KBC 746M, KBB 494T, KBB 793F, KAW 776H, KAT 644J, KAZ 108S, KBB 181T, KAU 280Z KAT, 953U, KAV 673A, KAX 659N, KAU 283D, KAW 374K, KBB, 852X, KAW 020Q, KBB 192T, KBA 164G. KBB 552A, KBB559A, KBC 065D, KAZ 147Z, KAZ 183B, KBC 137G, KBB 419M, KBA 813A, KAY 280G. KAW 356G, KBA 633N based on the aforesaid decision.

3. As the issue of the full settlement of the duty remains unresolved, there will be no order as to costs.

31. Orders accordingly.

Dated at Nairobi this 7th day of December, 2016

G V ODUNGA

JUDGE

Delivered in the presence of;

Mr Lemiso for Mr Twahir for the 1st Respondent

CA Mwangi