



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

**Misc Appli 589 of 2007**

**JOHN MUCHWANDA CHITALA.....APPLICANT**

**Versus**

**THE COMMISSIONER OF CUSTOMS EXCISE & TWO OTHERS...RESPONDENT**

**JUDGMENT**

John Muchwanda Chitala brought this Judicial Review application against the Commissioner of Customs and Excise, The Registrar of Motor Vehicles and the Kenya Revenue Authority seeking the following orders-

- (a) An order of certiorari to quash the decision of the Customs Services Department of Kenya Revenue Authority as conveyed by the letter Ref No. KRA/CUS/NIB/C/051/04 dated 18<sup>th</sup> December 2006, signed by D.M. Njuguna;
- (b) Prohibition to prohibit the Respondent from unlawfully enforcing or administering as against the Applicant, the provisions of the East African Community Customs Management Act, 2004 (hereinafter referred to the EACCM ACT) in relation to the motor vehicle Registration No. KAK 911 N Kia Sportage Chasis No. 5409582 Engine No. 717/74;
- (c) Prohibition to prohibit the Respondents from unlawfully enforcing or administering as against the Applicant the provisions of the Customs and Excise Act Cap 472 Laws of Kenya in relation to the Motor Vehicle Reg. No. KAK 811 N Kia Sportage Chasis No. 5409582 Engine No. 717/74;
- (d) Mandamus to compel and require the Respondent to impose, levy and collect from Kingsway Motors (K) Ltd the import duty, Excise duty, VAT and import Declaration Form (IDF) fee payable in respect of Motor Vehicle KAK 911 N;
- (e) Mandamus to compel the 2<sup>nd</sup> Respondent to process the application by John Muchwanda Chitala and register him as the lawful owner of motor vehicle Reg. KAK 911 N;
- (f) Mandamus to direct and compel the 2<sup>nd</sup> Respondent to reconstitute to the Applicant the Registration (Log) Book lodged on 29<sup>th</sup> June 2001 showing that the Applicant is the lawful owner of motor vehicle Reg. No. KAK 911 N.

The application is supported by a statement dated 10<sup>th</sup> April 2007, a verifying affidavit dated 12<sup>th</sup> April 2007 and skeleton arguments filed in court on 22<sup>nd</sup> January 2008 plus a list of authorities. The Applicant was represented by Mr. Amolo, Advocate. The Notice of Motion was opposed and Antony Mungai

Njuguna, an Assistant Commissioner in the Investigations and Enforcement Department of Kenya Revenue Authority swore an affidavit on 12<sup>th</sup> February 2008 and a further replying affidavit dated 6<sup>th</sup> January 2009, written submissions filed in court on 12<sup>th</sup> February 2009 and was represented by Rosalie Ngugi, Advocate.

Briefly, the factual background of this case is that sometime in March 2001 the Applicant bought motor vehicle KAK 911 N, Kia Sportage at a price of Kshs.760,000/= from Castle Breweries Kenya Ltd. (CBK Ltd). Payment was by cheque (JMC 1.). He was given the original Log Book and the Transfer form was duly signed by CBK (JMC II). He lodged the logbook with the 2<sup>nd</sup> Respondent on 29<sup>th</sup> June 2001 (JMC III) and was issued with a receipt. The 2<sup>nd</sup> Respondent did not effect the transfer for reasons that the necessary duty had not been paid. The Respondent communicated that decision to him in the letter dated 12<sup>th</sup> September 2001 (JMC IV). Upon inquiry from CBK Ltd, he was informed that the vehicle had been imported by Kingsway Motors in the year 1998 and was referred to the said Kingsway Motors to avail the necessary documents but Kingsway Motors declined to deal with the Applicant. On 14<sup>th</sup> June 2009, the 1<sup>st</sup> Respondent issued a seizure notice and took away the vehicle. (JMC VI). The Applicant has tried to explain to the Respondent his peculiar case in that CBK Ltd wound up its business in Kenya but it has fallen in a deaf ear. He filed a civil suit against the Respondents but withdrew it when he realized it was futile. He engaged Kingsway Motors who informed him that Kingsway Motors had taken advantage of Tax Amnesty and settled all their tax liability (JMC X). That the KRA had given a tax Amnesty in 2004. Kingsway Motors declined to give him any document as proof that tax was paid.

Further tax Amnesty was published in 2006 and he submitted his request but instead a demand for tax of Kshs.412,650/= was made (JMC XI). According to the Applicant the price paid by CBK Ltd to Kingsway Motors included all taxes and in any event he is not the person liable to pay tax or duty on the vehicle. That the demand is unlawful as the Customs & Excise Act requires that Kingsway Motors, the importers be liable to pay duty. That in any event, when the vehicle was sold to him there was no indication in the log book that duty was owed and its due to the Respondents negligence, indolence that duty had not been paid and it should not be visited on him.

In addition Mr. Amolo submitted that under Section 15 of the Customs & Excise Act, once it is established that duty has not been paid by the owner of the goods the duty of Kenya Revenue Authority to recover by way of an action or suit. Under S 122 of the Act, it is a recoverable debt due to the Government. That the owner of the vehicle is not the Applicant and the Applicant is not the owner under the Act. He urged that the vehicle is duly registered in Kenya and the question is why they registered it when duty was not paid. That it was upto the Respondent to demonstrate that it is the responsibility of the Applicant to pay the tax. He also urged that by the time the vehicle was imported, EACCM Act, 2004 was not yet in force and the Respondents wrongly applied it against the applicant.

Mrs. Ngugi urged the court to dismiss the ex applicant's Notice of Motion for the following reasons; That after seizure, an application for amnesty was made by one Damaris Kimuhu and was rejected because she was not known to the Respondents and the vehicle was over 8 years old. That under S 210 of EACCM Act, goods liable for forfeiture are unaccustomed goods and the Respondent had the power to seize under S 213 of the Act as no duty had been paid. That under S 223 of EACCM Act, the onus of proving that duty was paid lies on the person alleging so and that a 2<sup>nd</sup> ownership does not extinguish the duty of one to pay tax. That under S 130, the owner of goods includes a person in possession. That S 10 (b) of the Traffic Act also forbids the registration of a vehicle which is unlawfully imported and that in any event S 5 (2) A (ii) mandates the Respondent to enforce all written laws in Part 1 and 2 of the Kenya Revenue Authority Act, Cap 469.

Counsel also urged that even though the logbook had been issued to CBK Ltd, that cannot bar the Respondent from exercise of its lawful duties and that there cannot be an estoppel against exercise of statutory powers. For that proposition the Respondent relied on the case of **MARITIME ELEC CO. V GEN. DIARIES LTD (1937) 1 ALL ER 748** and **ABERDARE FREIGHT SERVICES V KRA. (2004) 2 KLR 530**.

Counsel denied that EACCM Act was being applied retrospectively because the impugned letter was issued on 18<sup>th</sup> February 2006 whereas the EACCM Act had commenced on 1<sup>st</sup> January 2005. Counsel submitted that none of the orders sought can issue because the Respondents acted legally. In addition, certiorari cannot issue because the Applicant has not sought to have the seizure notice quashed and that mandamus cannot issue because it does not lie to direct how the public duty is to be performed.

I have now considered the pleadings before this court, the submissions by both Counsel. At issue in this matter is the payment of import duty to the Respondent in respect of motor vehicle KAK 911 N which the Applicant purchased from Castle Breweries Ltd. It seems not be in dispute that duty has not been paid in respect of the said vehicle. According to the facts, the vehicle was brought in duty free by Kingsway Motors, who sold it to Castle Breweries who in turn sold it to the Applicant. The Applicant at paragraph 19 of his verifying affidavit admitted to having applied to the Respondent for amnesty in late 2006 but instead the Respondent demanded tax of Kshs.412,650/= under the letter dated 18<sup>th</sup> December 2006. The issues here are who was supposed to pay the duty, the former owners or the Applicant, which law was applicable to payment of the duty, the Customs & Excise Act or the EACCM Act, 2004; whether the Respondent is estopped from claiming duty having registered the motor vehicle; can the orders issue and lastly who pays the costs.

The importer of this subject vehicle was Kingsway Motors who bought it duty free. It was later sold to Castle Breweries Ltd and registered without payment of duty, the question that will be considered is whether the vehicle having been registered, can the Applicant be called upon to pay the duty? It is the Applicant's contention that the person who imported the goods is the one liable to pay the duty and that was Kingsway Motors.

At this stage may be I should clarify which law is applicable. Whereas the Applicant invokes the Customs and Excise Act Cap 470 Laws of Kenya, the Respondents were invoking the EACCM Act 2004. Though the said vehicle was imported before 2001 and the EACCM Act only commenced on 1<sup>st</sup> December 2005, the cause of action herein arose 18<sup>th</sup> December 2006 the date that the impugned letter was written. The law applicable is therefore the EACCM Act. S 253 of the EACCM Act provides that this Act takes precedence over the partner states law with respect to any matter to which its provisions relate. In the instant case therefore, S 2 & 122 of the Customs & Excise Act on which the Applicant relies are not applicable to this matter. In the EACCM Act, the definition of the word owner under S 2 which is the interpretation section, is similar to that in the Customs & Excise Act. It reads as follows:

**“Owner in respect of**

- (a) An aircraft, vessel or vehicle include every person acting as agent for the owner, or who receives freight or other charges payable in respect of, or who is in possession or control of the aircraft, vessel or vehicle;**
- (b) Goods, includes any person other than an officer acting in his or her official capacity being or holding himself or herself out to be the owner, importer, exporter, consignee, agent or the person in possession of or beneficially interested in, or having control of or power of dispensation over the goods;**

In the context of that Section the Applicant is an owner of the disputed motor vehicle. He had purchased it and was seeking registration as an owner. In fact that is one of the prayers he seeks.

The other issue raised by the Applicant is that it is the Respondent who had registered the motor vehicle even before duty was paid and he is an innocent purchaser from Castle Breweries. However, Section 217 of the EACCM Act which deals with the process of seizure of goods provides that the process shall not in any way be affected by the fact that any owner of the things seized was not in any way concerned with the act that rendered him liable to forfeiture.

In this case, the fact that the Applicant may not have been aware that duty had not been paid on the vehicle did not exonerate him from the duty to pay duty. And I also do agree with the Respondents

submission that there cannot be an estoppel against a public authority's exercise of its statutory powers or provisions of law even in the face of an error (See **ABERDARE CASE (supra)**). In the EACCM Act, there are clear provisions that duty must be paid on dutiable goods and the fact that the vehicle had been registered does not bar the Respondents from claiming duty. It must be that somebody acted contrary to the law in having it registered.

The seizure notice had been issued under the Customs & Excise Act, S 196. That section provided for circumstances under which goods could be liable to forfeiture and that included unaccustomed goods. Under S 2 of that Act Cap 472 Laws of Kenya, unaccustomed goods are dutiable goods on which the full duties have not been paid or any goods dealt with otherwise than in accordance with the Act. Under the EACCM Act, S 210 provides for the goods which are liable to forfeiture and they include unaccustomed goods and goods in respect of which incorrect or false declarations have been made. S 2 of the EACCM Act defines unaccustomed goods like Cap 472 does.

S 213 of the EACCM Act then gives the Respondent the mandate to seize and detain goods which are liable to forfeiture or goods liable to seizure. In this case, there was outstanding duty that had remained unpaid and the vehicle was liable to seizure. It seems that duty attached to the vehicle and not the owner because an owner can change. Once duty was not paid, whoever becomes the owner would be liable to pay. If the registration of the Castle Breweries as the owner was illegal, the Applicant would need to pay the duty to mitigate his loss and then follow up Castle Breweries or Kingsway Motors.

Can the orders sought lie? An order of certiorari is sought to quash the letter of 18<sup>th</sup> December 2006 demanding duty. This court has found that the Respondents have acted within the law in demanding duty which had not been paid on the motor vehicle. The court has also found the applicable law to be the EACCM Act not the Customs & Excise Act. There is nothing unlawful or illegal about the letter dated 18<sup>th</sup> December 2006. An order of certiorari lies to quash a decision made without or in excess of jurisdiction or where rules of natural justice have been breached. In the instant case, the decision of the Respondent was made within the law and the Applicant has not established grounds for the grant of the said orders.

Besides, as properly observed by the Respondents, even if the court were to grant the said order it would not serve any purpose because the Applicant has not sought the quashing of the seizure notice. The Applicant did not seek to have quashed all consequential actions to the decision made on 18<sup>th</sup> December 2006. It would be futile quashing the decision while the action taken after the decision was made still remains.

The Applicant also seeks to compel the Respondents to collect the duty from Kingsway Motors and process the application by the Applicant to be registered as the owner of the vehicle. An order of mandamus compels the performance of a statutory duty which the public officer or body has refused or neglected to perform. However, the public body or public officer cannot be directed on how the duty should be performed. The discretion on how the duty is to be performed remains with the public body or officer. The Respondent has demanded duty from the Applicant and the Applicant cannot ask the court to demand it from another person. If anything it is for the Applicant to pay then pursue the third party see **KNEC V REP CA 266/96** on the scope and efficacy of an order of mandamus.

An order of prohibition issues from the High Court directed and at an inferior tribunal to forbid it from continuing proceedings or acting in excess of jurisdiction or in contravention of the law. In the instant case, the court has found that the Respondent was carrying out its mandate under the law and there is no reason to stop it by an order of prohibition.

The upshot is that none of the orders of Judicial Review can issue. The application is dismissed with the Applicant bearing the costs.

Dated and delivered this 7<sup>th</sup> day of July 2009.

R.P.V. WENDOH

JUDGE

**Present**

Mr. Twahir holding brief for Mr. Ngugi for the Respondent

Muturi: Court Clerk