IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 89 OF 2007

TRANSOUTH CONVEYORS LIMITED …..……...…… APPELLANT

AND

KENYA REVENUE AUTHORITY ……..…..……. 1ST RESPONDENT

KENYA SUGAR BOARD ……2ND RESPONDENT

MAT INTERNATIONAL LIMITED ……....……..…….. 3RD RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 92 OF 2007

BETWEEN

STUNTWAVE LIMITED ……..…….……...……. APPELLANT

AND

KENYA REVENUE AUTHORITY –

COMMISSIONER OF CUSTOMS SERVICES..….1ST RESPONDENT

KENYA SUGAR BOARD …...…… 2ND RESPONDENT

(Appeal from the judgment and decree of the High Court (Constitutional and Judicial Review Division) at Nairobi given by (Mathew Emukule J.) on 30th March 2007

in

MISC. C.A. NO. 120 OF 2007 CONSOLIDATED WITH MISC. C. APP. NO. 136 OF 2007

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JUDGMENT OF THE COURT

These two consolidated appeals are part of a series of matters which have come to this Court, in what was described by this court, in **Aberdare Freight Services Ltd v. Kenya Revenue Authority Civil Appeal No. 263 of 2004**, and **Kenya Sugar Board v. Transouth Conveyors Ltd**, **Civil Application**

NAI. 101 of 2005 (UR) as the "*sugar wars*".

The first appeal to wit Civil Appeal No. 89 of 2007, is by Transouth Conveyors Ltd, which we shall hereafter refer to as the 1st appellant. There are two respondents, Kenya Revenue Authority (1st respondent) and Kenya Sugar Board (the 2nd respondent). MAT International Limited, was named as interested party, but in the course of hearing the appeal we did not appreciate why it sought to be heard considering that no orders adverse to it were made in the order appealed against. So we declined to hear it.

The second appeal was assigned No. 92 of 2007, and is by Stuntwave Limited, and the 1st and 2nd respondents, above, are also the respondents in that appeal. Stuntwave Limited shall hereafter be referred to as the 2nd appellant except where the context otherwise permits.

Both appellants commenced proceedings in the superior court Nairobi under O.L III of the Civil Procedure Rules. Pursuant to the leave granted by that court each appellant took out a motion praying for orders of certiorari, prohibition, and mandamus. The basis of their respective suits were notices published in local dailies, namely the Standard newspaper of 2nd February 2007, the Kenya Times and Daily Nation of 6th February 2007 respectively, in which the Commissioner of Customs directed that the effective date of importation of 2007/2008 sugar quota to be imported duty free from the Common Market for Eastern and Southern Africa (COMESA) Free Trade Area would be 1st March 2007 and not 1st February 2007 as earlier on published by the 2nd respondent in a Kenya Gazette Notice (No. 296 of 11th January 2007) and consequential decisions of those notices. The appellants did not think the Commissioner of Customs or indeed Kenya Revenue Authority under which the Department of Customs fell had the power and jurisdiction to fix the dates within which to import sugar duty free in view of the provisions of Section 118 of the Customs and Excise Act, Cap 472 of the Laws of Kenya, a view the superior court did not share and hence these consolidated appeals. First we consider it essential to set out the background facts.

By the Treaty establishing The Common Market for Eastern and Southern Africa (under the Treaty), signed by Kenya, among other countries on 8th December, 1994, a provision was made, to wit **Article 61** to provide for safeguards for the protection of the local economies of the member states for limited periods and the procedure for taking advantage of the safeguard provisions. Pursuant to that article, Kenya presented in March 2003, a case to the Council of Ministers for the extension of the duration of the safeguard measures, *"in view of the status of the sugar industry and the threat posed by duty free sugar imports from the COMESA FTA."* It specifically asked for a five year extension as well as the reduction of the scheduled quota of imports to Kenya from 200,000 to 75,000 metric Tonnes of Sugar. The Council of Ministers approved a limited extension but declined a reduction prompting the country to renew its request for an extension of a 4 - year remedial safeguard period and that duty free imported sugar "***be sustained at 200,000 metric tonnes apportioned as follows, 111,000 metric tonnes of refined sugar for industrial use, and 89,000 tonnes of domestic sugar, from 1st January 2004 up to 31st December, 2007."***

The COMESA intergovernmental Committee approved the request on 28th November, 2003 at Lusaka, Zambia. But that approval could not be acted upon unless it was domesticated pursuant to the provisions of section 118, aforesaid, which provides as follow:

"118 The Minister may from time to time by notice in the Gazette declare that arrangements specified in the notice being arrangements that have been made between the Government of Kenya and another government with a view to the mutual relief of duty, shall , notwithstanding section 117, have effect in relation to duty and the notice shall, subject to the provisions of this section, have effect according to its tenor."

Section 117 provides for the imposition of rates of duty on various imported items. In pursuance of section 118, above, the Minister for Finance published in the Kenya Gazette Legal Notice No. 12 of 1st

March 2004 in order to domesticate the arrangements Kenya had made with COMESA on 28th November 2003. The notice as material read as follows:

"LEGAL NOTICE NO. 12

THE CUSTOMS AND EXCISE ACT

MUTUAL TARIFF CONCESSIONS – COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA).

IN EXERCISE of the powers conferred by section 118 of the Customs and Excise Act, the Minister for Finance declares that the duty payable on all goods imported from member states of the Common Market for Eastern and Southern Africa specified in the first column of the schedule hereto, shall be reduced by the percentage respectively specified in the second column of the schedule, on condition that such goods meet the rules of origin of the Common Market for Eastern Africa as contained in the COMESA Treaty;

(a) ….

(b) Where the goods imported consist of refined raw and mill white sugar, this notice shall, pursuant to Article 61 of the COMESA Treaty apply only in respect of a maximum of 111,000 metric tonnes of white refined sugar per annum and 89,000 metric tonnes of other sugar per annum, being the total amount, imported into Kenya from any or all of the member states, and any quantities imported in excess of that amount shall be subject to 100% import duty and other levies of equivalent effect; and

(c) Unless advised otherwise, the provisions of this legal notice shall expire –

(i) …..

(ii) By the end of February, 2008, in the case of items (b) above."

The notice concludes by giving a schedule of the member states and the percentage reduction of duty for each state.

It is quite clear that there was a delay of two months in publishing the notice. During the hearing of the appellants' suits before the superior court issues were raised concerning this delay, but for purposes of these appeals, nothing much turns on those delays as the sugar which is the subject matter of these appeals was imported in 2007 and not 2004. It is quite clear that L.N. NO. 12 of 2004 did not give the commencement date of those imports which counsel appearing in these appeals referred to as the *sunrise date*. The last date is given as end of February, 2008, and if indeed the Legal Notice was given pursuant to the arrangements of 28th November, 2003, the then Minister for Finance had no right to exceed the agreed sunset date of 31st December, 2007. The approved duration was not for any four years, but the period of four years with effect from 1st January 2004 upto 31st December, 2007.

Misunderstandings between the parties herein set in when Gazette Notice No. 296 of 2007 dated 12th January 2007, was published by the Chief Executive Officer of the Kenya Sugar Board. The Kenya Sugar Board is a body which was established pursuant to the provisions of **section 3** of the Sugar Act, Act No. 10 of 2001, as a body corporate and as the successor of the Kenya Sugar Authority. The objects and functions of that Board are spelt out under **section 4** of the same Act, the major functions being: to regulate, develop and promote the sugar industry; co-ordinate the activities of individuals and organizations within the industry; facilitate equitable access to the benefits and resources of the industry by all interested parties. **Section 27** of the Act specifically provides in that regard as follows:-

"27 (1) subject to such regional and international trade agreements to which Kenya is a party, all

sugar imports into the country shall be subject to the prevailing import duties, taxes and other tariffs and <u>such imports shall be controlled by the Board</u> (Emphasis supplied)

(2) The Government shall introduce other safeguard measures as may be necessary to protect the industry from unfair trade practices."

It would seem to us that Gazette Notice No. 296 of 2007, was published on the basis of this provision. Regulation 6(1) of the Sugar (Imports, And By-Products) Regulations, 2003, provides that the Board shall determine annually the amount of refined sugar required for local consumption taking into account the shortfall in the domestic production. These regulations accord with the intendment and tenor of that section. The aforesaid Gazette Notice cites this regulation and Legal Notice No. 12 of 2004, part of which we earlier reproduced.

The relevant part of that notice for purposes of these appeals, provides as follows:-

" In Exercise of the powers conferred by Regulation 6 … and pursuant to the provisions of Legal Notice No.12 of 2004, the Kenya Sugar Board notifies all registered importers who wish to import quantities of sugar during the year 2007 under COMESA safeguard Regulations as specified below:

(a) Raw/Mill white sugar

All registered importers of raw/mill sugar shall import up to a maxium of 89,000 metric tones duty-free from COMESA FTA countries and such quantities shall be imported over the period 1st February, 2007 to 28th February, 2008.

Imports of any quantities over and above 89,000 metric tones shall be subject to 100% customs duty.

(b) White refined sugar (For Industrial use)

Registered importers of white refined sugar for industrial use shall import upto a maximum of 111,000 metric tones duty free from COMESA FTA countries over the period 1st February, 2007 to 28th February 2008.

Imports of any quantities over and above 111,000 metric tones shall be subject to 100 % customs duty.

…

Dated 11th January 2007

A.O. Otieno

Chief Executive Officer

Kenya Sugar Board."

It should be noted that, apart from the sunset date the Gazette Notice, in effect, reproduced, the wording of the approved arrangement between Kenya and COMESA , and it also followed the wording of Legal Notice No. 12 of 2004. For the period of importation namely 2007, Kenya Revenue Authority did not think the Kenya Sugar Board had any role to fix the dates. Hence its notices which are the subject matter of these appeals. The notices in all the daily papers were identical and a reproduction of one only will suffice. It read as follows

"<u>Sugar Importation from COMESA</u>

Kenya Revenue Authority wishes to bring to the attention of the general public and sugar importers in particular that the effective date of importation of the 2007/2008 sugar quota to be imported duty free from the Common Market for Eastern and Southern Africa (COMESA) Free Trade Area will be 1st March 2007 in accordance with Legal Notice No. 12 dated 28th February 2004 and not 1st February 2007, as earlier published by the Kenya Sugar Board in the Kenya Gazette Notice No. 296 dated 11th January, 2007.

Please be guided accordingly. Commissioner of Customs."

It was contended on behalf of the appellants that the publication of the above notices was mischievous and in bad faith in view of the provisions of **section 118** of the Customs and Excise Act, and **section 27** of the Sugar Act, none of which provisions, authorize the Minister for Finance to fix the period of importation of sugar duty free. Mr. Nowrojee who with Mr. Asige appeared for the 2nd appellant as also Mr. Mwenesi who with Mr. Mogaka appeared for the 1st appellant addressed us at length on among other issues, the interpretation to give to both sections 118 and 27, above. Before we deal with those submissions it is essential to give in resume form the facts and circumstances which provoked the suits before us.

Both appellants were as at 1st March 2007, registered sugar importers with necessary licences issued by the 2nd respondent. It was their respective cases that following the publication of Gazette Notice No. 296 of 2007, they caused to be imported certain specified quantities of sugar expecting that no duty would be levied on it. In doing so they believed that the effective date of the importation would be 1st February, 2007. However, while the sugar was in transit the notices in the daily papers were published stating that all sugar imported prior to 1st March 2007 would attract 100% duty. So when the sugar arrived in the country on, 11th February 2007, in the case of the 1st appellant and 9th February 2007, in the case of the 2nd appellant, KRA could not clear the sugar duty free. These among other suits were thus provoked.

The appellants' respective cases are simple. The 2nd respondent had the legitimate authority and power to publish Gazette Notice No. 296 of 2007, on the basis of which they imported sugar expecting that no duty would be payable. The Newspaper notices which were published by the 1st respondent were therefore unlawful, illegal, *ultra vires* the powers and statutory functions of the 1st respondent, an abuse of power, unreasonable and were published in bad faith. It was submitted on their behalf that the Minister for Finance had no power to alter the dates agreed upon between Kenya and COMESA.

The 1st respondent filed a replying affidavit sworn by Mr. Joseph Kinyua, the Permanent Secretary in the Ministry of Finance who deposed that the sunset date for the importation was 28th February 2008, and that it was the practice to start importing sugar on 1st March of each year during the safeguard period, namely between 2004 and 2008. He implied that as the issue between the parties related to payment of duty it was within the powers of the Minister for Finance to fix the commencement date as he did.

The 2nd respondent's position was simple. No sugar imports could be made without a Gazette Notice from it, similar to Gazette Notice No 296 of 2007. Legal Notice No. 12 of 2004 was initiated by it and its effect was to set the sunrise and sunset days leaving the commencement dates for the sugar imports duty free to the regulator of sugar imports. That is why the said Legal Notice did not mention any commencement date. In a replying affidavit sworn by its Chief Executive Officer Mr. Otieno, it was deponed on its behalf that 1st February 2007, was arrived at after due consultations with stakeholders. It was its case that sugar importers who imported sugar acting on the basis of Gazette Notice No.296 of 2007, were entitled to the duty free benefit.

In the course of the hearing of the appellants' respective matters it came to light that KRA has been unhappy with the provisions of section 27 of the Sugar Act, which vests the power in the Kenya Sugar Board to control sugar imports. In the Finance Bill 2006, the Minister For Finance, had proposed an amendment to that section by deleting the words:

"*and such imports shall be controlled by the Board*." It was on the basis of this that the appellants' respective counsel submitted that the publication of the impugned notices in the daily papers was in bad faith, capricious and lacking in fairness and rationality.

The prayers in the appellants' respective motions were, as we stated earlier, in general terms the same. These were:

(1) An order of certiorari to remove into the High Court for quashing the decision of KRA contained in the newspaper notices carried in the Standard Newspaper of 2nd February 2007, Kenya Times and Daily Nation of 6th February 2007 directing that the effective date of importation of 2007/2008 sugar quota to be imported from the COMESA Free Trade Area be 1st March 2007 and not 1st February 2007 as published by the 2nd respondent in the Kenya Gazette Notice No. 296 dated 11th January 2007, and consequential decisions in the same notices.

(2) An order of prohibition prohibiting the 1st respondent from levying customs duty or any other charges on 5000 Metric tonnes of sugar imported from COMESA Free Trade Area into the country by each of the appellants after 1st February 2007 and a further order prohibiting the 2nd respondent from withdrawing Gazette Notice No. 296 of 2007 or publishing a contrary notice.

(3) An order of mandamus compelling KRA to process the sugar in question in terms of Gazette Notice No. 296 of 2007 and to release the sugar to the appellants free of any charges that would have accrued pending disposal of the applications.

The appellants' applications were heard by Emukule J. In a ruling erroneously titled as "*judgment,*" delivered on 30th March 2007 which also dealt with an application by Commodity House Ltd of similar nature, the major issue he framed for determination was: who between the Minister for Finance and Kenya Sugar Board had the power to control sugar imports and whether in that regard the Minister had the power to fix or vary the effective date of the importation of sugar duty free. He held, firstly, that Legal Notice No. 12 of 2004 of 2004 set the sunrise and sunset dates of importing sugar duty free and the same having been published by the Minister for Finance he and not Kenya Sugar Board had power over matters relating to fiscal or monetary regime in Kenya. Secondly, that the press announcements were not decisions capable of being quashed by an order of certiorari as they were merely published as a general information to the public of the existence of L.N. NO. 12 OF 2004. Thirdly, that Gazette Notice No. 296 of 2007 did not and could not revoke L.N. NO. 12 of 2004, and was published by Kenya Sugar Board without legal authority or jurisdiction, served no useful purpose and was capable of causing confusion, chaos and anarchy in the sugar industry. Fourthly, that KRA did not alter the commencement date of the importation duty free of sugar, by its press announcements from 1st February 2007 to 1st March, 2007. Fifthly, that the court could not prohibit that which Parliament had sanctioned. Lastly, that mandamus could not issue as no statutory duty is imposed upon the Minister for Finance or KRA which had not been performed. He consequently declined to grant the orders prayed for and dismissed all the applications with costs and thus provoked these appeals.

The memoranda of appeal raise issues principally attacking all the foregoing holdings. Determination of those appeals largely depends on what interpretation to give to sections 118 of the Customs and Excise Act, and 27 of the Sugar Act. We earlier reproduced both sections. It cannot be gainsaid that section 118 above was meant to deal with safeguard measures the country may from time to time wish to take to deal with economic downturns in the country caused by various circumstances foreseeable or otherwise, among them duty free imports. In the matters before us, there was sugar shortage in the country and to alleviate the shortage a limited amount of sugar had to be imported duty free. Mr. Otieno, the Chief Executive Officer of the Kenya Sugar Board deposed in replying affidavits he filed stating that in or about 2003 Kenya was experiencing a sugar shortage and the shortfall could only be met through importation.

The proposal leading to the agreement entered into between Kenya and COMESA on 28th November 2003 was made by the Government of Kenya. It is such an agreement which is envisaged under section

118 – above. That agreement satisfied the first pre-condition under section 118. The second condition imposed by the section is that the Minister for Finance has to publish a notice in the Kenya Gazette, which he did on 1st March 2004, to wit Legal Notice No. 12 of 2004. An issue was raised by counsel appearing for the appellants regarding not only the delay in publication but also on the correctness of the sunset date. We reproduced the Legal Notice earlier. What is clear from it is that it did not accord with the wording of section 118. The section requires that a notice be published declaring the arrangements entered into between the Government of Kenya and another government. The word "declare" as defined in the Concise Oxford English Dictionary 9th Edition means to announce openly or formally. That is the ordinary meaning of the word. As used in section 118, it is not used in a technical sense but in the ordinary sense. That then means that the section requires that the Minister for Finance announce to the general public the arrangements agreed upon between the Kenya Government and a foreign government or governments.

We agree with Messrs. Nowrojee and Mwenesi that the Minister acted outside his powers under the section when he specified a date other than 31st December 2007, as the sunset date, as it was not the date agreed upon between the Government of Kenya and COMESA. It is our view that the second precondition was satisfied but not as required by the relevant section.

It is noteworthy that section 118, above, does not specify what would follow after the aforesaid preconditions have been satisfied. Emukule J. seemed to think that as the arrangements between Kenya and COMESA, related to fiscal matters then the Kenya Sugar Board had no business in the matter. It is however clear that Parliament by enacting section 118, did not want to clothe the Minister for Finance with more power than is donated by that section. Otherwise express words would have been used to make that clearer. Besides if Parliament had intended to give the Minister power to control importation of sugar, the same Parliament would not have enacted section 27 of the Sugar Act. That section must of necessity be read with section 118. Section 27, donates the power to the Kenya Sugar Board to control imports of Sugar. But this is made subject not only to international trade agreements, like the one Kenya signed with COMESA on 28th November, 2003, but also subject to the prevailing import duties, taxes and other tariffs.

Legal Notice No. 12 of 2004, dealt with the issue of import duty on sugar imports from COMESA for a designated period. None could be due for sugar imports from COMESA countries, for all sugar imports permitted by the Kenya Sugar Board during the period 1st January 2004 and 31st December, 2007. Any imports of sugar outside this period and those in excess of the agreed amounts would not fall within the arrangements agreed upon between Kenya and COMESA, and would be outside the safeguard measures and therefore attract normal import duty.

It is instructive that **section 118**, above ends with the words:

''… have effect in relation to duty and the notice shall, subject to the provisions of this section, have effect according to its tenor."

The emphasis in the section is that the arrangements between Kenya and other governments are only in relation to duty. The period agreed upon covered a period of four years. Not any four years, but a specific four years. By giving the sunset date as 28th February 2008, the Minister for Finance was in effect attempting to extend the period agreed upon. He was, we think, trying to cover his omission to publish the Legal Notice timeously. Section 118 is clear that such notice is subject to the provisions of the section, and the extended period is therefore of no legal effect. Besides, the tenor of the notice can only be gathered from the agreement between the Kenya Government and the foreign government and any variation will breach the terms of section 118, and also the agreement.

We earlier alluded to an attempt by the Minister for Finance to amend **section 27** of the Sugar Act, through the Finance Bill 2006, to take away the power vested in the Sugar Board to control sugar imports. The bill was rejected by Parliament. The Minister's move clearly showed that he was aware that he did not have the power, beyond publishing a notice under section 118, above, of controlling

imports. After publishing such notice the Minister for Finance or indeed the Commissioner of Customs would have no role in the matter except processing the sugar imports. The power to licence importers and to determine the need for sugar imports lies with the Sugar Board; and by publishing Gazette Notice No. 296 of 2007, that Board was acting within its statutory power. Emukule J. therefore erred when he held that the Sugar Board had no legal authority to publish that Gazette Notice.

Regarding the impugned press announcements which are the subject matter of these consolidated appeals, the learned Judge held that they were not decisions which could be quashed by an order of certiorari. In his view they were announcements to inform the general public of the existence of L.N. No. 12 of 2004. It should be recalled that the importation of sugar duty free did not commence in 2007, but 2004. The general public was or was deemed to have had notice of it by its publication in the Kenya Gazette. The newspaper announcements however, went beyond general information because it was in them that KRA, for the first time, stated that the sunrise date for the 2007/2008 sugar imports duty free, was 1st March 2008. As we stated earlier KRA's duty with regard to those imports ended with the publication by the Minister for Finance of Legal Notice No. 12 of 2004. Its duty was thereafter limited to satisfying itself that an importer was licensed, and had all the necessary papers to show that the imported sugar fell within the ambit of the arrangements made between Kenya and COMESA in the agreement made on 28th November, 2003. These newspaper notices purported to change the date the Kenya Sugar Board had fixed not pursuant to that agreement but in exercise of the powers under the Sugar Act, to control sugar imports. It was a decision in the strict sense, though made without legal authority. Such a decision is in the nature of decisions which are amenable to review by an order of certiorari. Emukule J. therefore fell into error, when he ruled otherwise.

Emukule J. also fell into error when he suggested that the appellants were asking him to prohibit what Parliament had sanctioned. Parliament sanctioned the levy of import duty. The same Parliament at the same time legislated circumstances when such duty could be waived. If KRA attempted to levy import duty in circumstances which entitle an importer to the waiver of duty, then the court has jurisdiction to prohibit the threatened action. That is what the appellants herein were seeking. The learned Judge erred in declining to grant an order of prohibition in those circumstances.

The appellants were also justified in fearing that the Kenya Sugar Board could be influenced to withdraw Gazette Notice No. 296 of 2007 which withdrawal would have meant that the sugar which had arrived in the country pursuant to that notice would attract 100% import duty. Such a move would be prejudicial to their respective interests.

Mr. Ontweka, counsel on record for the 1st respondent must have realized that prohibition could not be resisted, and properly conceded, that the newspaper notices were decisions and in appropriate cases were amenable to judicial review. In the Public Administration, a Journal of the Royal Institute of Public Administration, specifically the topic on Decisions and Decision Making by P.H. Levin, which was cited to us by Mr. Mwenesi, at Page 25, the author defines decision as:

"a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity".

KRA did not want duty to be waived for sugar imported before 1st March, 2007. The newspaper notices were intended to deny the appellants, among other sugar importers, the waiver of duty announced in Legal Notice No. 12 of 2004 and Gazette Notice No. 296 of 2007. They were therefore decisions amenable to judicial review.

It was also submitted by the lead counsel for both appellants that the trial Judge did not assign reasons for part of his ruling. In the course of his judgment against which these appeals relate, Emukule J. stated as follows:

"In the words of Mr. Ontweka, learned counsel for KRA, and Mr. Makongo learned counsel for the Ministry of Finance, the affected persons were purely busy bodies. I agree with that submission and I will give my reasons later on why I think so called affected persons were indeed busy bodies,

and only managed to prolong the proceedings herein."

The Learned Judge did not remember to give those reasons. It was submitted that the failure to give the reasons rendered the ruling invalid, which then should be declared as such and these appeals be allowed as prayed.

O. XX rule 4 of the Civil Procedure Rules provides that :

"Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereof, and the reasons for such decision."

And **O. XX rule 5** of the Civil Procedure Rules provides that:

"In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue."

The learned Judge made a decision as to the status of parties who were referred to as interested parties. They were not essential parties in the litigation but requested to be heard merely because they too had a cause or causes of action which happened to be based on the same set of facts. None of them is a party in these consolidated appeals. The learned Judge did deal with all the basic issues between the parties who had filed motions and whose causes of action he set out at the beginning of his ruling. While it would have been more prudent to assign reasons for his decision regarding the *locus standi* of those "interested parties" we do not think in the peculiar circumstances of these appeals the failure to assign reasons vitiated the ruling. The case of those "interested parties" is severable in the sense that it cannot be said that their matters were determined in the consolidated suits. Besides, the absence of those reasons in no way prejudiced either appellant.

The learned Judge also stated in another part of his ruling thus:

"I was also treated to many authorities, which were correct in their particular contexts but really none of them cited by the applicants' counsel help to determine the primary issue in these applications. I will consider those authorities in my detailed reasons to be done in the new term."

We were informed from the bar that no such reasons were ever given. In view of that counsel for the applicants submitted that the absence of those detailed reasons invalidated the ruling.

A careful reading of the Judge's remarks clearly shows that the learned Judge had come to the conclusion that the authorities cited could not advance any further the parties' respective cases. The ruling is prima facie, complete and it is not clear under what circumstances further and detailed reasons would be given – whether in the same matter or a different matter. If in the same matter, it was not procedurally permissible, in view of the clear provisions of **O. XX rule 3 (1) and (3)** of the Civil Procedure Rules which provides that:

"3(1) A judgment pronounced by the Judge who wrote it shall be dated and signed by him in open court at the time of pronouncing it."

(2) …

(3) A Judgment once signed shall not afterwards be altered save as provided by section 99 of the Act or on review."

In the circumstances we must look at the ruling as it is in view of the fact that there is no indication that there was either a review or amendment of the ruling under the slip rule which permits amendment of judgments and rulings where clerical or arithmetical mistakes are committed by the court.

We have carefully gone through the ruling of the learned Judge, but we cannot categorically say it is

deficient with regard to form. The learned Judge however grossly misdirected himself in making the statement we reproduced earlier in view of the provisions of **O.XX rule 3 (3)**, above, but we are of the view that his misdirection did not prejudice the appellants in their matter, nor did it render the ruling invalid, the learned Judge having assigned reasons to all the central issues in the litigation. This matter is clearly distinguishable from the case of B.G. SAINT V. KEVIN HOGAN [1953] 20 EACA 85 cited to us by Mr. Nowrojee, on which there were no reasons at all for the judgment within the body of the judgment itself.

We earlier stated that Emukule J. erroneously titled his decision as a judgment. It was not one of the matters which counsel for the parties canvassed before us. However we consider it our duty to clarify this matter.

Under the Civil Procedure Act and Rules made thereunder, there is a clear distinction between the term ***"Decree"*** and ***"Order."*** Decree is defined in section 2 of the Civil Procedure Act, as meaning:

"the formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or 91, but does not include-

(a) any adjudication from which an appeal lies as an appeal from an order; or

(b) any order of dismissal in default."

……..."

And the term ***"Order"*** is defined under the same section as meaning:

" the formal expression of any decision of a court which is not a decree , and includes a rule nisi".

There are two separate sets of provisions within the Act dealing with appeals, one set relates to appeals from decrees, and the other set relates to appeals from orders. **Sections 65 to 72** both inclusive of the Civil Procedure Act deal with appeals from original and appellate decrees while **sections 75 and 76** deal with appeals from orders.

The practice in all civil courts in East Africa is that suits commenced by plaint give rise to a judgment while civil proceedings commenced in any other manner give rise to a ruling which is concluded by the making of an order. That would explain why we do not have any definition in the Civil Procedure Act or Rules made thereunder of the term ***"ruling"***

O.LIII of the Civil Procedure Rules makes provision for special proceedings pursuant to the provisions of the Law Reform Act Cap 26 Laws of Kenya. **Section 9(2**) thereof, as material, provides as follows:

"… rules made under subsection (1) may prescribe that applications <u>for an order</u> of mandamus, prohibition or certiorari – shall, in specified proceedings, be made within six months,…" (Emphasis supplied).

Hence, in O.LIII , the rules talk about "***Order***" not judgment. It then follows that the decision from which these consolidated appeals arose should have been titled ruling or ***"Order"*** to accord with the relevant provisions of the Civil Procedure Act, above.

Two more issues fall for consideration, the first one being whether the appellant showed circumstances which would raise a legitimate expectation that the sugar they imported would be allowed into the country duty free. Each of the appellants imported about 5000 tonnes of white refined sugar. This was within the limits imposed by the agreement between the Government of Kenya and COMESA

Free Trade Area, and the limit imposed by Gazette Notice No. 296 of 2007. The period of importation was within the agreement and they had the essential licences from the Kenya Sugar Board to import the sugar. In those circumstances the appellants were perfectly entitled to expect that the importation would be duty free. The Kenya Sugar Board supported their contention in this regard and the learned Judge of the superior court erred in ruling otherwise.

The second issue is whether an order of Mandamus would issue. It is in evidence that KRA refused to clear the appellants' sugar duty free mistakenly believing that the appellants had no legal right of importing the sugar without paying import duty in terms of **section 117** of the Customs and Excise Act. Emukule J. correctly stated that an order of mandamus is a command from the High Court to an inferior tribunal or public authority or body charged or invested with a duty to carry out or do what is by law required to do or to be done, and where that person or body or authority has failed to perform the duty to the prejudice of a person who had a legal right to expect the duty to be performed. We earlier held that the appellants have shown circumstances which show that they were perfectly entitled and legitimately so that KRA would clear their sugar duty free after they satisfied the preconditions. Those are circumstances which in our view entitled them to an order of mandamus. KRA is a public body whose statutory duty is to clear imported goods where importers have met all the preconditions for the importation.

As KRA declined to clear the appellants' sugar duty free the superior court erred in holding that no statutory duty lay with KRA and by extension the Minister concerned to clear the sugar. On the other hand no duty lay on the Kenya Sugar Board to clear the sugar and so an order of mandamus could not properly issue against it and none was in any case prayed for against it.

We have said enough to show that these consolidated appeals should be allowed. Accordingly, we hereby order that they be allowed with costs to both the appellants against the 1st respondent. The effect of that order is that the order of the superior court dismissing the respective applications of the 1st and 2nd appellants made on 30th March 2007 is set aside and substituted therefor with an order allowing their respective applications dated 20th February 2007 and 26th February 2007, with costs, against the 1st respondent Kenya Revenue Authority. There shall be no order as to costs against Kenya Sugar Board, the 2nd respondent, both here and in the court below. The 1st respondent shall forthwith release the sugar consignment for each appellant free of all charges and duty in terms of Gazette Notice No. 296 of 2007.

Order accordingly.

Dated and delivered at Nairobi this 30th day of May 2008.

P.K. TUNOI

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

J. ALUOCH

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR