REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPLI 94 of 2007 (UR 61/10)

THE COMMISSIONER OF CUSTOMS ……..…… 1ST APPLICANT

THE KENYA REVENUE AUTHORITY ……...……..… 2ND APPLICANT

THE REGISTRAR OF MOTOR VEHICLES ….…….....3RD APPLICANT

AND

AMIT ASHOK DOSHI ……..…..…….....1ST RESPONDENT

ASHOK DOSHI …….…..…...… 2ND RESPONDENT

MEHIL PATEL …….....……...…….3RD RESPONDENT

AND

AHMED SAID AHMED ……..……1ST INTERESTED PARTY

AHMED JAFFAR TAIBAL …….....…….2ND INTERESTED PARTY

(Application for stay of orders of the High Court of Kenya

Mombasa (Sergon, J) dated 30th March 2007

in

H.C. Misc. Civil Application No. 520 of 2006)

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RULING OF THE COURT

We have before us an application brought by way of a notice of motion under rule 5(2) (b) of the Court of Appeal Rules (the Rules) in which the applicants, The Commissioner of Customs, The Kenya Revenue Authority and The Registrar of Motor Vehicles, being the first, second and third applicants respectively, are seeking on the main two orders appearing as prayers 2 and 3 in the application together with an order that costs of and incidental to the application do abide the results of the intended appeal. The two main

orders sought are:

"2. That there be a stay of the orders of the superior court issued on 30th March 2007:

(a) That by way of Judicial Review and (sic) order of certiorari be and is hereby issued to remove into the High Court for purposes of it being quashed the public Notice Published in the Standard & Nation of 26th May 2006 and 28th May 2006 respectively.

(b) That by way of Judicial Review an order of prohibition be and is hereby issued prohibiting the respondents from seizing for forfeiture the applicant's motor vehicles registered as:

(i) KAU 333K Toyota Jeep

(ii) KAU 200T Mercedes Benz

(iii) KAU 430M Toyota Lexus

(iv) KAU 600K Porsche Cayenne

3. That this Honourable Court be pleased to make an order imposing security for losses on payable import duties upon the respondents to the tune of Ksh.13,123,279/= pending the hearing and determination of the appeal intended to be filed in this Court."

The application is founded upon six grounds, a summary of which is that the applicants have an arguable appeal and there is a draft memorandum of appeal in support of the same; that unless the orders of stay are granted by this Court, the possible success of the same appeal will be rendered nugatory; that the order granted by the superior court prohibits the seizure of the subject motor vehicles upon which duty have not been paid as no proof of the same was availed in the superior court; that the decision to prohibit seizure of the same vehicles as granted by the superior court would end in the country losing revenue and would make it possible for people who have not paid duty for their vehicles and are not exempted from paying such duties using the same vehicles freely in the country which would create a bad precedent and that the superior court in granting the orders complained of failed to appreciate that the notices complained of were issued pursuant to the statute and so in issuing its orders, the court usurped the constitutional and legal duty of the Government of Kenya to collect taxes as provided by law. There was an affidavit in support of the application, highlighting the grounds in support of the application.

The application was opposed and Ashok Doshi, the second respondent, swore a replying affidavit on 8th May 2007 in which he stated what we may briefly state that, the fact that the applicants have a duty to collect taxes to finance the national budget is not a good reason for the applicants to deprive the respondents of their properties irregularly; that the applicants stand to suffer no prejudice until the intended appeal is heard as the vehicles are within the jurisdiction; that the applicants will then not suffer as, if their intended appeal succeeds, the vehicles will be there for them to seize; that the applicants are confused as to what they seek as the amounts they have set out as the revenue sought in respect of the duty for the vehicles differ in that at one time they put the figure of the unpaid duty at Ksh.7,851,348/=, and at another time they put the figure at Ksh.13,123,279/=; that the learned Judge of the superior court considered all aspects of the matter and came to a well considered decision such that the intended appeal is not arguable either in law or in fact and lastly that in the event the application is allowed, the respondents stand to suffer irredeemable losses and damages as they will be deprived of their property despite the finding of the superior court in their favour.

Before us, Mr. Matuku, the learned counsel for the applicants, mainly highlighted the grounds in support of the application, stating further that the intended appeal is arguable as the superior court failed to consider that in all circumstances of the matter, it was not equitable and fair to grant the application. In his view, the notices that were quashed were notices issued pursuant to the powers donated to the applicants by **sections 234(2) and (3) and 236** of the East African Community Customs Management Act 2004 and so could not be quashed by the Court. On the nugatory aspect, he invited us to accept that the

motor vehicles which are currently being used by the respondents without duty paid on them, are depreciating daily such that if they are not seized and put in the applicant's custody or if no security for duty on them is provided, the applicants may not be able to realise the assessed duty on them at the end of the intended appeal even if the applicants' intended appeal were to succeed and thus the victory if secured on appeal, will be rendered a pyrrhic victory as there will be nothing to seize by the time the appeal is finalised.

Mr. Omulele, the learned counsel for the respondents, on the other hand, having also highlighted the contents of the replying affidavit, submitted that the respondents were in fact advised to purchase the vehicles from the importer by the applicants, and the applicants went ahead to register the vehicles in the names of the respondents. That being the case, the intended appeal cannot be arguable as the facts of the case which the learned Judge of the superior court considered left no room for any other conclusion except the conclusion that the learned Judge arrived at. He contended on the nugatory aspect that the actual duty was actually paid by the importer as that was the basis upon which the applicants released the vehicles and approved the registration of the vehicles into their names. They would not entertain the allegations of fraud made by the applicants as, if there was any fraud in the whole matter, the applicants would have taken criminal action against those involved.

The above were the rival positions taken by the parties before us. The record shows that the subject motor vehicles were received at the port of entry on their importation. The first respondent, **Amit Ashok Doshi**, purchased motor vehicle registration number KAU 200T Mercedes Benz saloon from the importer, a Mr. Saud Abdalla Soud Omar Ali on or about 27th December 2005. He paid the purchase price after ascertaining from the Kenya Revenue Authority, the second applicant, that duty was duly paid on the vehicle. He lodged transfer of the ownership of the same vehicle with the third respondent and the vehicle was duly registered in his name. **Ashok Doshi**, the second respondent, bought his vehicle KAU 430M, Toyota Lexus on 7th October 2005 from one Umilkher Omar Ali and followed the same procedure ending with the vehicle being registered in his name, and the third respondent, **Mehil Patel**, purchased motor vehicle KAU 600K Porsche Cayenne from an importer Mr. Khamis Said Khamis and after being assured by the second applicant that the vehicle was properly registered in the vendor's name, he had it registered in his name by the third applicant. Apparently, the other vehicle KAU 333K Toyota Jeep was also released under similar circumstances. Later as appears in the applicants' affidavit in the superior court sworn by one James Karanja, the second appellant, through its Business Intelligence Office of the Investigation and Enforcement Department, carried out post-import investigation to confirm whether all imported goods into the country had their import duties properly paid and accounted for. He alleges that he carried out investigations among others, on the subject vehicles and established that all of them were uncustomed meaning that no duty was paid on them. He also found out that the importers of the same vehicles had forged bank receipts as proof of payment of duties and taxes, and so he confirmed that notwithstanding that the subject motor vehicles had been registered by the third applicant and were subsequently transferred to the respondents as second owners, the same registration and transfers were not valid as the importers used the forged receipts to fraudulently obtain clearance from the first applicant's officers. Having come to that conclusion, the first appellant then acted pursuant to the powers donated to it by **section 234** and **236** of the East African Community Customs Management Act 2004 and gave a public notice through the Standard and the Daily Nation issues of 26th May 2006 and 28th May 2006 respectively.

Those notices are what triggered the applications that were brought before the superior court by the respondents in this notice of motion before us. The final Public Notice stated:

"**In accordance with powers conferred upon me by section 234 and 236(sic) of the East African Community Customs Management Act (2004) I wish to serve a final notice on the importers/owners/clearing agents of the under mentioned motor vehicles to avail the same for physical verification together with all the relevant documents relating to their importation and payment of taxes in their possession."**

The respondents felt aggrieved with the notice and filed an application for leave to apply for an order of certiorari to remove into the High Court for purposes of it being quashed, the public notice published in

the Standard & Nation newspapers of 26th May 2006 and 28th May 2006 respectively and to apply for an order of prohibition to issue prohibiting the applicants from seizing for forfeiture the respondents' subject vehicles. That application was granted and was ordered to operate as a stay of the applicants' intended action. A proper application was filed. In the meantime, the applicants felt dissatisfied with the decision granting leave and directing the same leave to operate as a stay of the applicants' intended action. The applicants filed a notice of motion seeking to set aside the same order. The two motions were heard together and the learned Judge of the superior court (Sergon, J), after full hearing, allowed the respondents' application but dismissed the applicants' motion. In doing so, the learned Judge stated, *inter alia,* as follows:

"**My view in this matter is that the reasons advanced by the respondents in issuing the notice appear to be good but they are unreasonable in that there is no connection between the evidence and the applicants. Consequently there is no adequate justification for the decision *vis a vis* the applicants.**

In the end, I am convinced that the motion dated 22.6.2006 has merit. The same is allowed as prayed. I see no merit in the motion dated 31st July 2006. The same is dismissed with costs to the applicants. This decision applies to Mombasa H.C. Misc. Civil Application No. 521 and 523 of 2006."

The applicants feel aggrieved by that decision and intend to appeal. They have filed a notice of appeal. In the meanwhile, they are seeking a stay order and in the alternative, an order for security of the duty to be provided. All that is in the application, the salient part of which we have reproduced hereinabove.

This application, as we have stated above, is brought under **rule 5(2) (b)** of the Rules. The jurisdiction exercisable by this Court under **rule 5(2) (b)** of the Rules is now well settled. It is original and discretionary. For an applicant to succeed, he must satisfy the twin guiding principles, first, that the intended appeal is arguable, that is that it is not frivolous and second, that unless a stay is granted, the appeal or as in this case, the intended appeal, if it eventually succeeds, will be rendered nugatory - see the cases of **Githunguri vs. Jimba Credit Corporation Ltd. (No. 2) (1988) KLR 838, J.K. Industries Ltd. vs. Kenya Commercial Bank Ltd. (1982-88) 1 KAR 1688, Reliance Bank Limited (In Liquidation) vs. Norlake Investments Limited – Civil Application No. Nai. 98 of 2002 (unreported) and Al-Mahra Limited vs. Premier Foods Industries Limited – Civil Application No. Nai. 163 of 2006.**

In this notice of motion, guided by the above principles, we have considered the affidavits, the rival submissions by both counsel, the draft memorandum of appeal and the entire record. In our view, the question as to the extent to which a Court of Law should, in its supervisory powers control the exercise of statutory powers donated to the various Government authorities and particularly the powers donated to the second applicant by the statutes is a matter which we are certain is arguable. Secondly, we note that the learned Judge on the points of fact did find that the reason leading to the issue of subject notices appeared good but they were unreasonable in that there was no connection between the evidence and the applicants. That finding was made notwithstanding that the notices were to the importer/owners/clearing agents. As at the time the notices were issued, the respondents were the owners of the same vehicles as it was not disputed that the vehicles were transferred to them from the respective importers. It is thus arguable as whether that finding on matters of fact and law is tenable. We need not go further. All that is needed in law is that there be even one arguable point and that will suffice.

The next point to consider is whether if the intended appeal succeeds, the results would be rendered nugatory if we decline to grant the orders sought. In our mind, if we do not grant the orders sought, then by the time the intended appeal is finalised, the vehicles will have depreciated in value to an extent that seizing them for forfeiture will no longer be of any economic value. We accept the respondents' statement that the vehicles will not leave the jurisdiction but one cannot vouch for their being safe from accidents and one cannot stop the respondents from selling them whilst they are in their hands. Once sold, one cannot control the third owner/owners and that or those third owner/owners may very well take the vehicles or any of them out of jurisdiction. Considering all the above, what commends itself to us is

to grant the second prayer, which Mr. Matuku told us was an alternative to the first prayer and which, in our view, though not specifically stated, in the notice of motion must of necessity be alternative to the first prayer for the applicants cannot seek to seize the vehicles while at the same time seek security for the assessed duty. They can only seek one or the other.

Accordingly, we allow the application to the extent that we grant the alternative prayer.

The respondents are ordered to provide bank security from a reputable bank in the sum of **Ksh.13,123,279/=** within **45 (fourty five)** days of the date hereof to secure the payment to the applicants of the assessed import duties upon the subject motor vehicles. Subject to the respondents' complying with this order, they can retain the vehicles till the intended appeal is filed, heard and determined. If the respondents fail to comply with this order, then there shall be stay of the order of the superior court made on 30th March 2007 and the applicants will be at liberty to proceed and enforce the provisions of the law as regards their powers donated to them by the written law.

Costs in the intended appeal.

Dated and delivered at Nairobi this 8th day of June, 2007.

E.O. O'KUBASU

…….…….

JUDGE OF APPEAL

E.M. GITHINJI

…….……..…..

JUDGE OF APPEAL

J.W. ONYANGO OTIENO

…….…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR