



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**  
**MISC. APPLICATION NO. 209 OF 2001**

IN THE MATTER OF AN APPLICATION FOR JUDICIAL  
REVIEW

AND

IN THE MATTER OF THE CUSTOMS AND EXCISE ACT CAP  
(472) LAWS OF KENYA

AND

REPUBLIC EX-PARTE WATER OMINDE.....APPLICANT

VERSUS

THE COMMISSIONER OF CUSTOMS & EXCISE - KENYA REVENUE  
UTHORITY.....RESPONDENT

**RULING**

By a notice of motion dated 4th December 2001, Walter Edwin Ominde, the applicant seeks a judicial review by way of an order of prohibition directed at the Commissioner of Customs and Excise Kenya Revenue Authority barring him either by himself, agents, servants or any other person acting on his instructions from seizing, taking possession of and / or in any manner interfering with the application user of the motor vehicle reg. No. KAC 093R, Mitsubishi Pajero in any manner whatsoever and/or demanding for duty from the applicant. The application is brought under order 53 rules 3 and 4 of the Civil Procedure Rules and is supported by a statement of facts and a verifying affidavit of the applicant. The respondent opposes the application relying on a replying affidavit of Charles Nyado, a Revenue Investigating Officer with Customs and Excise Department based in Kisumu.

In his submission Mr. Kowinoh for the applicant submitted that it was common ground that the said motor vehicle was imported by a company known as Joy Imports and Export Co. Ltd and that that company was registered as the 1st owner on 8th October 1992. He said that subsequently that company transferred the vehicle to Tourist Paradise Investment Co. Ltd whose registration as the owner of it was endorsed in the log book. He claimed that in 1996 the vehicle was once again transferred to United Touring Co. Ltd from whom the applicant purchased it in 1998.

According to Mr. Kowinoh sometimes in October 2001 officers from the Revenue Authority visited the applicant's offices and told him they wanted to seize the said vehicle on allegation that no import duty

was paid for it.

Mr. Kowinoh submitted that the respondent's acts were wrongful and ultra vires Customs and Excise Act. According to Mr. Kowinoh the basis for the intended seizure of the applicants' vehicle is that the Registrar of motor vehicle lost his file after the vehicle was first registered in 1992 and after a log book had been issued in 1993 to M/S Joy Imports and Export Co. Ltd who had imported the vehicle. Mr. Kowinoh claimed that the respondent does not appear to have questioned the payment of duty before the original registration and at the two subsequent transfers of the vehicle which were duly endorsed by the Registrar of the motor vehicles, but only after the last transfer to the applicant on an allegation that it was on a temporary file. He contended that suspicion per se cannot be a basis for the seizure of property and that the Respondent has no powers to seize a motor vehicle for purposes of confirming that duty was paid. The respondent ought to have been ascertained and be satisfied that duty was not paid so as to have reasonable ground for belief which is a ground for seizure. He added that under section 218(1) of the Customs and Excise Act the Respondent is empowered within 5 years from the date of importation of property to require the owner to produce books and any documents but that was now not open to the respondent 9 years after the importation of the vehicle to seek proof of payment of duty was payable by the importer at the time of importation and that the first registration could not have effected without a certificate from the Respondent that duty had been paid.

The onus of proof of payment of duty was upon the Importer according to Mr. Kowinoh and that the Respondent has not shown any attempts he has made to inquire whether the importer made payment of duty. Miss Odundo for the Respondent in opposing the application said that the respondent had reasonable grounds for seizing the said vehicle as there was no proof that payment of duty was made. According to Miss Odundo Section 208 (b) of the Customs and Excise Acts the onus of proof of payment is upon the person claims the property seized. For that reason the applicant is deemed to be owner of the motor vehicle since he is in possession of it. She added that section 189

(1) of the Act empowers the Respondent to seize uncustomed goods as there is no proof of payment. According to Miss Odundo the Respondent made efforts to pursue M/S United Touring Company Ltd without success. Miss Odundo further submitted that an order of prohibition can only issue against a contemplated acts and not against acts which have been carried out. She added that as the motor vehicle in question has been seized there is no basis for this application. She also claimed that the facts relied on by the applicant were wrongly placed in the statement of facts instead of the verifying affidavit. Miss Odundo also contended that the demand of duty is not time barred as claimed and that in any case the discovery that duty it had not been paid made was made on 11th October 2001.

It is clear from the facts deponed to in the affidavits in supported of the application and in opposition to it that the respondent has not decided that the applicant has committed an offence under Customs and Excise Act. It appears that the intended seizure of the motor vehicle is to enable the applicant prove that the duty was originally paid, as the respondent is not sure whether it was paid due to the loss of the original file containing the documents relating to the said motor vehicle from the office of the Registrar of the motor vehicles. The respondent instead of requesting the applicant to produce documents to prove that duty was paid he has decided to seize the vehicle. He does not appear to have requested the original imported of it to produce relevant documents written Section 218 (2) of the Act so as to establish that payment of duty was made or not but has decided to go against the fourth owner. Both section 207 and 218 appear to limit the period within which seizure of such property or demand of documents to 5 years from date of offence or importation.

Under section 199 (1) of the said Act an officer may seize a property liable for forfeiture under Section 196 if he has reasonable grounds to believe the property is liable for forfeiture. The onus of arriving at

reasonable grounds for belief is upon the officer. In the present case there was a fact that the original file at the office of Registrar of motor vehicles went missing after the vehicle had been registered and a log book issued. There is no evidence of any attempts to obtain information from the importers of the vehicle whether duty was paid or not. Noting that the applicant is the 4th transferee who purchased the vehicle over six years since it was registered the Respondent has not that he had reasonable grounds for believing that import duty was not paid.

There is also no evidence that the Respondent in this case has seized the said vehicle . The applicant appears to have come to Court when he became aware of the investigations which were being conducted by the respondent. An order of prohibition is therefore still available to the applicant.

In the result I am satisfied that as the Respondent has not satisfied me that he had reasonable grounds for belief that import duty was not paid in 1992 when the vehicle was imported and first registered I grant an order of prohibition as prayed. The applicant will have the costs of this judicial review.

Dated and delivered this 11th August, 2004.

**B.K. TANUI**  
**JUDGE**

In the presence of Mr. Olel for Miss Odundo for respondent.

**OLEL**

I pray for leave to appeal and for a stay for 30 days.

**ORDER**

1. Leave is granted to the respondent to appeal.
2. Let there be a stay for 30 days.

**B.K. TANUI**

**JUDGE**



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