



**Uzuri Foods Limited v Commissioner Customs and Border Control (Judicial Review E149 of 2024) [2024] KEHC 15089 (KLR) (Judicial Review) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15089 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW E149 OF 2024  
JM CHIGITI, J  
NOVEMBER 29, 2024**

**BETWEEN**

**UZURI FOODS LIMITED ..... APPLICANT**

**AND**

**THE COMMISSIONER CUSTOMS AND BORDER CONTROL . RESPONDENT**

**RULING**

1. The Application before this court seeks the following orders:-
  - i. That leave be and is hereby granted to the Applicant to apply for a Judicial Review Order of a Declaration that the Respondent has violated the Applicant's rights to property and fair administrative action under Articles 40 47 of *the Constitution*, and Section 4 of the *Fair Administrative Action Act*, 2015 by failing to render a decision on refund of KES. 31,825,417.00 being overpaid import duty paid in error.
  - ii. That leave be and is hereby granted to the Applicant to apply for a Judicial Review Order of a Mandamus to compel the Respondent to refund the Applicant KES. 31,825,417.00 being overpaid import duty paid in error.
  - iii. That any other or further relief that this Court may deem fit to grant.
  - iv. That the costs of this Application be awarded to the Applicant.

**Grounds;**

2. The Applicant is a reputable and leading manufacturing Company incorporated in Kenya and it imports milling wheat from various suppliers for its manufacturing business.



3. The Respondent is a creature of statute established under Section 5 of the East African Customs Management Act, 2004 as read with Section 13 of the *Kenya Revenue Authority Act*, Cap 469, which is required to adhere to *the Constitution* and the *Fair Administrative Action Act*, 2015.
4. Between the years 2016 to 2020, the Applicant purchased milling wheat in bulk from various suppliers and imported the same and declared the imports for import duty in the Respondent's Simba System.
5. The Applicant noted that the Respondent's Simba System was wrongly calibrated in a manner that calculates the import duty to be excess of the import duty percentage payable resulting in a system generated error captured on the consignment entries which caused the Applicant to overpay import duty by a total of KES. 31,825,417.00 therefore requiring paying excess import duty.
6. Section 144 of EACCMA provides as follows:  

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  - (1) Subject to any regulations, the Commissioner shall refund any customs duty paid on the importation of the goods —
    - (a) of any import duty, or part thereof which has been paid in respect of goods which have been damaged or pillaged during the voyage or damaged or destroyed while subject to Customs control;
    - (b) of any import or export duty which has been paid in error.
  - (2) Refund of import or export duty or part thereof, shall not be granted under subsection (1) unless the person claiming such refund presents such claim within a period of twelve months from the date of the payment of the duty.
7. As such, the Applicant made the appropriate claims to the Respondent pursuant to Section 144 (1) (b) and (2) for refunds of import duty paid in error by filling form C34 as per Regulation 148 (1) of the EACCMA Regulations, 2010. The said claims were made within the required period of twelve (12) months from the date of the payment of the said duties.
8. In apparent breach of the provisions of Section 144 (1) of EACCMA which is couched in mandatory terms, and despite the Applicant having fulfilled the conditions as provided under Section 144 (2) of EACCMA, the Respondent has ignored the Applicants refund claims and failed to refund the Applicant import duties paid in error as required under the said statutory provision for a period of over eight (8) years despite Section 144(1) of EACCMA being couched in mandatory terms.
9. In addition, the Respondent has failed to respond to the Applicant's refund claims by either allowing or rejecting the same, and/or ignored the said refund claims altogether.
10. By failing and/or refusing to issue a refund decision on the Applicant's Claim for refund as aforesaid, and in the absence of such refund decision, the Respondent effectively denied the Applicant the chance to invoke Sections 229 and 230 of EACCMA which would otherwise have permitted the Applicant to appeal a rejection of the refund to the Tax Appeals Tribunal. In addition, in the absence of a decision from the Respondent, no decision is capable for review by the Tax Appeals Tribunal.
11. Article 47 of *the Constitution* guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This right is reiterated under Section 4 (1) of the Fair Administrative Actions Act.



12. In the circumstances, the Applicant wrote to the Respondent on 3 April 2024 pursuant to Section 6 (1) of the Fair Administrative Actions Act demanding the refunds, or at least requiring the Respondent to give reasons for failure to act and therefore materially or adversely affecting the Applicant's right to be supplied with such information as may be necessary to facilitate its application for an appeal or review as appropriate.
13. In further apparent breach of Section 6 (3) of the Fair Administrative Actions Act, the Respondent has failed and/or refused to respond to the said demand within thirty (30) days after receiving the request/demand.
14. The Respondent's unreasonable delay and failure to act in discharge of a duty imposed under Section 144 of EACCMA to refund the import duty paid by the Applicant in error, is not only in bad faith, unreasonable, and an abuse of discretion and power, but is also unfair, taken with an ulterior motive or purpose calculated to prejudice the legal rights of the Applicant and violates the legitimate expectations of the person to whom it relates.
15. In view of the Respondent's statutory and constitutional breaches aforesaid, the Applicant continues to be occasioned grave and irreparable prejudice warranting the grant of the Orders sought herein *ex debito justitiae*.
16. Unless the Orders sought herein are granted, the Respondent will continue to breach the Applicant's rights to property and fair administrative action and continue to deny the Applicant its lawful refund which has the effect of continuing to adversely affect its operations.
17. Unless the Orders sought herein are granted, the Applicant will continue to suffer such grave and irreparable prejudice from the Respondent which cannot be made right by any or any award or compensation.
18. Unless the Orders sought herein are granted, the Applicant will have no other avenue to seek recourse from the Respondent's inaction and failure to process or issue the Applicant's refund.
19. This Honourable Court has supervisory jurisdiction over the Respondent to see that it undertakes its functions in accordance and compliance with the law, when the Respondent purports to be lethargic or unreasonably delays in undertaking its statutory mandate in a expeditious and fair manner, especially when the statute requires the Respondent to act. It is therefore in the interest of justice that the Orders sought are granted.
20. The application is supported by a Statutory Statement and Verifying Affidavit sworn by Sameer Lagadia.

### **Analysis and Determination;**

21. Upon perusing the *Exparte* application, the issue that stands out for determination is whether the Applicant is entitled to leave to institute Judicial Review proceedings or not.
22. The requirement that leave must be obtained before making an application for judicial review under Order 53 of The Civil Procedure Rules was designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived. Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter-partes



hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially.

23. In Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996 Waki J. (as he then was) made the following findings:

“The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.”

24. This court is satisfied that the applicant is entitled to the orders sought.

**Order;**

25. The application is allowed in the following terms;

1. Prayers 1 and 2 of The Application dated 15.10.24 are allowed.
2. The Applicant shall file and serve the Substantive Application within 14 days of today's date.
3. The Respondent shall file and serve its responses within 14 days of service.
4. The Applicant shall thereafter file and serve its submissions within 7 days thereafter.
5. The Respondent shall thereafter file and serve submissions within 7 days of service.
6. The matter shall be mentioned on 19.3.25 for further directions.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2024.**

.....  
**J. M. CHIGITI (SC)**

**JUDGE**

