REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. E009 OF 2021

IN THE MATTER OF: AN APPLICATION BY SBI INTERNATIONAL HOLDINGS AG KENYA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY OF AN ORDER OF CERTIORARI;

AND

IN THE MATTER OF: ILLEGAL, IRRATIONAL AND PREMATURE IMPUGNED AGENCY NOTICES UNDER SECTION 131 OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004;

AND

IN THE MATTER OF: VIOLATION OF THE FUNDAMENTAL RIGHT TO A FAIR ADMINISTRATIVE ACTION GUARANTEED BY ARTICLE 47(1) OF THE CONSTITUTION OF KENYA;

BETWEEN

SBI INTERNATIONAL HOLDINGS AG KENYA.....APPLICANT

VERSUS

THE COMMISSIONER, CUSTOMS AND BORDER CONTROL,

OF THE KENYA REVENUE AUTHORITY.....RESPONDENT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 16th August, 2021, the *ex parte* applicant herein, **SBI International Holdings AG Kenya,** seeks the following orders:

> **a) An Order of *Certiorari* to bring in to this Court and to quash the Agency Notice issued by the Commissioner, Customs and Border Control of the Kenya Revenue Authority, dated 3rd August 2021 against the Applicant's bankers NCBA Bank Kenya PLC.**
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> **b) An Order of *Certiorari* to bring in to this Court and to quash the Agency Notice issued by the Commissioner, Customs and Border Control of the Kenya Revenue Authority, dated 3rd August 2021 against the Applicant's bankers United Bank of Africa, Apollo Centre, Ring Road.**
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> **c) An order for costs.**

Ex Parte Applicant's Case

2. According to the applicant, the Respondent issued Agency Notices dated both 3rd August 2021 against the Applicant's bank accounts held at NCBA Bank Kenya PLC, NCBA Centre Branch and United Bank of Africa, Apollo Centre, Ring Road, purportedly under section 131 of the ***East African Community Customs Management Act, 2004*** (hereinafter referred to as "the Act"). As a consequence, the Applicant's bankers, NCBA, issued notification to the Applicant that the said accounts were immediately attached and that the funds therein would anytime from then be paid to the Kenya Revenue Authority.

3. The Applicant contended that the said Agency Notices were grossly illegal, premature, unprecedented abuse of power, grossly irrational and issued in extremely bad faith, warranting immediate invocation of this Court's jurisdiction to urgently intervene, to forestall the otherwise devastating prejudice to the Applicant, violating the fundamental right to a fair administrative action.

4. It was contended that under section 131 of the said Act, the Respondent has jurisdiction to issue Agency Notice only where a tax is due, not before duty due is calculated, ascertained and or communicated. However, in the present case, prior to issuance of the impugned Agency Notices dated 3rd August 2021, there were no tax decisions or assessment by the Respondent informing the Applicant of any tax due and or payable and informing the Applicant of any mode of objecting to any tax decision, before any enforcement mechanisms could be deployed under section 131 of the Act.

5. The Applicant averred that the last correspondence from the Respondent was vide letter dated 25th March 2021. To that letter, it was averred that the Applicant responded vide letter dated 30th March 2021 informing the Respondent that due COVID -19 restraints, 7 days were short notice but that it would avail the evidence of *by* either providing evidence of re-export or conversion to home use**.** The Applicant did then hold a meeting with the representatives of the Respondent at the Respondent's establishment in Nairobi on 1st April 2021 explaining the evidence of re-export or conversion to home use, and did by letter dated 9th April 2021, forwarding to the Respondent the evidence of re-export or conversion to home use and that it evidenced 73 cases where the goods were re-exported or conversion to home use, complete with evidence of Conversion Entries and Perfection of Bond Entries.

6. According to the Applicant, as a result of the availed evidence of re-export or conversion to home use above and per the invitation of the Respondent vide its letter of 25th March 2021, the Respondent was enjoined to consider the availed evidence, before determining the duty due and was enjoined to communicate any such decision of the duty due to the Applicant, with mode of objection, and await expiry of the objection period before undertaking enforcement action through Agency Notices under section 131 of the Act but that none was communicated.

7. It was therefore contended that by invoking enforcement procedures of Agency Notices before determination of duty due as above, the Respondent acted illegally and in contravention of section 131 of the said Act hence the Agency Notice dated 3rd August 2021, is illegally issued and is null and void. In the Applicant's view, issuance of Agency Notices being an enforcement mechanism, it is only properly issuable after due tax has been determined, and the period for objection has expired, when duty/tax is now payable. However, in this case, duty due had not yet been determined since, upon the invitation of the Respondent the Applicant furnished evidence of re-export or conversion to home use vide letter of 9th April 2021, and the parties were still engaged in reconciliations. It is only after these reconciliations that the Respondent would then issue tax assessment/decision, and provide for the period of objection, await the period to lapse, before then enforcement mechanism such as Agency Notices could issue.

8. It was disclosed that prior to the impugned Agency Notices, the parties had been in correspondence in which the Applicant furnished to the Respondent all evidence as required. The discussions were therefore inchoate inconclusive and no due tax had been determined hence there has been no decision of the assessment of real tax due and payable by the Applicant and allowing the Applicant to object to it as per section 229 of the Act.

9. It was further contended that in the present case, the Respondent was enjoined to first issue the tax decision and allow for the appeal review period of thirty days to lapse, then make decision having regarded the appeal, before enforcement could be undertaken through the Agency Notices. Taking enforcement steps by issuance of the Agency Notices before and without determining the due tax, the Applicant lamented was premature enforcement and was grossly irrational.

10. It was reiterated that the Respondent was enjoined to consider this evidence, and make appropriate deduction and set off the duty claimed. At the very least, before exercise of any administrative action, the Respondent was enjoined to give reasons on the availed evidence above and then issue tax assessment before making administrative decision of Agency Notices, that are prejudicial to the Applicant.

11. The Applicant lamented that it was accordingly grossly unreasonable that the Respondent would call for evidence vide letter of 25th March 2021, and when evidence is availed vide letter of 9th April 2021, the Respondent totally ignores the evidence and without any reasons whatsoever, proceeds to make the impugned administrative decision characterized by the Agency Notices dated 3rd August 2021. Further, it is also openly in extreme bad faith, that the Respondent should take a decision to persecute and prejudice the Applicant seeking to collect tax/duty, that is not due and that is not owing, considering the evidence of re-export or conversion to home use, furnished vide letter of 9th April 2021. In view of the foregoing, it was contended that the decision by the Respondent to issue the impugned Agency Notices was grossly unreasonable and unfair and by itself and implication contravenes Article 47(1) of the Constitution of Kenya.

12. In its further affidavit, averred that as acknowledged and admitted by the Respondent, the process of Bond accounting and reconciliation was an ongoing process between the parties, and at no point was the process concluded and at no point did the Respondent issue a tax decision with any finality as confirmed the letter of dated 22nd April 2021. Therefore, the Respondent did not issue any tax assessment decision, or determine any tax due but instead the Respondent proceeded to advice the Ex parte Applicant to continue with accounting, and lodge Bonds for cancellation and that following the express advice from the Respondent, the Ex parte Applicant lodged the said Bonds for Cancellation and paid all due taxes on items that had been converted to home use.

13. Accordingly, between the last letter of the Respondent of 22nd April 2021 and the 3rd of August 2021, when the Respondent issued the impugned Agency Notices, there was no tax assessment and or any demand to the Ex parte Applicant yet before issuing any tax assessment and or demand, the Respondent was firstly enjoined to appraise its records and account/give credit to all the bonds retired, and the evidence of conversion to home use furnished on 9th April 2021.

14. The Applicant therefore denied the allegations of the Respondent that the Ex parte Applicant was given occasion to make settlement of due taxes and failed and asserted that the Ex parte Applicant has settled all due taxes to the Respondent, however, as it evident on the nature

of the bonds, the equipment subject to the bonds were re-exportable in which event no taxes were due, or could be converted to home use in which taxes would be assessed and paid. On each occasion that the equipment were converted full taxes were paid. It was clarified that all demands that the Respondent made on the Ex Parte Applicant, the Ex parte Applicant timeously replied to, and contrary to the claims of the Respondent in the Replying Affidavit, there was no occasion whatsoever when the Ex parte Applicant failed to answer to requests for information and or failed to settle any computed tax.

15. According to the Applicant, there has never been any enforcement mechanism for the said assessment and that the enforcement process, the impugned Agency Notices creative of the present proceedings are not for the Kshs. 66, 234,762.00, but for Kshs. 1,908,485,357.00, for which no assessment exists. In any event following the disputation by the Ex parte Applicant of the tax assessment of Kshs. 66, 234,762.00, the Respondent now subsumed it in the letter of 25th March 2021, calling for total evidence of re-export or conversion to home use of all the Bonds, or payment of Kshs. 1, 825,649, 658.00, which was 100% of all bonds. The assessment of Kshs. 66,234,762.00 was accordingly by that demand rescinded.

16. Concerning the argument on exhaustion local remedies, under section 9(1) of the ***Fair Administrative Actions Act, 2005*** and the reliance on the case of **Nairobi HC JR Application No. 447 of 2018 Republic vs Kenya Revenue Authority Ex parte Centrica Investments (eKLR),** the Applicant averred that:

> a. Firstly, the application before the Court does not challenge the mathematical sum claimed in the Agency Notices dated 3rd August 2021, which is the primary exclusive province of the Tax Appeals Tribunal, but challenges the legality and verity in the procedure of issuance of the Agency Notices, which is a matter over which the Court has jurisdiction over in Judicial Review;
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> b. Secondly, the impugned Agency Notices are not '*appealable decisions'*, that the Ex parte Applicant could directly file contests against in the Tax Appeals Tribunal. Under section 229(1) of the EACCMA,2004, the disputation of the value in the Agency Notices is to be filed before the Commissioner and the Commissioner has 30 days to decide, and if the Applicant is aggrieved by the Commissioner's decision, then the Applicant has liberty to apply to the Tax Appeals Tribunal under section 230 of the Act. As regards the mathematical assessment of the Kshs. 1,908,485,357.00 the Ex parte Applicant filed the appeal before the Commissioner and awaits the assessment. In the present application, the Ex parte Applicant has not invited the Court to determine the correctness of the mathematical assessment of the sum of Kshs. 1,908,485,357.00, the application concerns the legal correctness of procedure in issuance of the Agency Notices, which is not matter for which any internal remedy is prescribed, it is directly and primarily a jurisdiction of the High Court in Judicial Review.
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> c. Thirdly, in any event the matter before the Court by its nature and urgency, is exceptional, and its circumstances qualify under section 9(4) of the ***Fair Administrative Actions Act, 2015***; it was necessary to issue orders of leave to operate as a stay of implementation of the impugned Agency Notices because the Agency Notices directed the Ex parte Applicant Bankers to remit the proceeds of the accounts to the Respondent's account at Central Bank immediately. Interests of justice would not allow any delay, and further no such reprieve was available in any internal measures.
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> *d.* Fourth and more significantly, the impugned Agency Notices were issue prematurely, illegally, capriciously, arbitrarily and unreasonably. The High Court has severally held that in the face of such circumstances, the High Court would have jurisdiction, notwithstanding the requirements of exhaustion of internal remedies mechanisms.

17. Accordingly, it was averred that the Respondent has not offered any defence to the grounds of the application before Court and that the Respondent initiated enforcement procedures for tax collection from the Ex parte Applicant before and without determination of the due tax under the law.

18. On behalf of the Applicant, the foregoing averments were reiterated and the Applicant while asserting that this Court has jurisdiction relied on **Republic vs. Kenya Revenue Authority Ex parte Jaffer Mujtab Mohamed [2015] eKLR, Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240, Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR,** and **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Ltd [1981] UKHL 2** *and* submitted that under section 131 of the ***East African Community Customs Management Act, 2004***, the Respondent has jurisdiction to issue Agency Notice only where a tax is due, not before duty due is calculated, ascertained and or communicated.

19. In the present case, it was submitted that prior to issuance of the impugned Agency Notices both dated 3rd August 2021, there was no tax decision, or assessment by the Respondent informing the Ex parte Applicant of any tax due and or payable, and informing the Applicant of any mode of objecting to any tax decision, before any enforcement mechanisms could be deployed under section 131 of the ***East African Community Customs Management Act, 2004***. It was submitted that as a result of the availed evidence of re-export or conversion to home use, and per the invitation of the Respondent vide its letter of 25th March 2021, and 22nd April 2021, the Respondent was enjoined to consider the availed evidence, before determining the duty due, and was enjoined to communicate any such decision of the duty due to the Applicant, with mode of objection, and await expiry of the objection period before undertaking enforcement action through Agency Notices under section 131 of the Act and that by invoking enforcement procedures of Agency Notices before determination of duty due, as above, the Respondent acted illegally and in contravention of the said section hence the Agency Notices dated 3rd August 2021, are accordingly illegally issued, and are null and void.

20. In support of its case, the Applicant relied on the authority of **Republic v Cabinet Secretary, Ministry of Agricultures, Livestock & Fisheries; Cabinet Secretary, Ministry of Industry, Trade & Co-operatives (Interested Party) Tanners Association of Kenya (Suing through its Chairman Robert Njoka Ex Parte Applicant [2019] eKLR** as wee as sections 229 and 230 of the ***East African Community Customs Management Act, 2004.***

21. In the present case, it was submitted that the Respondent was enjoined to first issue the tax decision and allow for the appeal review period of thirty days to lapse, then make decision having regarded the appeal, before enforcement could be undertaken through the Agency

Notices. Taking enforcement steps by issuance of the Agency Notices before and without determining the due tax, was premature enforcement and was grossly irrational. In this respect, the Applicant relied on **Republic vs. Kenya Revenue Authority Ex Parte Jaffer Mujtab Mohamed Nairobi Miscellaneous Civil Application No. 312 of 2011.**

22. According to the Applicant, the nature of duty under reference was only chargeable if the Applicant failed to provide evidence of re-export or conversion to home use. The Applicant provided the evidence of re-export or conversion to home use vide letter dated 9th April 2021 providing 73 cases complete with particulars. The Respondent was enjoined to consider this evidence, and make appropriate deduction and set off the duty claimed. At the very least, before exercise of any administrative action, the Respondent was enjoined to give reasons on the availed evidence above and then issue tax assessment before making administrative decision of issuance of the Agency Notices, that is prejudicial to the Applicant. If anything, the Respondent advised the Ex parte Applicant to progress the review and accounting for the subject bonds.

23. To the Applicant, it was accordingly grossly unreasonable that the Respondent would call for evidence vide letter of 25th March 2021, and when evidence is availed vide letter of 9th April 2021, and particularly after the Respondent had advised the Ex parte Applicant to progress the review and accounting for the subject bonds, and when the Ex parte Applicant had lodged the various bonds for cancellation, for the Respondent to totally ignore the evidence and without any reasons whatsoever, proceeds to make the impugned administrative decision characterized by the Agency Notices dated 3rd August 2021.

24. To the Applicant, in view of the totality of the foregoing, the decision by the Respondent to issue the impugned Agency Notices was grossly unreasonable and unfair and by itself and implication contravenes Article 47(1) of the Constitution of Kenya.

25. It was therefore submitted that it is in the interests of Justice that the reliefs sought in the instant application are granted to protect public interest and the fundamental rights of the Applicant and this submission was grounded on the holding of the Court in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240.**

Respondent's Case

26. In response to the Application, the Respondent relied on the replying affidavit sworn by **Frank Orondo,** an officer of the Respondent. According to him, the Applicant is an importer that conducts various projects being undertaken in Kenya and that at all material times in connection to this suit, the Applicant was an importer engaged in projects that required it to provide security Bonds for taxes to the Respondent in order to protect revenue that would become due to the Respondent. Upon re-exportation of goods and/or conversion to home use, the bonds are retired and/or cancelled once the Applicant accounts for them to the Respondent.

27. It was averred that the Respondent's Bonds Management Unit within its Trade Facilitation Division commenced an intensive Bonds audit in the financial year 2019/2020. The exercise involved retrieval of outstanding bonds in the Simba system and issuance of demands to the bond holders for accounting or payment of taxes and subsequent bond cancellation or retirement. Out of the audit, it was established that the Applicant was among the taxpayers with outstanding bonds for the period 2006-2014. As a result, the said security bonds issued by the Applicant were computed and the payable taxes and Compound interest amounted to Kshs. 1,908,485,367.00. The Respondent also established that a bulk of the security bonds have been outstanding in the Simba system for a long period of time, prompting the Respondent to seek to have them settled by the Applicant.

28. In a bid to ensure that the bonds are fully accounted for and cancelled or retired, the Respondent engaged the Applicant since August 2019, to have the Applicant account for the said bonds. In this regard, the deponent averred, on various dates issued three demands and reminders asking the Applicant to account for the imported goods by providing evidence of re-exportation or conversion to home use, failure to which the duty assessment amounting to Kshs. 1,908,485,367.00 would be deemed due and payable.

29. According to the deponent, vide its letter dated 28th August 2019, the Respondent issued its first demand letter that addressed ten (10) outstanding bonds, which entries were provisionally allowed under section 38 of the EACCMA 2004, but have never been perfected, that is to say, the Applicant never accounted for them by confirming whether the imports had been re-exported or converted to home use. The said taxes and interest in the outstanding bonds were principal Tax of Kshs. 16,127,945.00, interest of Kshs. 2,421,633.00 totaling Kshs 18,549,578.00 which the Applicant was required to pay within fourteen days of the demand, failure to which enforcement action would be initiated.

30. By a letter dated 16th September, 2019, it was averred, the Applicant responded to the Respondent's demand letter accounting for the outstanding bonds to which the Respondent replied vide its letter dated 26th September 2019 providing a clear position of the Ten (10) bonds. Subsequently, 2 bonds were cleared as being fully accounted for by the Applicant and cancelled leaving Eight (8) bonds outstanding. It was deposed that in a letter dated 19th October 2020, the Respondent issued a final reminder on the demand No. C&BC/BMU/TF/DEMAND/0919 calling the Applicant to pay a total sum of Kshs. 17,848,041.00 being principal taxes of Kshs. 15,514,268.00 and interest of Kshs. 2,333,773.00. This was followed by a series of correspondences between the parties herein, with the Applicant alleging to have either perfected the bonds or converted goods into home use and paid taxes due without providing any supporting documents. However, the Respondent replied to the Applicant's letters highlighting entries on which duty had not been paid, demanding for late cancelation fees on canceled bonds and advising the Applicant to apply for conversion to home use or re-export equipment and cancel the bonds on specified entries.

31. Vide its letter dated 6th March 2020 the Respondent issued its second demand letter to the Applicant for a total of Kshs. 1,825,792,119.00 being principal taxes of Kshs. 912,896,119.00 and interest of a similar amount in which it addressed the outstanding CB16 (project) bond transactions which had been executed between 2006 and 2012 but had not been retired by 2020 as required. Further, vide its letter dated 13th November 2020, the Respondent reminded the Applicant that their bonds had not yet been canceled long after completion of its project and attached a schedule of bonds to this reminder. In the same letter, the Applicant was asked to account for the goods by either providing evidence of re-exportation or conversation to home use or pay the total amount of Kshs. 1,825,792,119.00. However, by its letter dated 27th

November, 2020, the Applicant rejected the schedule of bonds submitted to it by the Respondent and the mode of calculation of interests but failed to provide any documentation or records in support of its objection to the tax demanded.

32. It was averred that the Respondent vide its letter dated 24th December 2020 requested for supporting documentation and explained that the interest in the schedules had been calculated in accordance with the law and further called for accounting of the outstanding entries within 14 days or payments of the outstanding amounts. The Applicant however, failed to avail the documentation required in support of its claim. Subsequently, the Applicant and Respondent engaged in a series of back and forth communication on the issue but in all the correspondences, the Applicant failed, neglected and or refused to adhere to the Respondents request for supporting documentations and/or pay the requisite duty.

33. According to the deponent, the Respondent's demand letter dated 13th November 2020 covers outstanding CB16 Bonds for the years 2013 and 2014 amounting to Kshs. 66,234,762.00 being principal tax of Kshs. 50,348,320.00 and interest of Kshs. 15,886,442.00 which was not covered by the correspondences between the parties. Noting that the Applicant was no longer interested in pursuing final accounting or payment for the outstanding bonds, the Respondent had no other choice but to commence execution action as per the provisions of the ***East Africa Community Customs Management Act, 2004*** (EACCMA). Based on legal advice, the deponent averred that pursuant to Section 106 of the EACCMA, the Commissioner of Customs is empowered to call for security for compliance with the Act and for protection of Customs revenue and that Section 107 (3) binds the person giving the Bond to the due performance of the conditions of the bond while Section 249 (1) of EACCMA provides for payment of interest at the rate of 2% per month where a sum of money which is due under the Act remains unpaid after the date upon which it is payable.

34. It was averred that contrary to assertions by the Applicant, it is the Respondent's contention that the final computation of taxes due included ONLY the un-accounted for security Bonds and ALL concluded bonds were excluded from the demanded amounts and that the Respondent did not ignore any of the Applicant's letters as alleged. Noting the Applicant's lack of compliance, the Respondent was exposed to revenue loss hence it instituted statutory execution measures in order to ensure it secures revenues that were due and payable.

35. In the deponent's view, the demand letters issued to the Applicant contained tax assessments and explanations as to the assessments and that despite several requests asking the Applicant to account for the bonds or pay duty due, the Applicant opted for endless correspondences as a way of delaying revenue collection. The deponent asserted that the Respondent carefully considered the Applicant's evidence before making its assessment and that it was the Applicant that failed to discharge its burden of proving that the Respondent's tax decision is incorrect. The deponent asserted that any duty that is payable by a person is a debt to the state hence collection and enforcement of the same is paramount and that section 109 of the EACCMA provides for the enforcement of bonds as due taxes within 14 days where conditions of the bond have not been complied with and a notice to the same has been issued.

36. It was therefore deposed that the Respondent fully accommodated the Applicant and took extreme measures to accord them an opportunity to account for the security Bonds as well as queries made by the Respondent. In the circumstances, it is incorrect for the Applicant to seek to invoke the provisions of the ***Fair Administrative Act*** and Article 47 of the Constitution, when the issue in dispute is a tax decision, capable of being adjudicated by a competent Tribunal vested with jurisdiction over tax decisions, that is, the Tax Appeals Tribunal. It was therefore contended that this Application is an abuse of the Court Process and one intended to cause delays and frustrate the collection of the taxes meant for the Respondent from the Applicants. It was therefore contended that the Application before this Court lacks merit, is calculated to curtail the Respondent's ability to collect due taxes and should therefore be dismissed with costs to the Respondent.

37. On behalf of the Respondent it was submitted the Applicant was an importer engaged in projects that required it to provide security Bonds for taxes to the Respondent in order to protect revenue that would otherwise become due to the Respondent, as provided by section 106 of EACCMA. Bonds were therefore issued by the Applicant in accordance to section 107 (1) (a) of the EACCMA. Upon re-exportation of goods and/or conversion to home use, the bonds are retired and/or cancelled once the Applicant accounts for them to the Respondent as provided by the law.

38. While reiterating the contents of the replying affidavit, it was submitted that while the Applicant bore the burden to prove the imports for which security bonds had been executed, were re-exported or converted to home use, the Applicant failed, neglected and/or refused to discharge the burden bestowed upon it and that he must now reap the fruits on his indolence. It was submitted that by asking the Applicant to provide evidence of re-exportation or conversion to home use, and upon failure by the Applicant to do so, issuing the demand letters, the Applicant was at liberty to apply for review of the Commissioners decision in accordance to section 229 of the EACCMA, if it was aggrieved by the Commissioner's decision. However, the Applicant failed to lodge an application for review of the Commissioner's decision. Instead, the Applicant opted to bring the Application before this Honourable Court, neglecting to first subject its grievance to a review as provided under the above stated provision.

39. It was submitted that upon compliance by the Respondent, with the provisions of Section 109 of EACCMA, that is, by issuing demand notice in writing, the Respondent had fully complied with the statutory requirement relating to accounting for security bonds. Once the Applicant failed to honour the demand, the Respondent was specifically mandated by law to collect the amounts due, as if the same were a debt owed to the state. In this case, the Respondent lawfully issued Agency Notices to enforce compliance with the written demand. According to the Respondent, the Applicant is seeking to turn the matter into an issue of procedural impropriety, rather than one of computation of due taxes. To the Respondent, having erroneously misconstrued the procedure for issuance of demand and enforcement for unpaid taxes, as that provided for under the ***Tax Procedures Act*** (TPA), the Applicant herein has gone on to demand that the Respondent failed to issue them with an assessment as countenanced by Section 29 and 30 of the TPA.

40. It is the Respondent's argument that upon receipt of the assessment, the Applicant had opportunity to Object to the assessment and then the Respondent would have had to issue an Objection Decision, against which the Applicant could Appeal to the Tax Appeals Tribunal. It was submitted that such procedure is relevant to disputes governed by and under the ***Tax Procedures Act***. However, the same procedure is NOT applicable to the circumstance herein since the law applicable is the EACCMA. Based on section 2 of the ***Tax Procedures Act***, ***Tax Procedures Act*** does not apply to matters governed by EACMMA. In this regard, the Respondent relied on Tax Appeals Tribunal Appeal No. 170 of 2020 - **AirKenya Express Limited vs Commissioner of Customs and Border Control**.

41. According to the Respondent, the EACCMA provides for both the substantive and procedural law hence ousting any necessity of applying the ***Tax Procedures Act*** to matters customs and that Sections 229 and 230 of the ***East Africa Community Customs Management Act*** is instructive in regards to the applicable procedure in this instance. It was submitted that since the Applicant failed to exercise his right to seek review of the Commissioner's decision within the prescribed thirty days, the taxes became due and payable as demanded by the Respondent.

42. It was submitted that in enforcing collection of revenue that had crystalized, the Respondent in accordance with section 109 of the EACCMA issued tax demand to the Applicant noting clearly the amount of tax to be paid and the time frame within which to pay the taxes. The Respondent, it was submitted, guided by the provisions of section 131 of the EACCMA enforced collection of payment of the securities as duty that was due and unpaid to the State by issuance of agency notices. The Respondent insisted that in no way was it in breach of the provisions of EACCMA and that on the contrary, it severally invited the Applicant to account for the bonds issued and/or pay taxes, a call that was only responded to by impish correspondences aimed at delaying revenue collection. The Respondent therefore submitted that it did not issue the Agency Notices complained of prematurely but that the Agency Notices were issued in enforcement of a tax debt that was due and payable by the Applicant herein and the same should be upheld.

43. As regards the exhaustion of the available remedies the Respondent reiterated the foregoing and submitted that the issuance of agency notices was a decision, remedy for the same is well provided for under the EACCMA. The Applicant was required to lodge an application to the Commissioner in writing within thirty days of the date of issuance of the agency notices seeking review of that decision after which the Commissioner would then be obligated to, issue a decision on the application for review as provided for under Section 229 (4) of EACCMA. If dissatisfied by a decision of the Commissioner issued under Section 229, the Applicant would then have had the liberty to Appeal the said decision to the Tax Appeals Tribunal, which is vested with the jurisdiction to hear Appeals from the review decision of the Commissioner. It was submitted that the Applicant failed to follow the procedures as expounded above and out of indolence sort to forum shop in this Court. In this regard the Respondent relied on the case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1,*** the writings of John Beecroft Saunders in a treatise titled ***Words and Phrases Legally defined*** – **Volume 3: I –** N. It was submitted that the Applicant failed to adhere to the doctrine of exhaustion by failing to follow the laid down mechanisms for dispute resolution before seeking the redress of the High Court and reliance was placed on **Speaker of National Assembly vs Karume** and the decision of **Mativo, J** in **NBI H.C. JR Application No. 447/2018 Republic versus Kenya Revenue Authority *Ex parte* Centrica Investments (eKLR).**

44. According to the Respondent, whereas the Applicant wants this Court to buy into the idea that the agency notices are not an appealable decision hence the need to appear before this Court, the notion of an appealable decision is a creation of the ***Tax Procedures Act*** that has no basis in customs matter such as the one we are dealing with. The upshot of the forgoing is that the Application before this Honorable Court lacks merit, is calculated to curtail the Respondent's ability to collect due taxes and should therefore be dismissed with costs to the Respondent.

45. This Court therefore urged to dismiss this Application with costs to the Respondent

Determinations

46. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions and authorities cited.

47. The parameters of judicial review were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** as follows:

> **"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision.....Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."**

48. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was held:

> **"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."**

49. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***

50. It must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

51. Therefore, such proceedings are not concerned with the determination of the question whether the applicant was liable to pay the taxes demanded or not. As was held in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007:**

> **"it was not the role of the superior court nor of this Court to determine the correctness or otherwise of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004."**

52. However, it must always be remembered that persons charged with statutory powers and duties ought to exercise the same reasonably and fairly. Accordingly, the court is perfectly entitled to intervene where it is alleged that the discretion is not being exercised judicially, that is to say, rationally and fairly and not arbitrarily, whimsically, capriciously or in flagrant disregard of the rules of natural justice. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma HC MISC. APPL. No. 81 of 2002 [2002] 1 KLR 486; [2008] 2 KLR (EP) 393**. If the discretion is used arbitrarily and unreasonably, the court may step in to remedy the situation. As was held by the Court of Appeal in **Republic vs. Commissioner of Co- Operatives, Kirinyaga Tea Growers Co- Operative & Savings & Credit Society Ltd. Civil Appeal No. 39 of 1997 [1999] 1 EA 245,** it is axiomatic that statutory power can only be exercised validly if exercised reasonably and not arbitrarily or in bad faith. It has been appreciated that judicial review has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. See **Re Bivac International Sa (Bureau Veritas) [2005] 2 EA 43**.

53. Therefore, whereas this Court is not entitled to question the merits of the decision of taxing authority, that authority must exercise its powers fairly and there ought to be a basis for the exercise of such powers. A taxing authority is not entitled to pluck a figure from the air and impose it upon a taxpayer without some rational basis for arriving at that figure and not another figure. Such action would be arbitrary, capricious and in bad faith. It would be an unreasonable exercise of power and discretion and that would justify the Court in intervening. In **Republic vs. Institute of Certified Public Accountants of Kenya ex parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006**, it was held that in the absence of a rational explanation, one must conclude that the decision challenged can only be termed irrational within the meaning of the *Wednesbury* unreasonableness, was in bad faith and constitutes a serious abuse of statutory power since no statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith.

54. In this case, the Applicant's case is that as a result of the availed evidence of re-export or conversion to home use and per the invitation of the Respondent vide its letter of 25th March 2021, the Respondent was enjoined to consider the availed evidence, before determining the duty due and was enjoined to communicate any such decision of the duty due to the Applicant, with mode of objection, and await expiry of the objection period before undertaking enforcement action through Agency Notices under section 131 of the ***East African Community Customs Management Act, 2004*** but that none was communicated. Therefore, the applicant contended, that by invoking enforcement procedures of Agency Notices before determination of duty due, the Respondent acted illegally and in contravention of section 131 of the said Act hence the Agency Notice dated 3rd August 2021, is illegally issued and is null and void. In the Applicant's view, issuance of Agency Notices being an enforcement mechanism, it is only properly issuable after due tax has been determined, and the period for objection has expired, when duty/tax is now payable. However, in this case, duty due had not yet been determined since, upon the invitation of the Respondent the Applicant furnished evidence of re-export or conversion to home use vide letter of 9th April 2021, and the parties were still engaged in reconciliations. It is only after these reconciliations that the Respondent would then issue tax assessment/decision, provide for the period of objection, await the period to lapse, that the enforcement mechanism, such as Agency Notices, could issue.

55. It was further contended that in the present case, the Respondent was enjoined to first issue the tax decision and allow for the appeal review period of thirty days to lapse, then make decision having regarded the appeal, before enforcement could be undertaken through the Agency Notices. Taking enforcement steps by issuance of the Agency Notices before and without determining the due tax, the Applicant lamented, was premature enforcement and was grossly irrational.

56. The said section 131 of the ***East African Community Customs Management Act, 2004*** provides that:

> ***131. (1) The Commissioner may, by written notice addressed to any person (in this section called the agent) appoint that person to be the agent of another person (in this section called the principal) for the purposes of collecting duty due under this Act from***

the principal where the Commissioner is satisfied that the agent—

(a) owes or is about to pay money to the principal;

(b) holds money for or on account of the principal;

(c) holds money on account or some other person for payment to the principal;

(d) has authority from some other person to pay money to the principal;

(e) holds goods belonging to the principal which are liable to duty and on which duty has not been paid…'

57. The Applicant relied on section 131(1)(e) above and contended that taking into account the facts of this case, the Respondent could not have been satisfied the principal (the Applicant) herein was liable to duty.

58. The Respondent argued that pursuant to section 230 of the said Act, where a person is dissatisfied with the decision of the Commissioner made under section 229, he may lodge an appeal to the Tax Appeals Tribunal within 45 days after being served with the Commissioner's decision. While the Applicant contends that the Commissioner has not made a decision that is capable of being challenged before the Tribunal, the Respondent insists that it made a decision and that the mere fact that parties entered into correspondences does not change the position as the intention by the Applicant in engaging the Respondent in the same was meant to buy time.

59. The Respondent contended that the applicant ought to have resorted to other available dispute resolution mechanisms before instituting these proceedings. In this respect reliance was placed on sections 229 and 230 of the ***East African Community Customs Management Act 2004*** as read together with section 51 of the ***Tax Procedures Act*** No. 29 of 2015 and Section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015.

60. Section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

61. It is clear that the onus was upon the applicant to satisfy the Court that he ought to be exempted from resorting to the available remedies. This was the position adopted by the Court of Appeal in **Republic vs. National Environment Management Authority [2011] eKLR**, where the Court held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at page 15 and 16 of its judgment,

"The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v BIRMINGHAM CITY COUNCIL, ex parte FERRERO LTD case. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."

62. in **Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE** Judicial Review Case No. 441 of 2013 it was held that:

"…one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute."

63. There is now a chain of authorities from the High Court as well as the Court of Appeal that where a statute has provided a remedy to a

party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in **Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425,** where it held that;

> **"Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions."**

64. It is now a cardinal principle that, save in the most exceptional circumstances the judicial review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy. In **Re Preston [1985] AC 835 at 825D Lord Scarman** was of the view that a remedy by judicial review should not be made available where an alternative remedy existed and should only be made as a last resort.

65. Lord Chancellor, **Lord Hailsham of St. Marylebone** in the House of Lords decision in **Chief Constable vs. Evans [1982] 3 ALL ER 141**, stated at p 143 as follows with respect to the judicial review remedy:

> ***"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner".***

66. **Mumbi Ngugi, J** (as she then was) in **Rich Productions Limited vs. Kenya Pipeline Company & Another [2014],** explained why the Court must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

> **"The reason why the Constitution and law establish different institutions and mechanisms for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 of the Constitution to supervise bodies such as the 2nd Respondent such supervision is limited in various respects, which I need not go into here. Suffice it that it (the court) cannot exercise such jurisdiction in circumstances where parties before court seek to avoid mechanisms and process provided by law, and convert the issues in dispute into constitutional issues when it is not."**

67. Sections 229 and 230 of the ***East African Community Customs Management Act 2004*** provide as hereunder:

> ***229(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.***
>
> ***(2)The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.***
>
> ***(3) ….***
>
> ***(4)The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any other further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.***
>
> ***(5) Where the Commissioner has not communicated his or her decision the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.***
>
> ***(6) During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner.***
>
> ***230. (1) A person dissatisfied with the decision of the commissioner under section 229 may appeal to the tax appeals tribunal established in accordance with section 231.***

68. On the other hand, section 51 of the ***Tax Procedures Act*** No. 29 of 2015 provides as follows:

> ***(1) A taxpayer who wishes to dispute a tax decision shall first lodge an objection against that tax decision under this section before proceeding under any other written law.***
>
> ***(2) A taxpayer who disputes a tax decision may lodge a notice of objection to the decision, in writing, with the Commissioner within thirty days of being notified of the decision.***

(3) A notice of objection shall be treated as validly lodged by a taxpayer under subsection (2) if—

> ***(a) the notice of objection states precisely the grounds of objection, the amendments required to be made to correct the decision, and the reasons for the amendments; and***
>
> ***(b) in relation to an objection to an assessment, the taxpayer has paid the entire amount of tax due under the assessment that is not in dispute.***

69. It is clear that section 229 of the ***East African Community Customs Management Act 2004*** is not worded in the same manner as section 51 of the ***Tax Procedures Act*** No. 29 of 2015. While the latter only deals with decisions, the former deals with both decisions and omissions. As submitted by the Respondent, ***The East African Community Customs Management Act 2004*** provides for both the substantive and procedural law hence ousting any necessity of applying the ***Tax Procedures Act*** to matters customs .

70. In this case, it was the Applicant's case that the Commission took enforcement action before determining the duty due. According to the Applicant, the enforcement action was undertaken when the parties were still discussing the matter and no decision had been made as a result thereof. To the Applicant, the Respondent ought to have first made a decision before taking the said action. If I understand the Applicant well, it was its case that the Respondents are guilty of prematurely putting into action the enforcement action before making a decision on the duty due. The said prematurity is based on the fact that the Respondent omitted to take a necessary step in the proceedings before taking the impugned action.

71. Assuming that that position is correct, section 229 of the ***East African Community Customs Management Act 2004*** deals with both decisions and omissions and provides that the remedy available is to lodge an application for review of that decision or omission with the Commission.

72. Further the issuance of agency notices was clearly a decision and a decision may be right or wrong. Where a decision is wrong the remedy is provided for under section 229 of the ***East African Community Customs Management Act 2004***. In that event, the Applicant was required to lodge an application to the Commissioner in writing within thirty days of the date of issuance of the agency notices seeking review of that decision after which the Commissioner would then be obligated to, issue a decision on the application for review as provided for under Section 229 (4) of the ***East African Community Customs Management Act 2004***. If dissatisfied by a decision of the Commissioner issued under Section 229, the Applicant would then have had the liberty to Appeal the said decision to the Tax Appeals Tribunal, which is vested with the jurisdiction to hear Appeals from the review decision of the Commissioner.

73. So whichever way one looks at the impugned step, whether as an omission or a commission, the remedy for the same is prescribed under section 229 of the ***East African Community Customs Management Act 2004.***

74. Therein lies the first distinction between the present case and **Republic vs. Kenya Revenue Authority Ex Parte Jaffer Mujtab Mohamed Nairobi Miscellaneous Civil Application No. 312 of 2011** a decision that was arrived at based on the provisions of the ***Income Tax Act*** as read with the provisions of the ***Tax Procedures Act.*** It was, based on the said enactments, that the Court found in the above case that the action of issuing the Agency Notices was premature as the period stipulated for challenging the decision had not run out and that the effect of the Respondent's action would have been to scuttle the appellate process. However, where the provision deals with both actions and omissions and what is provided is the maximum period for lodging an objection as in this case, the argument of prematurity of the enforcement action may not be of any assistance to the Applicant.

75. Therefore, whether one argues that there was a decision or not the end result is the same that the Applicant ought to have resorted to the prescribed remedy.

76. As regards the Objection to the Commission regarding the omission to make a decision on the duty due, which is the gravamen of the Applicant's case, the issue of the Respondent issuing the tax decision and allowing for the appeal review period of thirty days to lapse, before making the decision having regarded the appeal, before enforcement could be undertaken through the Agency Notices, does not therefore arise.

77. The Applicant, while relying on section 131(1)(e) of the ***East African Community Customs Management Act 2004,*** argued that taking into account the facts of this case, the Respondent could not have been satisfied the principal (the Applicant) herein was liable to duty. This argument is based on the Applicant's position that the Respondent did not consider the Applicant's representations before taking the impugned action. That argument, if true, is similarly caught up by the interpretation of section 229 aforesaid. Failure to consider representations similarly amounts to an omission which falls squarely under ambits of the said section. On the other hand, if the argument is that the facts themselves exonerated the Applicant from payment of duty, that would go to the merit of the Respondents decision and as was held in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007:**

> **"As the trial Judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili's account at the Bank was or was not liable to tax. No material was placed before the Judge on that point... it was not the role of the superior court nor of this Court to determine the correctness or otherwise of the tax which Pili was liable or whether Pili was liable to pay any tax at all for the year 2004."**

78. The issue of a decision on the merits would then have to be dealt with under section 230 of the ***East African Community Customs Management Act 2004.***

79. It is therefore my view that the applicant's grievances could have been properly dealt with under the aforesaid provisions. No convincing

reasons have been given to me why the applicant opted to bypass the aforesaid mechanisms which in my view are not any less appropriate, convenient, effective and/or beneficial.

80. In the premises I find that this Notice of Motion is misconceived and incompetent. It is struck out but with no order as to costs as the Respondent twice failed to comply, within the period directed time, with this Court's repeated reminders to furnish the soft copies of its documents in word format. It was not until yesterday, a day to the delivery of this decision that the Respondent furnished the same.

81. It is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 30TH DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

IN THE PRESENCE OF:

MR BWIRE FOR THE EX PARTE APPLICANT

MR SAIDI FOR MR WAIRIRE FOR THE RESPONDENT

CA SUSAN