REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 779 OF 2009

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER GENERAL,KENYA REVENUE AUTHORITY.....RESPONDENT

EX –PARTE APPLICANT: EQUATOR BOTTLERS LIMITED

JUDGMENT

The Application

1. Equator Bottles Limited, the *ex parte* Applicant herein, filed an application by way of a Notice of Motion dated 14th September, 2009, seeking the following judicial review orders against the Commissioner General of Kenya Revenue Authority (the Respondent herein):

> **a. An order of prohibition directed at the Respondent, whether acting by himself or through any of his officers, prohibiting him from acting upon his decision made on 12th August 2009 and communicated through a letter of the same date for the payment of taxes, penalties and interest in the sum of Ksh. 537,946,896.00 based upon the findings of an audit carried out by the Respondent upon the ex parte Applicant, which findings do not conform with the provisions of the Customs and Excise Act by including values attributable to returnable containers (bottles and crates) in the ex-factory selling price of the Excisable Beverages for the purpose of excise duty, while returnable containers (bottles and crates) are not excisable goods.**
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> **b. An order of certiorari to remove into the High Court and quash the said decision of the Respondent made on 12th August 2009 to make a demand for the payment of taxes, penalties and interest in the sum of Ksh. 537,946,896.00 based upon the findings of an audit carried out by the Respondent upon the ex parte Applicant, which findings do not conform with the provisions of the Customs and Excise Act by including values attributable to returnable containers (bottles and crates), in the ex-factory selling price of the Excisable Beverages for the purpose of excise duty, while returnable containers (bottles and crates) are not excisable goods.**
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> **c. An order of mandamus directed at Respondent compelling him to comply with the provisions of the Customs & Excise Act in relation to the determination of the value of goods for excise duty purposes by not taking into account values attributable to returnable containers (bottles) in the ex-factory selling price of the Excisable Beverages for the purposes of excise duty.**
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> **d. An order of prohibition directed at the Respondent prohibiting him from issuing any further demands or instituting recovery mechanisms for the sum of Kshs. 537,946,896.00 or at all, prior to complying with the provisions of the Customs & Excise Act in relation to the subject matter of the dispute in relation to the unlawful inclusion of values related to returnable containers.**
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> **e. THAT costs of this application be provided for**.

2. The application is supported by a statutory statement dated 9th September 2009, and an affidavit and the supplementary affidavit sworn on 9th September 2009 and 10th September 2009 respectively by Rajiv Shah, a Director of the *ex Parte* Applicant. The Respondent filed a replying affidavit in opposition to the said application, sworn on 14th October 2009 by Patrick Chege, who was at that time serving as an Assistant Commissioner in the Large Tax Payer's Office of the Domestic Tax Department.

3. An account of the parties' respective cases from the pleadings filed now follows.

The *ex parte* Applicant's Case

4. The *ex parte* Applicant stated that pursuant to an agreement entered into with the Coca Cola Company, which is the franchise holder for the Coca Cola range of products, it engaged in the business of the manufacturer and packaging of beverages in the Coca Cola range of products, and the subsequent distribution and sale of the said beverages in approved containers determined by the franchise holder in the Nyanza Province area. Further, that under the provision of the Customs and Exercise Act, Chapter 472 of the Laws of Kenya and in particular by the reason of the Fifth Schedule and tariff description therein no. 2202.10.00, the *ex Parte* Applicant theereby manufactures excisable goods, herein referred to as "excisable beverages".

5. According to the *ex parte* Applicant, the excisable beverages it manufactured were delivered to customers in various vessels, and with regard to the subject matter of the dispute herein, were delivered in returnable bottles transported in returnable in the following capacities:

i. 200ml of beverage which was then sold to the customers at a recommended retail price of Kshs. 12.00

ii. 300ml of beverage which was then currently sold to the customers at a recommended retail price of Kshs. 20.00

iii. 500ml of beverage which was sold to the customers at a recommended retail price of Kshs. 28.00

6. Further, that in the case of all of the above products and despite the facts that each capacity bottle had different costs, it was the practice of the *ex parte* Applicant to secure the return of the bottles and crates in which the excisable beverages were sold by the imposition of a refundable deposit of Kshs.10 per bottle and Kshs.100 per crate (exclusive of the VAT). In addition, that at the point of sale of the excisable beverages, a purchaser who provided empty returnable containers did not make any additional payment of deposit to the *ex parte* Applicant in the sum of Kshs.10 per bottle and Kshs.100 per crate or at all.

7. The *ex parte* Applicant averred that by letters dated 28th April 2009 and 24th June 2009, the Respondent's officer notified the *ex parte* Applicant that it was liable to pay Kshs. 564,649,213.00 and Kshs. 537,946,896.00 respectively as additional excise duty, penalties and interest thereon, alleged to be payable on account of the manufacture of the excisable beverages. Further, that this notification was made after an audit conducted of the *ex parte* Applicant in connection, *inter alia*, with tax arising on account of excise duty for the years of income 2006, 2007 and 2008.

8. The *ex parte* Applicant further averred that, it had through independent investigation, deduced that in arriving at the figure in the letter dated 28th April 2009 seeking Kshs 564,649,213.00, the Respondent's agents took into account the cost of purchase by the *ex parte* Applicant of each bottle in which the excisable beverages were delivered to the consumers, and added this sum to the excisable value of the excisable beverages. Further, and upon examination of the sum demanded with respect to the letter dated 24th June 2009, it had through independent investigation deduced that in arriving at the decision to the said sum of Kshs. 537,946,896.00, the Respondents agent's appeared to have taken into account the value of the refundable deposit paid for each bottle and each crate in which the excisable beverages were delivered to the consumers, and added this sum to the excisable value of the excisable beverages.

9. In addition, that as there was no explanation given as to the change in the basis of the computation of the excisable value of the excisable beverages as computed between the letter dated 28th April 2009 and the letter dated 24th June 2009, and the *ex parte* Applicant was thereby of the opinion that the Respondent's agents arbitrarily arrived on the method to apply.

10. The *ex parte* Applicant explained that having already paid excise duty on the cost of the excisable beverages, it sought legal and tax opinions on the matter and thereafter wrote to the Respondent's officers on 20th July 2009, and communicated the erroneous basis upon which the said additional duty, penalties and interest were alleged to be due. That in the said letter, the *ex parte* Applicant pointed out that the cost of the returnable containers did not, within the context of the Customs & Excise Act as drafted, attract excise duty as alleged by the Respondent and his agents and/or officers, and that the cost of the purchase of the bottles were included in the cost of the beverage amortized over time.

11. However, that despite the said letter, the Respondent in a letter dated 12th August 2009 under the hand of Ms. A. Irungu expressed to be written for the Commissioner of Domestic Taxes, Large Tax Payers office, made a demand for payment of Kshs. 537,946,896.00 arising on account of excise duty in the circumstances stated above without providing any reasoned response or justification for such decision. The *ex parte* Applicant contended that by a further letter dated 18th August 2009, it again invited the Respondent to give reasons for its decision, but that no response has been received by the *ex parte* Applicant to date.

12. It is thus the *ex parte* Applicant's case that the decision of the Respondent on 12th August 2009 to make a demand of disputed tax was tainted with illegality, to the extent that the tax claimed was not chargeable, due, or payable under the provisions of the Custom and Exercise Act governing the calculation of the value of locally manufactured goods for excise duty. Further, that the decision of the Respondent made on 12th August 2009 to make a demand for disputed tax was unreasonable, manifestly unjust, and tainted with demonstrable bad faith and malice.

13. The reasons advanced by the *ex parte* Applicant for impugning the Respondent's decision were that firstly, it seeks to levy excise duty which by its very nature is a duty charged on goods manufactured by a person chargeable to excise duty, when in fact the *ex parte* Applicant was not a manufacturer of bottles and crates but merely purchased them from manufacturers of bottles and crates as a mode of delivery of excisable beverages to consumers. Further, that if the Respondent was minded to charge the returnable containers to excise duty, then the logical and proper course of action would be to levy excise duty on the manufacturers of bottles and crates, not on the *ex parte* Applicant, a mere purchaser of goods already manufactured.

14. Secondly, that even if excise duty would otherwise be chargeable on the sales of bottles by the *ex parte* Applicant, the said bottles were never sold to the customers, since bottles were returnable to the *ex parte* Applicant, and such obligation to return the bottle was secured by a refundable deposit of ksh.10 per bottle regardless of the bottle size or condition. Therefore, since the bottles were never sold, no excise duty could arise, and since bottles were re-used frequently (and on average 18 times), the Respondent's demand for excise duty had the effect of imposing excise duty on each bottle several times despite no accrual of cash to the *ex parte* Applicant, and the Respondent assessed amount of Kshs. 537,946,896.00 was fundamentally flawed and significantly overstated.

15. The *ex parte* Applicant was therefore apprehensive that unless restrained, the Respondent was likely to invoke and implement drastic recovery mechanisms provided for under the provisions of the Customs & Exercise Act and thereby obtain the benefit of the sum of Kshs. 537,946,896.00 which would greatly prejudice the *ex parte* Applicant and its business. The *ex parte* Applicant gave the particulars of the effect the payment of the said sum would have on its business. The *ex parte* Applicant reiterated that the duly computed excise duty had already been paid to the Respondent in a timely fashion, and that the additional duties sought were substantial and were not provided for in the Customs and & Exercise Act.

The Respondent's Case

16. In response to the application, the Respondent contended the *ex parte* Applicant engaged in the manufacture and distribution of soft drinks which where excisable as per the Fifth Schedule to the Customs & Excise Act, as read together with section 127(C) of Customs & Excise Act. The Respondent explained that the *ex parte* Applicant was selected for audit in May 2009 for the period 2006-2008, and that during the audit exercise, the issue of the excise duty on the sales value attributable to bottles and crates (returnable containers) was raised. Further, that during the period covered by the audit, the *ex parte* Applicant bottled soft drinks in 200ml, 300ml and 500ml bottles in both glass and plastic cases, and that the glass bottles were treated as inventory items by the *ex parte* Applicant. The Respondent averred that the original cost of the bottle was broken down to Kshs. 8.60, and that the rest of the cost was expensed directly as a deferred bottle cost. Further, that its decision was informed by International Accounting Standards which define inventories as assets held for sale in the ordinary course of business.

17. According to the Respondent, upon sales, the *ex parte* Applicant raises an invoice reflecting the selling price of the liquid beverage and for the bottles which can be subsequently be resold by the distributor, and both the liquid and bottle physically pass on to the distributor at the price shown in the invoice. However, that the *ex parte* Applicant erroneously computed and paid excise duty on the value of the liquid only and excludes the value of the bottles and crates from the determination of the excise duty, on the claim that they are returnable.

18. The Respondent's case is that its demand was founded in law and on two facts:

i. The *ex parte* Applicant's bottles were sold to the distributor at a price reflected in their invoice, and the bottles only went back to the company when the distributor was desirous of selling them back, otherwise the distributor was at liberty to sell them to other third parties.

ii. A percentage of the bottles/containers was never returned or recycled because some may be broken or retained by some consumers, as the consumer was under no obligation of compulsion to return the bottles.

19. In addition, that the Respondent's audit findings squarely conformed to the provisions of the Customs & Excise Act which defines *"ex-factory selling price"* under section 127(C) to mean the price at which goods are sold from a factory exclusive only of Value Added Tax and excise stamps where applicable. Therefore, that the Kshs. 537,946,896/- demanded by the Respondent is the excise duty computed on the invoiced values for the bottles for the period under audit, and which was in conformity with the provisions of the Customs & Excise Act.

20. The Respondent gave various reasons why the price of the bottles should be included in the excisable sum. Firstly, because it was not possible to sell the liquid in any other manner than in bottles. Secondly, that glass bottles and plastic crates were not excisable when sold on their own and as such, the Respondent did not levy excise on the manufacturers of those products. Thirdly, that the excisable value of locally manufactured goods is the price at which goods are sold from the factory excluding VAT and excise stamps, which includes the cost going into making the product such as packaging and packing cost, plus a profit margin on the same. Further, that Coca Cola Co. Ltd did not own the bottles and containers used for bottling their drink, and it sub-contracted independent bottlers such as the *ex parte* Applicant, who purchased the bottles from the manufacturers, then bottled the liquid and sold the end product (both bottle and liquid) to the distributors.

21. Fourthly, that although the bottles were bought once from the manufacturer, each individual bottle was sold and resold, upon return, at a cost along with its contents to the distributor as evidenced by the *ex parte* Applicant's invoices. According to the Respondent, every bottle of soft drink was invoiced at a value every time it was filled and dispatched from the factory, and that it was levying excise duty on the invoiced value of the soft drink as a finished product, which was sold at a constant price every time, despite the recycling of the bottle.

22. Lastly, that the excise duty regime prior to 2004 determined the excisable value based on costing, and it specifically excluded the cost of containers which were returned to the manufacturer from the determination of the ex-factory selling price. However, that the current regime provided that the ex-factory selling price is the sales value excluding only VAT and excise stamps. The Respondent averred that their audit therefore concluded that the value of bottles and crates should be included in the calculation of excise duty every time there was an invoice raised reflecting the price of the bottles and crates.

23. While admitting that their audit findings as communicated through their letter dated 28th April, 2009 reported a figure of Kshs. 564,649,213 the Respondent explained that the amount was based on the weighted average costs of bottles and crates over the period of the audit. Further, that the amount was revised to Kshs. 537,946,896 through their letter dated 24th June, 2009, and that their letter of 28th April, 2009 was based on preliminary audit finding. The Respondent contended that after various discussions were held and other explanations and supporting documentation provided on various issues, the figures were amended as per their letter dated 24th June, 2009, in which the basis for charging the excise duty was the actual invoiced value for the bottles and crates as appearing in the invoices.

24. In conclusion, the Respondent stated that the *ex parte* Applicant's letter of 20th July, 2009 was a response and objection to their demand dated 24th June, 2009, as it attempted to demonstrate that the excise duty demanded was not due and payable. However, that the explanations advanced did not change the earlier position taken by the Respondent, and could not change the provisions of the law on this matter, which position was communicated to the *ex parte* Applicant in the Respondent's letter of 12th August, 2009.

The Determination

25. Before determining the issues raised by the parties herein, it is necessary to restate the parameters of judicial review jurisdiction, as stated in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** thus:

> **"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality…..**
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> **Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."**

26. Judicial review is now entrenched as a constitutional principle pursuant to 1right to fair administrative action, and section 7 of the Fair Administrative Action Act in this regard provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision.

27. In addition, it was emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act reveals an implicit shift of judicial review to include aspects of merit review of administrative action, even though the reviewing court has no mandate to substitute its own decision for that of the administrator. Lastly,** Article 165(6) of the Constitution also provides that this Court has supervisory jurisdiction over any person, body or authority that exercises a quasi-judicial function or a function that is likely to affect a person's rights.

28. Coming to the specific issues for determination, the same were raised by the *ex parte* Applicant' Advocates on record, Anjarwalla & Khanna LLP Advocates, in written submissions dated 12th June 2020, while Shijenje Johnson Advocate for the Respondent urged their issues in written submissions dated 12th August 2020.

29. The Respondent's counsel raised a preliminary issue in his submissions on the propriety of the *ex parte* Applicant's application, and contended that at the material time in question, section 127E and 127F of the Customs and Excise Act established an Appeals Tribunal and procedures for the purposes of hearing appeals on disputes arising from the decisions of the Commissioner or a person authorized by him, which procedures were not followed by the *ex parte* Applicant.

30. It is notable that this particular issue was not pleaded by the Respondent, and was only introduced in its submissions, thus denying the *ex parte* Applicant an opportunity to be heard on the same. It is in this respect trite law that that a party cannot raise new and fresh evidence through written submissions, because submissions must be based on the pleadings and the evidence as adduced, and nothing more. It was in this respect held by the Court of Appeal in **Daniel Toroitich Moi vs. Stephen Muriithi & Another [2014] eKLR, as follows**:

> **"...Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."**

31. In addition, even if the said **preliminary issue is being raised by the Respondent as a point of law, it is notable that this case was filed in 2009 when Article 159 of the Constitution and section 9(2) and (3)** of the Fair Administrative Act, that requires the exhaustion of statutory and other internal review or appeal mechanisms before a party can seek judicial review, had not been enacted.

32. It needs to be restated in this respect that this Court has **inherent and wide jurisdiction under Articles 47 and 165(6) to supervise the Respondent,** and the availability of an adequate alternative remedy does not affect the Court's jurisdiction to entertain a claim for judicial review in this respect. Such an alternative remedy only becomes a material consideration in the exercise of the Court's discretion to grant the relief sought on account of the fact that judicial review is a remedy of last resort.

33. It is also acknowledged that the Courts may, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where the dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons. This discretion is exercised pursuant to the provisions of section 9(4) of the Fair Administrative Action Act.

34. I am of the view that judicial review is a more effective and convenient remedy than the statutory laid down dispute resolution mechanism in the present application, as the issues raised herein concern the interpretation of a point of law of general importance, which in the public interest ought to be definitively determined by a court of law, despite the existence of an alternative dispute resolution mechanism. In the premises, I find that this matter is properly before this Court.

35. Moving on to the outstanding matters for determination, two substantive issues were canvassed by the parties in their pleadings and submissions, namely, whether the Respondent lawfully included the costs of the returnable bottles in the excisable price of the *ex parte* Applicant's excisable beverages, and secondly, whether the relief sought is merited. The determination of the two issues is in the ensuing sections of this judgment.

On the inclusion of the cost of bottles in the excisable price.

36. A determination of the first issue of the lawfulness of the Respondent's assessment of excise duty payable on the *ex parte* Applicant's returnable bottles for excisable beverages for the year 2006 to 2008 hinges on the interpretation of the law that applied at the time on the imposition and assessment of excise duty. The *ex parte* Applicant submitted in this regard that at the heart of the question regarding excise duty on returnable bottles is the evolution of section 127C of the Custom and Excise Act, which the Respondent relied on to levy excise duty on returnable bottles.

37. It was in this respect submitted by the counsel for the *ex parte* Applicant that prior to the enactment of the Finance Act, 2003 and the amendments it introduced, section 127C of the Custom and Excise Act read as follows:

> **"127C. Value of goods for excise duty purposes**
>
> **(1) The value of imported goods for purposes of levying excise duty shall be the sum of—**
>
> **(a) the value of such goods ascertained for the purpose of import duty; and**
>
> **(b) the amount of import duty, suspended duty and dumping duty if any.**
>
> **(2) The value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price.**
>
> **(3) For the purposes of subsection (2), the ex-factory selling price shall be determined in accordance with Part II of the Seventh Schedule and include-**
>
> **(a) The cost of any wrapper, package, box, bottle or other container in which the excisable goods are packaged;**
>
> **(b) The cost of any other goods contained in or attached to the wrapper, package, box, bottle or other container; and**
>
> **(c) Any other cost incidental to the sale of goods including advertising, financing, warranty, commission, transportation, markup or any other cost incurred related to delivery to the point of sale.**
>
> **(4) Notwithstanding subsection (3) (b), the cost of returnable containers and excise stamps shall be excluded from the excisable value."**

38. The counsel further averred that the Finance Act, 2003 came into force on 12th June, 2003 and deleted subsections (3) and (4) outlined above and enacted a new subsection (3) as below:

> ***(*3) For the purposes of subsection (2), the ex-factory selling price shall not include-**
>
> **(a) value added tax;**
>
> **(b) cost of returnable containers; or**
>
> **(c) cost of excise stamps**

39. Further, that the Finance Act, 2004 which came into force on 10th June 2004 deleted subsection (3)(b) highlighted above, and the effect of the deletion was that the ex-factory selling price of goods chargeable to excise duty should not include VAT or the cost of excise stamps. The counsel for the *ex parte* Applicant contended that the important question which was the crux of the dispute was whether the Respondent,

through the amendment passed in 2004, had been given an open cheque to levy excise duty on returnable bottles.

40. The counsel submitted in this respect that it was important to note that subsection (2) of Section 127C of the Act determined the items whose value ought to be included in the ex-factory selling price of excisable goods. These items included the cost of the wrapper, packaging, bottle or other container in which the excisable goods were packaged. Counsels submitted that the rationale for that was self-evident. It was contended that once excisable goods were manufactured, packaged and sold together with the packaging, the law treated the packaging as being part of the excisable good and required that the cost of packaging should form part of the product's ex-factory selling price.

41. The *ex parte* Applicant referred to the state of the law as it existed in 2003 and before the 2004 deletion, and submitted that the then provisions of subsection (3) (a) referred to a "bottle", not a "returnable bottle". Furthermore, that subsection (4) provided that the cost of "returnable containers" would be excluded from the excisable value. Counsel contended that the implicit interpretation of the law was that the packaging referred to in subsection 3 (a) was packaging that was sold to the end consumer together with the excisable goods; whereas on the other hand, theirs were excisable goods sold in a returnable container, where the container would be returned to the manufacturer. He stated that evidently, where the container was returned to the manufacturer for re-packaging of the excisable goods, it would be absurd for the law to impose an excise duty on such returnable containers and that the end result of such an absurdity would result in multiple instances of taxation on the same returnable container.

42. The Court of Appeal decision in in **Mount Kenya Bottlers Ltd & 3 others v Attorney General & 3 others [2019] eKLR (**hereinafter **The Mt. Kenya Bottlers Case),** was extensively relied upon and cited by the *ex parte* Applicant for the legal position on the applicability of excise duty on returnable containers under section 127C of the Customs and Excise Act, and where it was found that in light of the doctrine of strict interpretation of taxing statutes, there was no express provision in the Act to suggest or stipulate that the cost of returnable containers would be included in the cost of the ex-factory selling price.

43. Counsel contended that the Court of Appeal made it clear that the deletion of returnable containers in computation of the ex-factory selling price of excisable goods *vide* the amendment introduced by the Finance Act 2004, did not allow an interpretation that allowed the Respondent to charge excise duty on returnable containers, simply because the Act did not expressly provide for the inclusion of the said cost. They submitted that should Parliament have intended for excise duty to apply to the cost of returnable containers, it ought to have expressly and clearly provided the same in the 2004 amendment or subsequent amendments to the Act.

44. Lastly, the counsel for the *ex parte* Applicant contended that at the backdrop of the interpretation of the Act was the understanding that excise duty was a tax charged on a manufacturer. He averred that it was incontestable that the Applicant was not the manufacturer of the glass bottles; and simply buys the said bottles from a third party for packaging purposes. He contended that charging excise duty against the *ex parte* Applicant was manifestly unjust and unreasonable, and the repeated inclusion of the "cost" for a returnable bottle was absurd, punitive and illegal since the Respondent was retroactively seeking to tax a product that was neither "bought" nor sold by the Applicant.

45. On his part, the counsel for the Respondent submitted that the law was at the material time in question was section 127C(2) of the Customs and Excise Act (Revised 2007), in which the value of locally manufactured goods for purposes of levying *ad valorem* excise duty was the ex-factory selling price. He also contended that under section 127C(3) of that Act, for purposes of subsection (2) above, the ex-factory selling price shall not include value added tax and/or cost of excise stamps.

46. The counsel averred that it was worth noting that at all material times prior to the above legal position, "cost of returnable containers" was also expressly excluded in determination of the ex-factory selling price. He added that this position only lasted until the Finance Act No. 4 of 2004, that deleted that exclusion of "cost of returnable containers" so that at all the material times to the subject matter herein, the law only excluded "Value Added Tax and/or cost of Excise Stamps" in computation of ex-factory selling price, and for purposes of levying *ad valorem* excise duty.

47. On the Court of Appeal decision in **The Mt. Kenya Bottlers' Case,** the Respondent submitted that the said case decided on the constitutionality or otherwise of Section 127C(3) of the Customs and Excise Act, and that the said decision had not crystallised as it was subject of an appeal in **KRA & 2 Others vs Mt. Kenya Bottlers Limited and 4 Others**, **Supreme Court Petition No. 44 of 2019 t**hat was pending hearing and determination,

48. The starting point for this Court's interpretation of section 127C of the Customs and Excise Act, which is the provision whose meaning and import is disputed, are the key principles of statutory interpretation that apply to tax laws, which are generally considered to be penal in nature. A law is penal in nature when its substance inflicts a detriment on the persons it affects, as explained in **Halsbury's Laws of England, Vol 44(1) (Re issue)** at paragraph 1240:

> **" A law that inflicts hardship or deprivation of any kind on a person is in essence penal. There are degrees of penalisation, but the concept of detriment inflicted through the state's coercive power pervades them all. The substance, not the form of the penalty is what matters. The law is concerned that a person should not be put in peril of any kind upon an ambiguity"**

49. The first key principle of interpretation is that taxing legislation must be construed with strictness whether or not such construction is against the State or against the person sought to be taxed, and there should be no room for presumption or assumption. This principle was explained by the Court of Appeal in the **Mt Kenya Bottlers Case** as follows:

> **"48…..However, when it comes to interpretation of tax legislation, the statute must be looked at using slightly different lenses. With regard to tax legislation, the language imposing the tax must receive a strict construction. Judge Rowlett in his decision in Cape Brandy Syndicate v I.R. Commissioners [1921] 1KB (cited by the appellants), expressed the common law position in this area when he stated;**
>
> **'…*in a taxing Act one has to look at what is clearly* said. There is no room for any intendment. There is no equity**

about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'.

(Emphasis ours)

49. Similar statements have been made in several judgments on tax cases. In Scott v. Russell (Inspector of Taxes), [1948] 2 All ER Lord Simonds expressed:

"... there is a maxim in Income tax law which, though it may sometimes be over-stressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him."

50. Likewise, in **Bennion on Statutory Interpretation, 5th Edition**, this position in law as far as interpretation of tax legislation is concerned was also surmised as follows:.

" It simply means that in a taxing Act one has to look merely at what is clearly said. There is no reason for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly on the language used.'....

51. In this respect, the definitions of various relevant terms in this case are provided for in section 2 of the Act as follows:

" "excisable goods" means goods manufactured in Kenya or imported into Kenya on which an excise duty is imposed under this Act;

"excisable value" means ex-factory selling price or the value determined in accordance with section 127C;

"excise duty" means a duty of excise imposed on goods manufactured in Kenya or imported into Kenya and specified in the Fifth Schedule;

52. A literal and strict interpretation of these terms in the circumstances of this case are that for returnable bottle is an excisable good, it must be manufactured or imported into Kenya, and fall within the list of goods that are excisable under the Fifth Schedule to the Act. A number of observations at this stage are material. Firstly, it is in this regard notable that bottles are not in the list of excisable goods in the Fifth Schedule of the Customs and Excise Act, and therefore, while they may the subject of other taxes or duties, they are not subject to levying of excise duty.

53. Secondly, the liability to pay excise duty falls on the manufacturer or importer of the goods. There is no dispute that the *ex parte* Applicant in this respect is not the manufacturer of the returnable bottles, and cannot therefore be the subject of liability of any excise duty due from the manufacture of the said goods.

54. As regards the excisable value of the excisable beverages which the *ex parte* Applicant produces and distributes, section 127C of the Act provides as follows:

"127C. Value of goods for excise duty purposes

(1) The value of imported goods for purposes of levying excise duty shall be the sum of—

(a) the value of such goods ascertained for the purpose of import duty; and

(b) the amount of import duty, suspended duty and dumping duty if any.

(2) The value of locally manufactured goods for purposes of levying ad valorem excise duty shall be the ex-factory selling price.

(3) For the purposes of subsection (2), the ex-factory selling price shall not include—

(a) value added tax;

(c) cost of excise stamps"

55. The ex-factory price means the selling price of goods from a seller's factory, and section 127C excludes the cost of excise stamps and VAT from this cost. The section is silent on whether the ex-factory selling price excluded the cost of returnable containers as was the case before. There are however two reasons why in my view such a cost would not be included in the ex-factory price of goods.

56. Firstly, the *ex parte* Applicant has averred that what is charged is a deposit of the returnable bottles which is not included in the cost of the excisable goods, namely the beverages it produces. The Respondent does not dispute that the bottles were returnable, but insists that the

said bottles were sold and resold at return. I should reiterate at this point that a strict interpretation favours the finding that the bottles are not excisable goods that can be subject to excise duty, and their costs, whether sold by the *ex parte* Applicant or charged as a deposit, cannot therefore be included in any valuation of excise duty. In my view, this is the mischief that the various amendments to section 127C on the excisable value has sought to cure over the years.

57. In addition, the second key principle of legal policy that applies in the interpretation of tax laws is that a person should not be penalised except under a clear law, also known as the principle against doubtful penalisation. This principle requires that a person should not be subjected by law to any sort of detriment unless it is imposed by clear words, and militates against inclusion of the costs of returnable bottles in the value of the ex-factory selling price of the *ex parte* Applicant's excisable goods, as there was no express provision in the Act at the time that stipulated so.

58. The Court of Appeal in the **Mt Kenya Bottlers Case** extensively dealt with the question of whether the deletion by the Finance Act of 2004 of the subsection that dealt with the exclusion of returnable containers meant that Parliament meant to include the returnable crates and bottles into the excise tax regime, and held as follows.

> **"54. For the sake of argument, but more importantly in the interest of wholesome and purposive interpretation of the said section, why would Parliament have expressly excluded the tax on returnable containers before 2004 and re-introduce subsections (3)(b) and (d) to again expressly exclude the returnable containers from the tax bracket through Section 5 of the Finance Act No. 10 of 2010? In our view, the exclusion of returnable containers from the ex-factory selling price as per the previous legislations must have appreciated the unique nature of the practice in the industry and the dealing in such containers.**
>
> **55. It is not in dispute that such returnable containers are manufactured once and used for purposes of distribution. The said returnable containers are returned to the appellants by distributors, retailers and all parties involved in the supply chain. They are not sold to either the distributors, retailers or the end users and any deposits received in the said supply chain is refundable. This unique situation may perhaps explain why such returnable containers were excluded from the ex-factory selling price. Levying tax on returnable containers every time they are refilled would amount to multiple taxation which is, needless to say, unconscionable and unlawful."**

59. I am in agreement with, and guided by the said holding. I accordingly find that arising from the foregoing reasons, the decision by the Respondent to levy excise duty on the returnable bottles in which the *ex parte* Applicant's excisable beverages were sold was unlawful.

Whether the orders sought are merited

60. On the last issue as regards the relief sought, the Applicant has sought orders of certiorari, prohibition and mandamus. The Court of Appeal held in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** *inter alia* as follows as regards the nature of the order of prohibition:

> **"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…"**

61. As regards the requirements for an order of mandamus to issue, the Court proceeded to hold as follows:

> **"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* compel 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…"**

62. Lastly, the Court of Appeal discussed the order of certiorari, and opined as follows:

> **"…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. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."

63. This Court has found that the Respondent acted unlawfully and in contravention of the provisions of the then section 127C of the Customs and Excise Act, in imposing excise duty on returnable bottles in which the *ex parte* Applicant's excisable beverages were sold for the period 2006 to 2008. This error of law has the effect of rendering the impugned decision made by the Respondent untenable. The *ex parte* Applicant is therefore entitled to the orders sought of certiorari to quash the impugned decision.

64. Since the imposition of the said excise duty by the Respondent was unlawful, the consequence is that there can be no actions taken to enforce its collection. Consequently, an order of prohibition stopping any payment of the said duty for the period 2006-2008 and any penalties and interest thereon is also merited, to ensure that this Court does not act in vain.

65. The outstanding orders of prohibition and mandamus cannot however be granted in the manner sought by the *ex parte* Applicant for two reasons. Firstly, this Court cannot prohibit the Respondent from undertaking its statutory duties without any justifiable basis. Secondly, the dereliction on part of the Respondent with respect to the specific circumstances of this application can be adequately remedied by way of an order of certiorari and prohibition. Lastly, an order of mandamus cannot issue to command the Respondent to act in a specific way in the future, and with respect to undefined and unknown circumstances for which no duty has been demonstrated on its part.

66. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 14th September 2009 is merited only to the extent of the following orders:

I. An order of certiorari be and is hereby issued to remove into the High Court and quash the decision of the Respondent made on 12th August 2009 to make a demand for the payment of taxes, penalties and interest in the sum of Ksh. 537,946,896.00 based upon the findings of an audit carried out by the Respondent upon the *ex parte* Applicant on the excise duty due for 2006 to 2008, which demand contravened the then applicable provisions of the section 127C of the Customs and Excise Act on the excisable value of the *ex parte* Applicant's excisable goods with respect to returnable containers (bottles and crates).

II. An order of prohibition be and is hereby issued directed at the Respondent, whether acting by himself or through any of his officers, prohibiting it from acting upon or enforcing the decision made on 12th August 2009 and communicated through a letter of the same date for the payment of taxes, penalties and interest in the sum of Ksh. 537,946,896.00 based upon the findings of an audit carried out by the Respondent upon the *ex parte* Applicant on the excise duty due for 2006 to 2008, which demand contravened the then applicable provisions of the section 127C of the Customs and Excise Act on the excisable value of the *ex parte* Applicant's excisable goods with respect to returnable containers (bottles and crates).

III. The Respondent shall meet the costs of the *ex parte* Applicant's Notice of Motion dated 14th September, 2009.

67. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF OCTOBER 2020

P. NYAMWEYA

JUDGE

FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT

In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE