REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 257 OF 2019

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

EX –PARTE APPLICANT:

MAJID AL FUTTAIM HYPERMARKETS LIMITED

JUDGMENT

The Application

1. Majid Al Futtaim Hypermarkets Limited, the *ex parte* Applicant herein, holds exclusive rights to the Carrefour franchise across the Middle East, Africa and Asia, and operates different hypermarket and supermarket stores. in which it offers a variety of food and non-food products and household goods. The *ex parte* Applicant has filed an application in this Court by way of a Notice of Motion dated 13th September 2019, seeking the following judicial review orders against the Kenya Revenue Authority (the Respondent herein):

> **1. An order of Certiorari to remove into this Court and quash the Respondent's demand for the sum of KES. 82,888,147 dated 19th August, 2019 and the Agency Notices dated 27th August, 2019 for duty and penalties allegedly owed by the ex-parte Applicant.**
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> **2. An order of Prohibition directed at the Respondent whether by itself, its servants, agents, officers, successors and/or assigns, prohibiting them from enforcing the demand for the sum of KES. 82,888,147 dated 19th August, 2019 and the Agency Notices dated 27th August, 2019 for duty and penalties allegedly owed by the ex-parte Applicant.**
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> **3. An order of Prohibition directed at the Respondent whether by itself, its servants, agents, officers, successors and/or assigns, prohibiting them from issuing any further Agency Notices or taking any further enforcement action in relation to the accounts belonging to the ex-parte Applicant, its servants, agents, officers, successors and/or assigns seeking to recover the disputed sum of KES. 82,888,147 for duty and penalties allegedly owed by the ex-parte Applicant.**
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> **4. A Declaration that the Respondent, in issuing the demand for the sum of KES. 82,888,147 dated 19th August, 2019 for duty and penalties allegedly owed by the ex-parte Applicant and threatening to enforce the demand against the ex-parte Applicant its servants, agents, officers and/or assigns through the Agency Notices dated 27th August, 2019, has abrogated the ex-parte Applicant's rights to fair administrative action, as guaranteed under Article 47 of the Constitution and as provided for under sections 3, 4, 5, 6 and 7 of the Fair Administrative Action Act.**
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> **5. A Declaration that in the exercise of its powers as vested in it by statute and otherwise, the Respondent has failed to comply with the requirements and tenets of fair administrative action contrary to the provisions of section 5, 6 and 7 of the Fair Administrative Action Act and Article 10 of the Constitution.**
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> **6. An order for Damages on account of the Respondent's violations of the ex-parte Applicant's Constitutional and statutory rights, such damages to comprise general, aggravated and punitive damages.**
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> **7. The costs of this Application be provided for.**

2. The application is supported by a statutory statement dated 2nd September, 2019 and the verifying affidavit sworn on the same date by Alaa Ahmed Mahmoud Abdo El-Gindy, the County Finance Manager of the *ex Parte* Applicant. The said deponent also filed a supplementary affidavit dated 2nd December, 2019 and a further affidavit dated 4th September, 2020 in response to the Respondent's response.

3. The Respondent relied on two replying affidavits in opposing the said application. The first was sworn by Nancy Jemutai on 6th September, 2019 in response to the *ex Parte* Applicant's Chamber Summons application dated 2nd September, 2019, and the second was sworn by Isaac Waithaka on 23rd September, 2019 who was at the time serving as a supervisor in the Post Clearance Audit Unit (PCA) of the Customs Services Department of the Respondent.

4. Before addressing the issues raised in this application, it is necessary to provide an account of the facts of this case as recounted by the *ex parte* Applicant and Respondent, as it is necessary in my determination to identify the facts that are not contested.

The Claim

5. According to the *ex parte* Applicant, the genesis of the dispute herein is an application it made on 13th December 2018 to the Deputy Commissioner Policy & Programs Division of the Customs & Border Control Department of the Respondent, in which it sought to install cooling systems in its Village Market, Sarit Centre and The Junction Mall stores. This was to be done by importing a complete cooling system for each store from Turkey in Completely Knocked Down ("CKD") form. Further, that the *ex parte* Applicant applied to import the industrial cooling plant system in CKD form under the Harmonised System code ("HS code") 8,418.69.20. The e*x parte* Applicant contended that in response, the Respondent, acting through the Customs & Border Control Department (the "CBCD"), allowed the *ex parte* Applicant's application, after finding that it fulfilled the conditions set out under the East African Community Common External Tariff, 2017 (the "EAC Tariff").

6. Similarly, that the *ex parte* Applicant sent a further application dated 28th January, 2019 to the Deputy Commissioner Policy & Programs Division of the Respondent, seeking to install the same cooling system at its Galleria Mall under the HS code 8418.69.20, and that the Respondent acting through the CBCD, allowed the *ex parte* Applicant's application through its letter of 6th February, 2019. The *ex parte* Applicant annexed copies of its applications, and of the letters of approval dated 11th January, 2019 and 6th February, 2019 from the Respondent

7. However, that the *ex parte* Applicant subsequently received a letter from the CBCD titled "Demand Notice of Kshs. 82,211,354" dated 30th January, 2019, wherein the Respondent stated that it had reviewed the *ex parte* Applicant's import entries from the year 2015, and found that there was a tariff "misdirection" whereby Refrigerated Cabinets for various shopping mall projects were classified under HS code 8418.69.20 instead of 8418.50.00. Further, that the Respondent stated that as a result, extra taxes were due and payable by the *ex parte* Applicant amounting to a total of KES. 82,211,354.

8. The *ex parte* Applicant averred that the parties then engaged in various correspondence between 19th March 2017 and 26th March 2019, whereby it reiterated its position that the Refrigerated Cabinets were classified under the correct nomenclature. Further, that, the *ex parte* Applicant arranged a meeting on 30th April, 2019 between its clearing and forwarding agent, and the Respondent's representatives. However, that after the said meeting, the Respondent sent another demand notice to the Applicant dated 2nd May, 2019 revising the figure from KES. 82,211,354 to KES. 78,150,848, which the *ex parte* Applicant rejected on the basis that the Respondent had already allowed the import of the Refrigerated Cabinets under HS code 8418.69.20, and confirmed that approval in writing. The *ex parte* Applicant contended that the Respondent refused to accept the reasons for the import of the Refrigerated Cabinets under HS code 8418.69.20

9. Subsequently that by a letter dated 6th June 2019, the *ex parte* Applicant requested a joint verification exercise which was conducted on 16th June, 2019. The *ex parte* Applicant also stated that it, through its import agents namely Bollore Transport and Logistics, appointed Ram Realtor Limited ("RRL") as its Tax Consultants on the revised demand. Further, that the said Tax Consultants thereupon filed an application for review of the decision made by the Respondent to issue the revised demand notice, and pursuant to section 229(4) of the East African Community Customs Management Act, 2004 (the "EACCMA"), sent a letter on 5th August, 2019 to the CBCD stating that the demand was closed for lack of a response from the Commissioner. It was contended that the CBCD completely ignored those provisions of the law and proceeded to issue a third demand notice dated 19th August, 2019, wherein it was stated that the outstanding amount owed had accrued a further duty of 5% and a subsequent penalty of 2% , and computed the tax liability at Kshs. 82,888,147.

10. In response to the third demand notice, the *ex parte* Applicant states that its Tax Consultants by a letter dated 21st August, 2019 wrote to the Commissioner indicating the lack of a response to its application for review, and that the same was thereby allowed by law. Further, that the Respondent also separately wrote to the Tax Consultant a letter dated 20th August, 2019 alleging that the said consultant was not on record for the *ex parte* Applicant, and that the Respondent could not discuss the matter with it. The *ex parte* Applicant averred that its tax consultant thereupon wrote two letters to the Respondent on 22nd August, 2019 affirming its appointment to act on behalf of the *ex parte* Applicant.

11. However, that on 27th August, 2019, the Respondent's Corporate Taxpayer Account Management Division thereafter sent an Agency Notice to the *ex parte* Applicant and the *ex parte* Applicant's bank, demanding payment for the third demand notice, and that a similar agency notice was issued as against the personal account of Mr. Paras Vinod Shah, the advocate who had incorporated the *ex parte* Applicant's company but who was not a director of the company at all.

12. The *ex parte* Applicant annexed copies of the Agency Notices dated 27th August, 2019 which it impugned on the following grounds:

a) The Agency Notice was erroneously addressed to Mr. Paras Vinod Shah as a Director of the *ex parte* Applicant, a position which he no longer held.

b) The Agency Notice was also erroneously addressed to Mr. Frank Pierre Moreau who was a director of the *ex parte* Applicant, but was not a tax agent for the *ex parte* Applicant, which is a separate legal and juristic entity under the law.

c) The Agency Notice indicated that payment should be made immediately in contravention of Section 131(2) and (5) of the EACCMA which provides for a person to furnish the Respondent with a return showing details of any moneys or goods which may be held by that person from whom duty is due, within thirty days of receipt of the notice.

d) The sums calculated in the Agency Notice did not indicate the basis for the computation or whether the Respondent had taken into account the sums previously paid.

e) The Agency Notice ignored the fact that the application for review had already been approved by law under the provisions of section 229(4) of the EACCMA.

13. In conclusion the *ex parte* Applicant averred that it relied in good faith on the Respondent's written representations that it could import the refrigeration system under a specific HS code and proceeded to do so. Further, that the *ex parte* Applicant therefore had a legitimate expectation that the Respondent would act in accordance with its representations, and not proceed to raise a demand based on a completely different HS code. Lastly, that the arbitrary and unlawful actions of the Respondent were further exhibited by the issuance of agency notices against personal accounts of individuals despite no demand for any taxes ever having been made as against them, and also without any legal basis for interfering with private bank accounts of officers of the company.

The Response

14. The Respondent on its part stated that during the period January 2019, the Post Clearance Audit Unit of the Respondent's Customs Department undertook a desk audit on the importations made by the *ex parte* Applicant, focusing on imports previously declared and documented as Refrigerated Cabinets, and which were now being declared as Industrial Cooling Systems, after receiving pro forma invoices of the refrigerated cabinets imported by the *ex parte* Applicant which had varying descriptions. Further, that the audit was undertaken pursuant to the provisions of section 236 of EACCMA.

15. The Respondent in this respect explained that the *ex parte* Applicant had on 15th August 2018 imported containers which were declared to Customs vide import entry number 2018ICD 39088 as refrigerated cabinets and documented in the commercial invoice as *Materials of Refrigerated Cabinets for the TRM Kenya Project.* Further, that the said goods were sold and exported to the *ex parte* Applicant by Tekso Teknik Sogutma San. VE TIC. A.S. from Turkey, and that the *ex parte* Applicant's agent, Bollore Transport and Logistics Kenya Limited, using the correct HS Code of 8418.50.00, properly declared the consignment and the requisite taxes were also paid and the goods. The Respondent annexed copies of the Import Declaration documents for the said consignment.

16. However, that between the period 19th October, 2018 and 23rd November, 2018, two months after the first consignment was imported, the *ex parte* Applicant imported other large identical consignments for its stores situated at the Junction Mall, Sarit Centre and Village Market, which remained un-cleared from customs area until 2019. Further, that the pro forma invoices for those consignments upon importation had a description of the goods as *Refrigerated Cabinets and Materials for Junction Kenya Project, Refrigerated Cabinets and Materials for Sarit Center Kenya Project* and *Refrigerated Cabinets and Materials for Village Market Kenya Project*. It was contended that the consignments were identical to the first consignment imported for the TRM Kenya Project by the *ex parte* Applicant and that the exporter/seller of the goods was also the same Tekso Teknik Sogutma San. VE TIC. A.S. from Turkey.

17. In addition, that when the *ex parte* Applicant was declaring the same goods to customs, the description of the goods in the declaration and Commercial Invoice presented changed from "*Refrigerated Cabinets and Materials"* to "*Industrial Cooling System in CKD Form"*, and the Respondent attached the copies of the Additional Commercial Invoices attached to the declaration. The Respondent contended that these invoices with varying description raised a red flag on the authenticity of the documents presented to customs by the *ex parte* Applicant and its agent for clearance of the goods. Further, that the HS Code used of 8418.69.20 was incorrect, as it attracted no duties, and the discrepancies pointed to a deliberate and calculated attempt by the *ex parte* Applicant to provide inaccurate description of the goods with the intent to evade payment of the correct taxes due to the Respondent.

18. The Respondent averred that other consignments under the same Import Declaration Form (IDF) was imported under similar circumstances for the *ex parte* Applicant but by a different clearing agent, namely Kenvilla Logistics Limited. Further, that based on the above profiling, the Respondent conducted an analysis of all the consignments fitting the above description imported by the *ex parte* Applicant for the period 2015 to January 2019, and it was established that some consignments had been wrongly described or classified under the HS Code 8418.69.20. The Respondent stated that it then issued a demand notice dated 30th January, 2019 for the amount Kshs. 82,211,354.00 pursuant to the provisions of Section 236 and 135 of EACCMA 2004 to the *ex parte* Applicant who received it on 31st January, 2019.

19. It was contended that the *ex parte* Applicant did not reply to that demand notice, thereby compelling the Respondent to write a reminder on 5th March, 2019, reminding it of the tax obligation, which by then had accrued a penalty as per provisions of section 135(2) EACCMA, which reminder was duly received by the *ex parte* Applicant on the same date. The Respondent annexed a copy of the Demand Notice dated 30th January, 2019 and of its letter dated 5th March, 2019.

20. The Respondent further averred that the *ex parte* Applicant subsequently responded to its letters by way of a letter dated 4th March, 2019 which was received by the Respondent on 8th March, 2019, in which it objected to the demand dated 30th January, 2019, and disputed the

Respondent's assertions that a tariff mis-declaration had occurred. Further, that the *ex parte* Applicant claimed in its letter that the code used in the importation of the impugned refrigerated cabinets consignments being 8418.69.20 was correct, and requested the Respondent to withdraw the demand for taxes.

21. The Respondent stated that it thereupon wrote back to the *ex parte* Applicant on 19th March, 2019 providing an explanation as to why the applicable HS Code for the refrigerated cabinets is 8418.50.00 and not 8418.69.20, whereupon the *ex parte* Applicant responded vide a letter dated 26th March, 2019 submitting on why HS Code 8418.69.20 is applicable, which letter the Respondent stated it received on 1st April, 2019. Furthermore, that the *ex parte* Applicant also attached a letter dated 11th January, 2019 obtained from the Respondent granting authority to import the consignment in partial shipments, which they also alleged was an authority to use HS Code 8418.69.20. Additionally, that the *ex parte* Applicant proposed and invited Customs to visit any of their outlets to establish that the consignment was indeed an industrial cooling plant

22. The Respondent annexed copies of the said letters, as well as a copy of the *ex parte* Applicant's application letter dated 13th December, 2018 and the Respondent's letter dated 11th January, 2019 authorizing shipment in partial consignments. It was contended that the letter dated 11th January, 2019 was an authority by the Respondent to import the goods through partial shipments as provided for under additional note 2 to Section XIV of the East African Community Common External Tariff (EAC CET), subject to the machinery being classifiable under the proposed tariff heading upon audit. Further, that contrary to the *ex parte* Applicant's assertions, the quoted section only provides for partial importations for the machinery indicated in Chapter 84 or Chapter 85 of the Common External Tarrif, and not the use of a specific HS Code.

23. It was also contended by the Respondent that the *ex parte* Applicant in its application stated that it was in *the process of importing a complete cooling system*, and as a sign of bad faith, failed to disclose to the Respondent at the time of making its application that the consignment had already been imported into the country between October and November 2018, and was awaiting clearance at ICDE. The Respondent averred that the *ex parte* Applicant's actions were already in contravention of condition 5 of the letter of authority to import in partial shipments, since the condition stated that *"…..all the components described under the respective invoices for each of the Industrial cooling plants shall be imported within six months (6) months from the date of this letter through the identified place of discharge to ensure easy monitoring…"*

24. Furthermore, that the *ex parte* Applicant used the application to import in partial consignments to sneak in a request to use a specific tariff that attracts lesser taxes than those that applied while importing an identical consignment for TRM Kenya Project. The Respondent averred that it only granted the *ex parte* Applicant authority "to import and clear the three complete industrial cooling plants in partial shipments in accordance with the provisions of the EAC Tariff nomenclature" subject to certain conditions.

25. The Respondent in this respect contended that while conditions 1, 2 and 3 of the said letter of authority stated that the components forming the machinery for the complete industrial cooling plants were classifiable under HS Code 8418.69.20, this was not an approval to classify the consignment under the requested tariff, but a condition that for the goods to be imported in partial shipments, they must fulfil all the conditions listed therein. Additionally, that condition 10 stated that the approval to import in partial shipments was granted based on the illustrations and documents presented in the application, and did not absolve the importer from liability on any inconsistencies that may be identified on importation.

26. It was averred that had the *ex parte* Applicant disclosed to the Commissioner at the time of making the application that it had already imported the consignment prior to making the application, the its consignment would have been subjected to pre-verification to confirm the actual description of the goods in addition to scrutiny of the documentation presented to the Customs officials. The Respondent reiterated that at no point did the Commissioner affirm that the refrigerated cabinets were classified under the declared HS Code, and that the authority the *ex parte* Applicant was referring to was an authority to import the consignment in partial shipments as per the provisions of additional note 2 to section XIV of the EAC Common External Tariff.

27. Regarding the events that followed after the exchange of the above correspondence, the Respondent gave a similar account regarding the site visit to one of the *ex parte* Applicant's premises for a site inspection/audit, and of the meeting held on 30th April, 2019 to inform and discuss on the findings of the site verification. The Respondent stated that it gave the *ex parte* Applicant the applicable HS Codes during the said meeting, and contended that on 2nd May, 2019, it sent to it the final reviewed demand notice of Kshs. 78,150,848 as per provisions of sections 236 and 135 of EACCMA, and taking into consideration the findings of the inspection audit. Further, that upon a request made by the *ex parte* Applicant by a letter dated 13th May, 2019, but which was received by the Respondent on 20th May, 2019, it sent the tariff ruling report to the *ex parte* Applicant on 22nd May 2020.

28. According to the Respondent, the *ex parte* Applicant on 31st May, 2019 objected to the final demand issued by the Respondent dated 2nd May, 2019 as per the provisions of Section 229(1), and requested that the demand be withdrawn, and the Respondent annexed a copy of the said objection letter dated 31st May, 2019. Further, that on 4th June, 2019, the Respondent responded to the *ex parte* Applicant's objection and gave its objection decision as per provisions of section 229 (4) EACCMA, and demanded the taxes due as per the demand notice dated 2nd May, 2019 on the grounds that the *ex parte* Applicant had not raised new and/or technical issues. The Respondent likewise annexed a copy of the objection decision dated 4th June, 2019.

29. However, that on 15th June, 2019, the Respondent received an unreferenced letter of the same date from an entity known as RAM Realtor Ltd, which had allegedly been appointed by M/S Bollore Africa Logistics Ltd on behalf of the *ex parte* Applicant to act as their tax consultant. Further, that the said letter was with regard to the demand dated 2nd May, 2019 for Kshs. 78,150,848.00, and was allegedly an objection to the Respondent's decision dated 4th June, 2019 and was appealing for a review of the decision.

30. The Respondent's position as regards the said letter from the *ex parte* Applicant's tax consultant is that firstly, the owner of the imported goods and upon whom the demand notices and the objection decision was issued is the *ex parte* Applicant, while its agent is Bollore

Transport and Logistics Kenya Limited, both of whom were on record in as far as this matter is concerned and whom the Respondent had been engaging all through. Therefore, that Bollore Africa Logistics Ltd and RAM Realtors are strangers to this matter.

31. Secondly, that section 146 of the EACCMA provides for the procedure to be followed when appointing an agent, wherein the appointing authority of RAM Realtors ought to have been the *ex parte* Applicant and not Bollore Africa Logistics Ltd. Furthermore, that section 146(2) provides that a person shall not be the duly authorised agent of any owner unless such person is exclusively in the employment of the owner or such person is a Customs agent duly licensed as such, and in either case, such person is authorized in writing by the owner to perform the act on behalf of the owner. The Respondent averred that neither the *ex parte* Applicant as the owners of the consignments nor Bollore Transport and Logistics Kenya Limited as the agent, notified the Commissioner in writing of appointing either Bollore Africa Logistics Limited or RAM Realtors Ltd to act on their behalf on any matter related to Customs.

32. The Respondent's case therefore is that the appointment of RAM Realtors as tax consultants was not in accordance with the law, and it was not at liberty to discuss any tax matters related to a taxpayer with strangers, since the Commissioner is bound to maintain confidentiality in his performance of his duties in line with Section 9(2) of the EACCMA. In addition, that its letter dated 4th June 2019 to the *ex parte* Applicant was the Commissioner's decision as provided for under Section 229(4) of EACCMA, and that the said decision was not subject to any further review under section 229(1) of the EACCMA. Therefore, that the only recourse available to the *ex parte* Applicant was to appeal to the Tax Appeals Tribunal under Section 230 of EACCMA.

33. The Respondent acknowledged having received the subsequent letter dated 5th August, 2019 from RAM Realtors Ltd, and averred that on 19th August, 2019, the Respondent wrote to the *ex parte* Applicant reminding them of the outstanding taxes of Kshs. 78,150,848 as per the demand notice dated 2nd May, 2019, which had attracted additional penalties as prescribed by Section 135 of EACCMA, and informed the *ex parte* Applicant that failure to pay the said taxes would result to enforcement measures being undertaken against it. Further that on 20th August, 2019, the Commissioner wrote to RAM Realtors clarifying the fact that RAM Realtors were strangers to this matter and had no *locus standi* to address any matter concerning the *ex parte* Applicant since their appointment was not in accordance to Section 146 of EACCMA, hence the Respondent was not at liberty to engage them.

34. The Respondent confirmed that it received two letters dated 21st August, 2019 and 22nd August, 2019 from RAM Realtors in response to the Respondent's letter dated 19th August, 2019, to the effect that the Respondent had allowed the *ex parte* Applicant's application for review and that there was allegedly now no demand on the *ex parte* Applicant to pay the taxes earlier demanded. The Respondent averred that contrary to the assertions made by RAM Realtors, the *ex parte* Applicant did not respond to the 1st demand notice from the Respondent dated 30th January, 2019, and 30 days lapsed without the *ex parte* Applicant lodging a valid objection as per the provisions of the law.

35. Further, that the Respondent issued a 2nd demand to the *ex parte* Applicant on 2nd May, 2019., to which the *ex parte* Applicant lodged its objection on 31st May, 2019, which was within the statutory timelines. Subsequently, that on 4th June, 2019, the Respondent wrote back in relation to the *ex parte* Applicant's objection dated 31st May, 2019 and the letter dated 4th June, 2019 was the Respondent's objection decision. It was the Respondent's position that if dissatisfied, the *ex parte* Applicant ought to have appealed against the said decision at the Tax Appeals Tribunal in accordance with Section 230 of the EACCMA.

36. On the issue of the agency notices, the Respondent averred that since the *ex parte* Applicant failed to pay the taxes demanded by the notice dated 2nd May, 2019 and despite the reminder from the Respondent by the letter dated 19th August, 2019, it was left with no choice but to invoke the law in section 131 of the EACCMA on recovery of taxes through issuance of agency notices. Accordingly, that on 27th August, 2019, the Commissioner of Customs forwarded the file to Corporate Tax Accounts Management Division of the Respondent for enforcement measures. Therefore, that the agency notices were awfully and procedurally issued on the *ex parte* Applicant's bankers and Directors on 27th August, 2019.

37. Further, that there was nothing un-procedural or disproportionate in issuing agency notices on several of the *ex parte* Applicant's bankers, as the Commissioner is allowed under section 131 of the EACCMA to issue agency notices to an agent for the purposes of collecting duty due, where the Commissioner is satisfied that the said agent(s) hold money for or on account of their principal. It was contended that according to the information with the Respondent, the directors of the *ex parte* Applicant Company are Paras Vinod Shah of PIN A002617897R and ID. No. 13298751 and Franck Pierre Moreau of PIN A008493701Z of alien ID No. 790855, as per records retrieved from the iTax records, a copy of which was annexed.

38. In conclusion, the Respondent stated that the enforcement measures it had taken were necessary to ensure the *ex parte* Applicant complied with its Constitutional duty to pay taxes. In addition, that it had not acted contrary to the law and had followed due process in assessing, demanding and enforcing the tax due, since the *ex parte* Applicant's objection was rejected by the Respondent. Further, that it had demonstrated that the *ex parte* Applicant was indeed given an opportunity to be heard, with evidence of all the meetings, site visit, tariff ruling and several correspondence exchange between the parties, and that there had been no violation or infringement of the *ex parte* Applicant's right to fair administrative action as alleged. The Respondent averred that it had not breached any principle of legitimate expectation, and that legitimate expectation cannot arise out of an illegality such as evasion of payment of taxes, nor can the Respondent act against clear provisions of a statute to meet the *ex parte* Applicant's expectations.

39. Lastly, that this application ought not to be entertained by this Court since the *ex parte* Applicant ought to have sought redress before the Tax Appeals Tribunal as per section 230 of the EACCMA, and the application therefore offended the doctrine of exhaustion. The Respondent asked the Court to balances the rights of all parties herein and secure the taxes due, as the public interest outweighs the private interests of the *ex parte* Applicant.

The Reply

40. The *ex parte* Applicant in reply sought to clarify that at all times, its imports constituted of industrial cooling systems consisting of

several components, which include refrigerated cabinets, electrical panels, cold and freezing rooms supplies, piping networks, oils and refrigerants, ice machines, refrigeration materials and several other apparatus. Further, that the system operates as one system despite the fact that it is imported as separate components. The *ex parte* Applicant explained that it had previously applied different Harmonised System (HS) codes for all different components of the system, and that upon the advice of its Customs Agents (Bollore Transport and Logistics Kenya Limited), it sought to modify its declarations to capture the correct HS code namely 8418.69.20 as all the components imported constituted one system, and to capture that the system would be imported in a completely knocked down (CKD) form (in a disassembled state). It was its case that declaring the individual components as separate items with different HS codes was in fact the mis-declaration.

41. The *ex parte* Applicant added that the reason it applied HS code 8418.69.20 rather than HS code 8418.50.00 was that the refrigerators under 8418.69.20 cover a wide range of application which in this case includes the cooling ice creams, cheeses, yoghurts, meats and other meat products at very low temperatures i.e. up to - 40 degrees a feature which cannot be provided by refrigerators under HS code 8418.50.00. Further, that due to the size of the refrigeration units which are classified under HS code 8418.69.20, the systems take about 3 months to be fully installed and operational. He added that the installation also requires a skilled technician which is also not the case with refrigerators under HS code 8418.50.00, as it comes in a CKD form.

42. In denying the allegation that the change of description of the goods imported was a deliberate and calculated attempt to provide inaccurate descriptions of the goods with the intent to evade payment of the correct taxes due to the Respondent, the *ex parte* Applicant pointed to Note 4 of Section XVI of the EAC Common External Tariff, which provides that "where a machine (including a combination of machines) consisting of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function." The *ex parte* Applicant averred that its declarations at all times were true and never designed to deceive or mislead the Respondent, and that the change of code in itself was not evidence of dishonesty on its part, but was based on the accurate nature and description of the goods it imported.

43. Furthermore, that the *ex parte* Applicant used the HS code 8418.69.20 with the specific approval of the Respondent, which was sought with every different shipment in the *ex parte* Applicant's letters dated 13th December, 2018 and 28th January, 2019, and the approval granted in the Respondent's letters dated 11th January, 2019 and 6th February, 2019 respectively. The *ex parte* Applicant averred that in the said letters, it sought the approval of the Respondent for:

(a) the authority to import the industrial cooling system as a partial shipment,

(b) the authority to declare the imports using one HS code i.e. 8418.69.20, and

(c) in CKD form.

In addition, that it made the application for partial shipment as they were importing a single system in various parts under one HS code and in CKD form.

44. Additional note 2 of Section XVI of the EAC Common External Tariff was cited by the *ex parte* Applicant as allowing for the above procedure, and which provides that "a machine in a disassembled or unassembled state may be imported in several consignments over a period of time if this is necessary for convenience of trade or transport". Further, that in order to be able to declare the different constituent parts under the same tariff heading or subheading as the assembled machine, the declarant must make a request in writing to the customs post not later than the first consignment, and must attach the diagrams and an inventory and documents on the characteristics and specifications of the items being imported.

45. The *ex parte* Applicant averred that it complied with these requirements as its applications were made before the consignment arrived in the country; an inventory of items was annexed for the Respondent's review; and the applications contained the diagrams and illustrations of the system. It denied that the imports were already in the country by the time it made the applications to the Respondent, and stated that no evidence had been tabled by the Respondent to support the said allegations. The *ex parte* Applicant stated that on the contrary, the goods for which it had requested authority for partial shipment were all released to it after the approval by the Respondent was granted.

46. The *ex parte* Applicant therefore contended that from the sequence of events, it had been transparent with the Respondent and sought its approval for the importation of every consignment, whereas the Respondent's actions are contradictory, in bad faith and unfair. Additionally, that the demand notice by the Respondent was issued in an unjustified manner, as it was issued without any audit which is the generally accepted tax practice before a demand notice is issued, and which would have provided the e*x parte* Applicant an opportunity to explain any variances or issues noted during the audit. Further, that the demand requested the *ex parte* Applicant to settle the tax due from 30 days of the letter, which was an unreasonable demand for the amount demanded (KES 82,211,354) considering the harsh economic conditions prevailing in the country.

47. On the contention by the Respondent that the approval it granted was for partial shipments only and not for the use a specific tariff code, the *ex parte* Applicant stated that its letter to the Respondent dated 13th December, 2018 was clearly titled "Application for Authority for Partial Shipments and Use of Single HS code 8418.69.20 For industrial Cooling System and Auxiliaries in Complete Knockdown Kit Imported By Majid Al Futtaim Hypermarkets Limited." Therefore, that it was unfair for the Respondent to then claim that it did not issue an approval for the use of the HS code requested. Further, that it did not make sense to have the letter requesting approval for partial shipment without indicating the HS code which an importer intends to use, as the request would not serve any practical purpose. He contended that it was also unfair for the Respondent to state that they did not intend to approve the use of the HS code when the *ex parte* Applicant had already relied on the approvals it granted.

48. The *ex parte* Applicant denied that the appointment of its tax consultant, Ram Realtors Limited (RRL) was unprocedural and averred that the customs agents provided under section 146 of EACCMA perform different duties from the work its tax consultants was appointed to do,

which was to assist the *ex parte* Applicant with the Respondent's tax demand. Therefore, the requirements under section 146(2) of the EACCMA do not apply to its tax consultant, and the *ex parte* Applicant contended that the Respondent's claims as regards the said tax consultant were aimed at avoiding the fact that the Respondent failed to respond to the application for review in line with the provisions of section 229 (5) the EACCMA

49. Lastly on the Agency Notices, the *ex parte* Applicant averred that it became aware after filing this suit that yet another Agency Notice also dated 27th August 2019 had been issued against the its s Stanbic Bank (K) Limited accounts and Stanbic Bank had proceeded to freeze the disputed sum of KES. 82,888,147. The *ex parte* Applicant annexed a copy of the Agency Notice dated 27th August, 2019 , and contended the issuance of three Agency Notices with respect to the sum of KES. 82,888,147 effectively meant that the collective amount of KES. 248,664,441.00 may then been frozen in relation to a disputed, unjustified amount of alleged "extra taxes". The *ex parte* Applicant further averred that unless this Court intervenes, the Respondent shall proceed to illegally exercise its powers to the its detriment, its operations and in violation of Constitutional rights of private individuals who are not a party to the dispute.

The Determination

50. The application herein was canvassed by way of written submissions. The *ex parte* Applicant' Advocates on record, Coulson Harney LLP Advocates, filed written submissions dated 2nd December, 2019, while Lydia Ng'angá Advocate for the Respondent filed written submissions dated 24th March, 2020. The parties in their submissions were agreed that the issues for determination are as follows:-

a) Whether the *ex parte* Applicant had exhausted the available remedies before filing its application before this Court.

b) Whether the Respondent's actions in respect of demanding taxes and issuing agency notices was lawful;

c) Whether the relief sought by the ex parte Applicant is merited.

51. Before determination of these issues, 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).**
>
> **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…..**
>
> **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)."**

52. Judicial review is now entrenched as a constitutional principle pursuant to the provisions of Article 47 of the Constitution, which provides for the right 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. In addition, it was noted 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.**

53. 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.

On Whether the ex parte Applicant Exhausted the Available Remedies

54. The issue of the propriety of the *ex parte* Applicant's application arose from the pleadings and arguments made as regards the dispute resolution procedure to be followed under section 229 of EACCMA, and the participation of Ram Realtors Ltd, the *ex parte* Applicant's alleged tax consultants, in this regard. I will proceed to address these two aspects separately.

On the Procedure under section 229 of EACCMA

55. The *ex parte* Applicant submitted that the matter of the taxes due from it was deemed closed pursuant to Section 229 (5) of EACCMA,

since the Respondent did not respond to its application for review within thirty (30) days as required by law. Further, that for this reason, the *ex parte* Applicant's agent sent a further letter dated 5th August, 2019 notifying the Respondent that the demand for Kshs. 78,150,848 as unpaid taxes from the *ex parte* Applicant was thereby deemed closed. The *ex parte* Applicant relied on the decision in **Republic vs Commissioner of Customs Services ex-parte Unilever Kenya Limited [2012] eKLR,** where the Court held that once a taxpayer lodges an application for review, the Commissioner of Customs has 30 days within which to make and communicate a decision to the taxpayer, and shall be deemed to have made a decision to allow the application if no communication is made. Therefore, that the *ex parte* Applicant had no reason to appeal a review that had been deemed allowed by operation of law, which therefore meant that the Tax Appeals Tribunal has no mandate to make a decision on a matter that had been concluded, as the jurisdiction of the Tribunal under section 230 of EACCMA only arises after being served with the decision to the Commissioner. Therefore, that it is a misdirection by the Respondent to claim that the Tribunal was the appropriate venue to deal with the *ex parte* Applicant's grievance.

56. According to the e*x parte* Applicant, its application for review of the Respondent's decision was lodged on 15th June, 2019, after the Respondent's final decision of 4th June, 2019, which dismissed the e*x parte* Applicant's objections. The e*x parte* Applicant's submission in this regard was that the Respondent's demand notice of 2nd May, 2019 for taxes of Kshs 78,150,848/= cannot have been a final decision and the baseline for time running, as the Respondent's own conduct and communication indicated that there was room for the same to be discussed leading to its revision. Further, that the e*x parte* Applicant's objection dated 31st May, 2019 was made in order to facilitate further discussion on the matter, and the Respondent's decision of 4th June, 2019 is the one that necessitated an application for review as it disregarded the *ex parte* Applicant's objection. The ex parte Applicant submitted that it accordingly made its application for review on 15th June 2019, which the Respondent failed, refused and neglected to respond to .

57. The *ex parte* Applicant submitted further that after it filed its application for review on 15th June, 2019, section 229 (4) of EACCMA obligated the Respondent to communicate its decision within a period not exceeding thirty days of the receipt of the application for review. In addition, that the requirement of exhaustion of local remedies is only tenable if there are effective, available and adequate internal remedies to be pursued, and since the law had provided the *ex parte* Applicant with a full remedy, there was no reason to appeal a decision that had already been made in its favour. It was thus contended that the remedy of appealing to the Tax Appeals Tribunal was not available as there was no appealable decision under section 53 of the Tax Procedure Act. The *ex parte* Applicant in this regard relied on the case of **Republic vs Commissioner General, Kenya Revenue Authority Ex parte Sanofi Aventis Kenya Limited [2019] eKLR**, that an internal remedy is effective if it offers a prospect of success and adequate if it is capable of redressing the complaint.

58. In conclusion, the *ex parte* Applicant submitted that it was not appealing a decision of the Respondent, but was rather invoking the powers of the High Court to conduct a judicial review of the actions taken by the Respondent following the matter becoming closed by operation of law, as provided under Section 229 (5) of EACCMA. The *ex parte* Applicant made reference to the distinction made between an appeal and review in **Republic vs Public Procurement Administrative Review Board & 3 others Ex-Parte Saracen Media Limited [2018] eKLR**, and contended that the essence of its complaint was the manner in which the Respondent acted in exercising its power, and that the actions of the Respondent fell squarely within the grounds upon which the Court's supervisory jurisdiction may be triggered pursuant to Article 165 (6) of the Constitution and Section 7 (2) of the Fair Administrative Act, 2015 as held in the case of **Silver Chain Limited vs Commissioner Income Tax & 3 Others [2016] e KLR.**

59. The Respondent on its part submitted that the *ex parte* Applicant, being dissatisfied with the decision of the Commissioner issued on 4th June, 2019, ought to have appealed against the said decision at the Tax Appeals Tribunal in accordance with Section 230 of the EACCMA. The Respondent reiterated that it issued a revised and final demand on 2nd May, 2019 to the *ex parte* Applicant for taxes amounting to Kshs 78,150,848/= pursuant to the provisions of sections 236 and 135 of EACCMA, and taking into consideration the findings of the inspection audit and the tariff ruling arbitration thereto. Further, that the Respondent discharged its statutory mandate by rendering its decision to the objection/application for review on 4th June, 2019, which was within the 30 days of receipt of the *ex parte* Applicant's objection/application for review dated 31st May 2019. The Respondent added that its decision dated 4th June, 2019 was the basis upon which the *ex parte* Applicant ought to have appealed to the Tax Appeals Tribunal in line with section 230 of the EACCMA.

60. According to the Respondent, there was no other or further opportunity under the law for the *ex parte* Applicant to make an application for review, and that therefore, the letter dated 15th June, 2019 received by the Respondent from an entity known as RAM Realtor Ltd seeking review of the Respondent's decision dated 4th June, 2019 was null and void ab initio. Further, that this Court therefore has no jurisdiction to entertain this application as the *ex parte* Applicant had not exhausted the available legal remedies, in this case being the Tax Appeals Tribunal, to ventilate their dissatisfaction with the agency notices issued by the Respondent for the recovery of the said taxes. It was contended that all the *ex parte* Applicant's prayers were premised on the impugned tax demand and agency notices, which constituted an appealable decision as per Section 3 of the Tax Procedures Act, 2015, and the proper forum for seeking redress on appealable decisions was the Tax Appeals Tribunal pursuant to section 52(1) of the Tax Procedures Act.

61. Lastly, the Respondent submitted that the impugned tax decision was an administrative decision within the meaning of section 2 of the Fair Administrative Action Act, 2015, and it therefore follows that the provisions of sections 9(1) (2) (3) & (4) of the Fair Administrative Action Act apply in this case, and specifically, the requirement for exhaustion of available remedies. Reliance was placed on various decisions for these submissions, including **Republic vs. Kenya Revenue Authority & Another, Exparte Centrica Investments, (2019) eKLR; Krystalline Salt Limited vs. Kenya Revenue Authority Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR; Republic vs Kenya Revenue Authority Ex-parte Keycorp Real Advisory Limited, Judicial Review Application No. 448 of 2018;** and **Cortec Mining Kenya Limited vs. Cabinet Secretary Ministry of Mining & 9 others [2017] eKLR.**

62. It is not in dispute that an internal dispute resolution mechanism is provided for in section 229 of the EACCMA which provides as follows:-

> **"(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) Where the Commissioner is satisfied other that, owing to absence from the Partner State, sickness cause, or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).

(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any 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 to 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.

63. Further, section 230 of EACCMA provides that:

"(1) A person dissatisfied with the decision of the Commissioner under Section 229 may appeal to a tax appeals tribunal established in accordance with Section 231.

(2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner."

64. **Likewise, with respect to tax disputes, s**ection 51(1) & (2) of the *Tax Procedures Act* provide as follows as regards the dispute resolution process:

"(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."

65. Section 52 of the Tax Procedures Act in addition provides as follows as regards appealable decisions to the Tax Appeals Tribunal:

"(1) A person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act, 2013 (No. 40 of 2013).

(2) A notice of appeal to the Tribunal relating to an assessment shall be valid if the taxpayer has paid the tax not in dispute or entered into an arrangement with the Commissioner to pay the tax not in dispute under the assessment at the time of lodging the notice."

66. It is notable in this regard that exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, as exemplified by emerging jurisdiction on the subject. This position was advanced by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (supra)** as follows:

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

67. In addition, sections 9(2) and (3) of the Fair Administrative Action Act requires the exhaustion of statutory and other internal review or appeal mechanisms before a party can seek judicial review. Under section 9 (4) of the Act, the Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. While the exceptions to the exhaustion requirement are not clearly delineated the Court of Appeal gave guidelines when they would apply in **Republic vs. National Environment Management Authority, Civil Appeal No. 84 of 2010**, as follows:

"...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 real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...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."

68. Likewise, it was held by the High Court **In the *Matter of the Mui Coal Basin Local Community* *(2013) e KLR*, *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya*** *and* **Mohamed Ali Baadi and others vs The Attorney General & 11 others [2018] eKLR** that in reaching a decision as to whether an exception applies, courts will undertake an analysis of the facts, regulatory scheme involved, the nature of the interests involved including the level of public interest involved, and the polycentricity of the issues and the ability of a statutory forum to determine them.

69. In the present case, it is not controverted that a tax demand was made by the Respondent to the *ex parte* Applicant, and that the said parties engaged in negotiations on its payment, which culminated in an application for review by the being made by the *ex parte* Applicant. The point of departure between the parties is on the manner and form in which the application for review made, and whether there was a decision thereon by the Respondent. The *ex parte* Applicant in this regard claims that its application for review is in the letter by its agent dated 15th June 2019, on which no decision was made by the Respondent, and that the application was therefore deemed to have been accepted, and there was no need to appeal. The Respondent on the other hand states that the *ex parte* Applicant's application for review was in its letter dated 31st May 2019, on which the Respondent made a decision in its letter 4th June 2019. Therefore, that the *ex parte* Applicant has not exhausted the internal appeal mechanisms provided for in EACCMA.

70. An examination of the correspondence exchanged between the parties on the Respondent's demand notices is therefore necessary to establish the position as regards compliance with section 229 of EACCMA. It is not in dispute in this regard that the Respondent issued its first demand notice on 30th January 2019 which read as follows:

> **30th January, 2019**
>
> **REF: HQ/PCA/RRI/002/2019**
>
> **PIN. No. P051522497N**
>
> **The Managing Director,**
>
> **Majid Al Futtaim Hypermarkets Limited,**
>
> **P.O. Box 2058 – 00502,**
>
> **NAIROBI.**
>
> **Dear Sir/Madam**
>
> **RE: DEMAND NOTICE OF KSH. 82, 11,354**
>
> **A review of your entries for the years 2015 to date pursuant to the provisions of section 236 of East African Customs Management Act (EACCMA) 2004, has indicated tariff misdeclaration where Refrigerated Cabinets for various shopping mall projects were classified under HS code 8418.69.20 instead of 8418.00.**
>
> **As a result of the above, extra taxes are due and payable to the Commissioner of Customs and Border Control Department as shown below:**
>
> **Ksh.**
>
> **Import Duty 29,786,722**
>
> **VAT 52,424,632**
>
> **Total 82,211,354**
>
> **You are hereby called upon to pay the taxes assessed within 30 (Thirty) days from the date of this letter in accordance with the provisions of section 135 of the EACCMA 2004. Attached herewith please find the workings for ease of reference.**
>
> **Please note that failure to pay the said taxes within the stated period will attract a further sum equal to 5% of the amount demanded by way if a penalty, plus a subsequent penalty of 2% for each month in default.**
>
> **I wish to advise that the assessment as summarized above was limited to Simba system declarations and conclusion drawn from them and KRA Customs Services Department reserves the right to re audit new information becomes available.**
>
> **Yours faithfully.**
>
> **Signed**
>
> **M. Mageto**

For: <u>Commissioner Customs and Border Control Department"</u>

71. It is also not in dispute that the parties thereafter engaged in a course of correspondence over the said demand, including site visits, which led to the second demand notice dated 2nd May 2019, and which read as follows:

"2nd May, 2019.

REF: HQ/PCA/RRI/002/2019

PIN. No. Po51522497N

The Managing Director,

Majid Al Futtaim Hypermarkets Limited,

P.0.-Box-2058-00502,

Nairobi.

Dear Sir/Madam,

RE: DEMAND NOTICE OF KSH. 82,211, 354

I refer to your letter number ARB/107/19e dated 26/03/2019 and our meeting of 30/04/2019 between KRA, yourselves and Bollore.

Consequently, after the KRA inspection on 9th April 2019 we have since revised demand our earlier from Kshs. 82,211,354 to Kshs. 78,150,848 as per the explanations shared during attached schedules and the meeting.

You are therefore called upon to pay the reviewed taxes assessed in accordance with the provisions of section 135 of the EACCMA 2004.

Please note that failure to pay the said taxes within the stated period will attract a further sum equal to 5% of the amount demanded by way of a penalty, plus a subsequent penalty-of 2% for each month in default.

Yours Faithfully,

JM Ojee

Deputy Commissioner Risk Management and PCA

For: Commissioner Customs and Border Control Department

72. The *ex parte* Applicant's reply dated 31st May 2019, and which the Respondent claims was the application for review, read as follows:

"ARB/198/19

31st May, 2019

The Commissioner,

Customs & Border Control Department,

Kenya Revenue Authority,

Times Tower,

<u>NAIROBI.</u>

Attention J.M. Ojee

Dear Sir,

SUB: DEMAND NOTICE OF KSH. 82,211,354

We are in receipt of your letter reference HQ/PCA/RRI/002/2019 dated 2nd May, 2019 and to which we refer.

We are not in agreement with your revised demand. Certainly the explanations given were not in line with our presentation of the facts. We refer you again to your letters ref: CSD/GEN/PP/1 dated 6th February 2019 and 11th January 2019 confirming that we could import these items under tariff code 8418.69.20.

What you are doing now is trying to reverse your own decision which is not only incorrect but is against the KRA principles of Professionalism, Integrity and Fairness.

Kindly withdraw your demand.

Yours faithfully,

For and Behalf of Majid Al Futtaim Hypermarket Ltd.

Signed.

J.A. Onyach

Import Manager

Encls.

73. The Respondent then responded in a letter dated 4th June 2019, which it states was its decision on the *ex parte* Applicant's application for review, as follows:

"4th June 2019

HO/PCA/RRI/002/2019

M/s Majid Al Futtaim,

P.O. Box 2012-00621,

NAIROBI.

Attn: J.A Onyach

Dear Sir,

RE: DEMAND NOTICE- KES. 78,150,848

We acknowledge receipt of your letter ref. ARB/198/19 dated 31st May, 2019 and to which we refer.

The Commissioner is not in a position to accept your letter of objection. There are no new and/or technical issues raised on the above letter. You are advised to reconsider your position and pay the taxes due as earlier communicated.

Yoú may further wish to note our letters referenced CSD/PP/GEN/1 dated 11th January 2019 and 6th February 2019 were not a tariff ruling but authority for partial shipments importation. We regret to note that you have not complied with all the conditions laid down in our said letters.

Please note and be guided accordingly.

Yours faithfully,

J.M. OJEE

Deputy Commissioner Risk Management Division

For: Commissioner Customs and Border Control Department"

74. The *ex parte* Applicant, through Ram Realtors Ltd, which it referred to as its tax consultant, thereupon wrote to the Respondent a letter

dated 15th June 2019, which it claims was its application for review. The said letter was as follows:

"Date: 15th June 2019

The Commissioner of Customs & Border Control,

Times Tower,

NAIROBI.

Dear Sir.

DEMAND NOTICE, KSHS. 78,150,848. M/S MAJID AL FUTTAIM.

We have been on the appointed above demand. by M/S Bollore Africa Logistics Ltd on behalf of Ms Majid Al Futtaim as their tax consultant on the above demand notice.

Please kindly refer to your letter Ret: Ha/PCA/RR1/002/2019 dated 4th June 2019 on the above demand notice. In accordance with the provisions of section 229 of the EACCM Act, we hereby apply for the review of your decision on the above demand notice.

As a law abiding company, before importation, M/S Majid Al Futtaim (an International Company) sought permission from the Commissioner to import the Integrated System in CKD and the tariff applicable. The company produced the following to support their request:-

1. Pictures of the items;

2. Invoice number 6243 dated 04.12.2018;

3. The invoice listed all the items to be imported. R

The Commissioner was satisfied and granted the request in accordance with the provisions of the *Additional Note 2 to Section XVI of the Harmonized Commodity and Coding Systems of the World Customs Organization (WCO)* to which Kenya and EAC are members. He granted permission in writing vide his letter DGEN/PP/ dated 6th February 2019. The Commissioner was satisfied that the goods constituted a complete Integrated Industrial System which was customer made according to the specification designed by Majid Al Futtaim (the buyer). The Commissioner made a decision in writing that the tariff applicable for by the whole integrated industrial system is 8418 69 20.

It is surprising that PCA ignored the Commissioner's written decision and raised the demand and changed the earlier tariff to 8418 50 00 contrary to the provision of section 134 of the EACCM Act. It was a decision of the Commissioner but not an opinion. That is the reason why the Commissioner's proper Officers at the port of importation approved and allowed the items under the Commissioner's written decision on tariff 8418 69 20.

The plant is an industrial integrated complete system and as such is to be classified as a complete industrial system and not in different individual tariffs of items. It is certainly not a domestic importation/system. A visit to the plant at the Two Rivers proves that *compressors, piping system, cabinets and evaporators* are all integrated and form an *integrated industrial system* and is in industrial use in an industrial concern but not domestic.

The above reasons support the application for a review of the decision.

Yours faithfully,

JB Miyumo.

for Ram Realtors Limited.

cc Bollore Africa Logistics Ltd. NAIROBI. Attn Ms Emma.

Majid Al Futtaim, Two Rivers NAIROBI. Attn Mr. Joseph Onyach."

75. The subsequent letter by the Respondent dated 19th August 2019 is also instructive:

"19 August 2019

REF:HQ/PCA/RRI/002/2019

PIN. No.PO51522497NN Carrefour

The Managing Director,

Majid Al Futtaim P.0. Hypermarkets Limited,

Box 2058 00502,

Nairobi.

Dear Sir/Madam,

RE: DEMAND NOTICE OF KSH. 78,150,848

Reference is made to our amended demand notice referenced HQ/PCA/RRI/002/2019 dated 20 May 2019 of Ksh.78,150,848 and the subsequent reminder dated 4th June 2019 to your company M/s Majid Al Futtaim Hypermarkets Limited. Our records indicate the demand remains outstanding to-date. Consequently, the amount has accrued a further duty of 5% and subsequent penalty of 2% as per provision of section 135 of the East African Community Customs Management Act (EACCMA), 2004 and the liability has therefore been recomputed as below: -

Ksh.

Import Duty 25,369,030

VAT 52,781,818

Further duty (5%) 3,907,543

Subsequent penalty (2%) 829,756

Total 82,888,147

You are called upon to pay all the taxes assessed plus the accrued penalties to the Commissioner of Customs & Border Services immediately, failure to which enforcement measures will be undertaken to recover the amounts due without any further reference to you.

Yours Faithfully,

J.M. 0JEE

Deputy Commissioner - Risk Management Division

For: Commissioner Customs and Border Control Department"

76. Two observations are pertinent from these exchange of letters. Firstly, it is evident that there was a course of correspondence between the parties with an aim of resolving the tax dispute, leading to the issuance of the three demand notices by the Respondent. The letter dated 19th August 2019 is this regard clearly a demand to pay the amount earlier demanded on 2nd May 2019 together with interest thereon, which had accrued to Kshs 82,88,147. It cannot therefore be the case, as argued by the Respondent, that the demand of 2nd May 2019 was their final demand, in the light of the correspondence the parties exchanged.

77. Secondly, there is no reference by the Respondent in any of its letters to an application for review made by the *ex parte* Applicant or of its decision thereon, which is the language employed in section 229 of the EACCMA. Its letter of 4th June 2019 stated that the Commissioner was not in a position to accept the letter of objection dated 31st May 2019, and the author of the said letter in another letter of 19th August 2019 expressly refers to the letter of 4th June 2019 as being "a reminder" of the demand notice of 2nd May 2019. He does not describe it as a decision on any objection or application for review, and it is evident that the intention at the time of writing of that letter of 4th June 2019 as gleaned from a construction and interpretation of the two letters, was not to provide a decision on any application for review. The Respondent, cannot therefore be allowed to reprobate in the face of its own clear evidence, and allege that the letter of 4th June 2019 was it decision on an application for review.

78. Lastly, the *ex parte* Applicant's letter of 31st May 2019 unlike the letter of 15thJune 2019 does not seek expressly seek any review nor state the grounds thereof, and only indicates its disagreement with the amended demand, and specifically requests for its withdrawal. The letter of 15th June 2019 on the other hand specifically states that it is an application for review of the decision in the letter dated 4th June 2019. It is thus this Court's finding that the only evidence of an application for review within the meaning of section 229 of EACCMA was

in the letter dated 15th June 2019 by Ram Realtors Ltd, the *ex parte* Applicant's alleged tax consultant.

79. The import of the said letter in terms of the exhaustion of dispute resolution remedies in EACCMA by the *ex parte* Applicant, will be discussed after dealing with the second aspect of the participation of the alleged tax consultant in the dispute resolution process. it is perhaps at this stage only opportune to recommend that the Respondent provides a procedure to be followed in applications for review under the EACCMA, to avoid future similar disputes and delays in tax administration.

On the participation by Ram Realtors Ltd

80. The *ex parte* Applicant reiterated that the reliance by the Respondent on section 146 of the EACCMA to bolster its argument that Ram Realtors Ltd was not its recognized agent was erroneous, for the reasons that the said section provides for the appointment of customs agents who perform different duties from the work that its tax consultant was appointed to do, which was to assist the *ex parte* Applicant with the Respondent's tax demand. Therefore, that the requirements under section 146(2) of the EACCMA did not apply to the tax consultant. Further, that even if section 146 were to apply, the Respondent was not at liberty to impute a lack of authority to act from a person presenting itself as an agent without recourse to that person to substantiate its authority to act. In addition, that it is only upon failure by the agent to produce a written authority to act for the Applicant that the Respondent may refuse to recognize the agent's appointment.

81. The *ex parte* Applicant urged that in any event, that there is no prescribed form or format for appointment of a tax agent provided under the EACCMA, and the Respondent could not impose on a party a means of communication of authority particularly as the *ex parte* Applicant was copied into the communication to the Respondent and had affirmed that Ram Realtors was its agent. The *ex parte* Applicant averred that upon receipt of the application for review, the Respondent, at the very least ought to have informed the Applicant or its agent that it did not recognize it.

82. The Respondent on its part reiterated that neither the *ex parte* Applicant or its agents had introduced or involved the said tax consultant as its agent in the negotiations on the impugned tax demands, and RAM Realtors Ltd was therefore a stranger to this matter in line with section 9 (2) of the EACCMA on the duty of confidentiality owed by the Commissioner. Further, that the Respondent having not received any formal letter of introduction from the *ex parte* Applicant or its clearing agent Bollore Transport and Logistics Kenya Limited indicating that the said RAM Realtor would be the Applicant's agent/representative, did not respond to the letter dated 15th June, 2019. In any event, that the window to lodge an application for review under Section 229(1) of the EACCMA had already lapsed since the Respondent had already issued its decision on 4th June 2019, and therefore the only recourse available to the *ex parte* Applicant was to file an appeal at the Tax Appeals Tribunal.

83. The Respondent also contended that section 146 of the EACCMA provides for the procedure to be followed when appointing an agent, and such appointment ought to have been made by the *ex parte* Applicant itself. Lastly, the Respondent submitted that the *ex parte* Applicant's interpretation of section 146 of the EACCMA was erroneous and misguided, as the scope of duties to be performed by customs agents is not limited to transacting business relating to declaration or clearance of goods or baggage. On the contrary, that the wording of the section is very clear and it refers to an owner authorizing an agent to perform any act under Customs laws. Therefore, that in this case, lodging an application for review under Section 229 is one of the "any act(s)" done under the provisions of the Customs laws, and for that, then the owner of goods or an authorized agent is the requisite party to make such an appointment.

84. Section 146 of EAMCCA in this regard provides as follows:

> **(1) Where under the provisions of the Customs laws the owner of any goods is required or authorised to perform any act then such act, unless the contrary appears, may be performed on his or her behalf by authorised agent.**
>
> **(2) A person shall not be the duly authorised agent or any owner unless—**
>
> **(a) such person is exclusively in the employment of the owner; or**
>
> **(b) such person is a Customs agent duly licensed as such in accordance with this Act, and, in either case, such person is authorised in writing by the owner, either generally or in relation to any particular act, to perform the act on behalf of the owner.**
>
> **3) The proper officer may require from any person purporting to be the duly authorised agent of any owner the production of his or her written authority and in default of the production of such authority the proper officer may refuse to recognise such person as a duly authorised agent.**

85. It is evident from the section that a customs agent once properly appointed has very wide powers under the said section as regards the roles and functions it can perform for an importer or owner of goods under the customs laws. An ordinary and purposeful interpretation of the section would therefore include the payment of duties and taxes by an appointed agent, and participating in any review applications as regards the payment of such duties and taxes. However, section 146(2) is clear that such an agent is required to be either exclusively in the employment of the owner or a duly licenced customs agent. No such evidence was produced was produced by the *ex parte* Applicant as regards the appointment of RAM Realtors either as its agents under section 146 of EACCMA or as a general agent, and this Court in the circumstances therefore finds that RAM Realtors was not duly authorized to make the application for review dated 15th June 2019 on behalf of the *ex parte* Applicant.

86. This finding notwithstanding, this Court however also notes that the procedure that ought to have been followed by the Respondent in such a circumstance where the authority of an agent is not known, is clearly spelt out in section 146(3) of the EACCMA, which is to conduct an inquiry as to the authority of the agent and seek production of evidence of that authority. Therefore, on the Respondent's submission that

it was upon the *ex parte* Applicant to provide evidence of the authority, the law is clear that it was the Respondent's duty is to first make the inquiry as regards the authority. In any event, given the nature of the request that was being made by the alleged tax consultant, the Fair Administrative Act also required the Respondent to give the tax consultant the opportunity to clarify its status.

87. There are important consequences of the Respondent's failure to inquire as to the tax consultant's authority as regards the availability of the alternative dispute resolution under section 229 of EACCMA, which provides for a time limit of thirty days within the making of a decision for an application for review of the said decision. In effect this failure resulted in the time within which to confirm the legitimacy of the application for review, and this remedy therefore being unavailable to the *ex parte* Applicant. In the case of **Dawda K. Jawara vs Gambia ACmHPR 147/95-149/96**, the African Commission of People and Human Rights held that a remedy is considered available if an applicant can pursue it without impediment, and can make use of it in the circumstances of his case.

2. The *ex parte* Applicant in the present case is unable to use the remedy available in section 229 of EACCMA as a result of the time that has lapsed from 4th June 2019, arising from the Respondent's omission to inquire as to the authority of RAM Realtors Ltd as the *ex parte* Applicant's agent, and consequently its inaction on the application for review made by the alleged agent.

3. It is also notable in this respect that the existence of an alternative remedy does not divest this Court of jurisdiction in such circumstances, as was noted by the Court of Appeal in **Fleur Investments Limited v Commissioner of Domestic Taxes & Another, [2018] eKLR:**

> **"Whereas courts of law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."**

Lastly, 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 in this respect.** In the premise, I find that the *ex parte* Applicant's Notice of Motion application dated 13th September 2019 is properly before this Court for the foregoing reasons.

On Whether the Respondent's Notices were Lawful

88. The parties canvassed three aspects of the issue of the legality of the demand and agency notices in their pleadings and submissions. The first was the legal justification for the demand notices, the second was the *ex parte* Applicant's legitimate expectations with regard to the said notices, and the last aspect was on the legal propriety of the agency notices.

On the Legal Justification for the Demand Notices.

89. The *ex parte* Applicant contended that the Respondent, acting through its Customs and Border Control Department, approved its request to import industrial cooling plants using the HS code 8418.69.20 in letters dated 11th January, 2019. dated 6th February, 2019. Therefore, that by approving the *ex parte* Applicant's request and thereafter holding that the *ex parte* Applicant had used the wrong HS code was irrational, arbitrary, unreasonable, unfair and amounted to procedural impropriety. Reliance was placed on the definitions of irrational decisions and procedural impropriety as expounded on in the case of **Republic v Public Procurement Administrative Review Board & 2 others Ex¬Parte Higawa Enterprises Limited [2017] eKLR** and in the **Silver Chain Limited Case (supra).**

90. The particulars of the Respondent's arbitrary, irrational, illegal and unreasonable actions were given by the ex parte Applicant as follows:

a) The Respondent determined that HS code 8418.69.20 should be applied and then arbitrarily changed its position and held that that HS code was not applicable in its demand of 30th January, 2019;

b) The *ex parte* Applicant had demonstrated that the proper HS code was applied and there was no basis to apply an alternative HS Code pursuant to Note 4 of Section XVI of the East Africa Community Common External Tariff.

91. The Respondent submitted that its actions were not only within their mandate but were also lawful and justifiable in line with the provisions of sections 236 that gives it powers of inspection of audit, and 135 of EACCMA to issue demands for duties that are short levied. Further, that in this case, it carried out a Post Clearance Audit Unit as per the provisions of section 236 on the importations made by the Applicant focusing on imports previously declared and documented as Refrigerated Cabinets but were now been declared as Industrial Cooling System, and established that some consignments had been wrongly described and / or classified under 8418.69.20 instead of 8418.50.00. Therefore, that proper taxes on them were computed by the Respondent in line its statutory mandate to administer, assess and collect taxes.

92. While relying on the decision by the Court of Appeal in **Nyaga vs. Housing Finance Company Ltd of Kenya, Civil Appeal No. 134 of 1987,** the Respondent submitted that this Court had no reason to interfere with the Respondent's statutory action of demanding taxes rightly owed by the *ex parte* Applicant as it was within the confines of the law and the Respondent had exercised its mandate judiciously and reasonably. Further, that apart from mere allegations, the *ex parte* Applicant had not proved which procedure(s) if any, were flouted by the Respondent in demanding the taxes due, nor how it acted arbitrarily, irrationally, illegally and unreasonably as alleged. The Respondent also submitted that it was therefore not in breach of Article 47 of the Constitution of Kenya and cited the decision in **Republic vs. Kenya Revenue Authority & 2 Others, Ex-parte Arrow Hi-fi (E. A.) Limited**, H**.C. Miscellaneous Civil Application No. 534 of 2007,** that where the taxman is within the four corners of the enabling law, the Court must uphold the provisions and it cannot substitute its sense of fairness or decision and would have no right to do so.

93. The Respondent maintained that its letters dated 11th January, 2019 and 6th February, 2019 were merely an authority to import the goods through partial shipments as provided for under additional note 2 to Section XIV of the East African Community Common External Tariff, subject to the machinery being classifiable under the proposed tariff heading upon audit. Further, the fact that the *ex parte* Applicant had applied the correct HS Code of 8418.50.00 in its first import of the refrigerated cabinets for the TRM project showed that it was well aware that the applicable code for refrigerated cabinets is 8418.50.00 and not 8418.69.20, and in any event, the said letters could not override the law, Reliance was placed on the definitions of illegality, irrationality and procedural impropriety in **Republic v Commissioner of Domestic Taxes Ex parte Sony Holdings Limited [2019] eKLR** to submit the *ex parte* Applicant had failed to demonstrate how the Respondent's actions of demanding taxes from it were illegal.

94. In determining whether or not the Respondents acted outside their powers, regard is made to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. In the present application, it is not in dispute that the power of the Respondent to issue demand notices for payment of any shortfall in duties is expressly provided for in section 135 of EACCMA , as is the power to undertake audits under section 236 .

95. What is being disputed in the present case is that this power was unreasonably exercised and in breach of the *ex parte* Applicant's legitimate expectations, in light of the applicable legal provisions and previous decisions made by the Respondent on the Harmonised Commodity Description and Code in the East Africa Community Common External Tariff that would apply to classify the goods imported by the *ex parte* Applicant, which also had a bearing on the duty paid thereon. The nature of approval given by the Respondent to the ex parte Applicant's in this regard in in contestation and therefore requires to be construed to determine its true nature.

96. The *ex parte* Applicant, in its letter dated 13th December 2018 sought approval from the Respondent as follows:

> **"Thursday, December 13, 2018**
>
> **The Deputy Commissioner,**
>
> **Policy& Programs Division,**
>
> **Customs& Border Control,**
>
> **Kenya Revenue Authority**
>
> **Times Tower,**
>
> **P.O. Box 48240-00100,**
>
> **Nairobi**
>
> **Dear Sir,**
>
> **RE: APPLICATION FORAUTHORITY FOR PARTIAL SHIPMENTS AND USE OF SINGLE HS CODE 8418.69.20 FOR INDUSTRIAL COOLING SYSTEM AND AUXILLIARIES IN COMPLETE KNOCKDOWN KIT IMPORTED BY MAJID AL FUTTAIM HYPERMARKETS LIMITED IDFs E1809945545, E1809945533 AND E1809945550**
>
> **Majid Al Futtaim Hypermarkets Limited started operations in Kenya in 2016 when we opened our first store operating under the name Carrefour at The Hub Mall. We are currently planning to install a cooling system at our Village Market, Sarit Centre and The Junction Mall stores and towards this end and therefore, we are in the process of importing a complete cooling system for each store from Tekso Teknik in Turkey in CKD form.**
>
> **In accordance and reference to Additional Note 2 to Section XVI of the EAC CET, we are hereby writing to your esteemed office with notification to both the Chief Manager- Port Operations seeking for your authority for the importation of Industrial Cooling Plant in CKD form under one HS Code 8418.69.20. The cooling system and auxiliaries will be imported for each store in one complete kit through the ICDE over a period of time for convenience of trade and transport in accordance with the provisions of GIR 2 (a). The conditions outlined in Additional Note 2 to Section XVI of the EAC CET will be complied with.**
>
> **Attached herewith, please find copies of the following documents for your perusal and necessary action:**
>
> **1) Purchase order 08124-18000111 with commercial invoice 5897/22.10.2018 and IDF E1809945545 attached.**
>
> **2) Purchase order 03100-18000382 with commercial invoice 5763/22.10.2018 and E1809945533 attached**
>
> **3) Purchase order 08122-18000273, with commercial invoice 5828/22.10.2018 and IDF E1809945550 attached.**

For: Majid AI Futtaim Hypermarkets (K) Ltd,

Franck Moreau

Country Manager, Kenya-Uganda

97. The Respondent replied as follows in its letter dated 11th January 2019:

"11th January, 2019

CSD/PP/GEN/I

M/S Majid Al Futtaim Hypermarkets Ltd

P.O Box 2012-00621

Nairobi

Dear Sirs,

RER: APPLICATION FOR AUTHORITY TO IMPORT IN PARTIAL SHIPMENTTS

MACHINERY FOR A THREE COMPLETE INDUSTRIAL, CO0LING PLANTS AND AUXILLIARIES IN COMPLETE KNOCK DOWN KIT IDFs E1809945545, E1809945533, E1809945550

Your letter dated 13th December, 2018 on the above subject matter refers.

We have noted your request for approval for importation in partial shipments three sets of machinery for Industrial cooling plant to be used at your Village Market, Sarit Centre and The Junction Mall Stores.

Your request has been considered in accordance with the East Africa Community Tariff nomenclature. Accordingly, we wish to make the following observations:

Section note 5 of Section XVI to the nomenclature clarifies that for purposes of the section notes, the expression "machine" refers to any machine, machinery, plant, equipment, apparatus, or appliance cited in the headings of Chapter 84 or 85.

Additional note 2 of the Section provides that a machine in disassembled or unassembled state may be imported in several consignments over a period of time for convenience of trade or transport.

The illustrations and other documents availed to this office to support your application have been found acceptable in fulfillment of the conditions set out under additional note 2 with regard to partial shipments.

In view of the foregoing, your application to import and clear the three complete Industrial cooling plants in partial shipments has been considered and is hereby granted in accordance with the aforementioned provisions of the EAC Tariff nomenclature subject to the following conditions:…."

98. A request on similar terms was made by the *ex parte* Applicant in a letter dated 28th January 2019 for the shipment of the cooling system at their Galleria Mall store and a similar response given by the Respondent in a letter dated 6th February 2019.

99. The ex parte in its application specifically sought authority to import the industrial cooling plants in CKD form under the HS Code 8418.69.20, and the Respondent in its response specifically stated that the *ex parte* Applicant's application was in accordance with the East Africa Community Tariff nomenclature, and specifically referred to note 5 of Section XVI to and additional note 2 of the section. The Respondent then specifically approved and allowed the *ex parte* Applicant's application to import and clear the three complete Industrial cooling plants in partial shipments in accordance with the provisions of the East African Community Common External Tariff and subject to the certain conditions.

100. On the specified conditions, and contrary to the Respondent's submissions, the HS Code that would apply to the machinery that was being imported by the *ex parte* Applicant was clearly identified by the Respondent as follows:

"1.The components forming the machinery for the complete Industrial cooling plant under Purchase order no 08124-18000111 commercial invoice No 5897/22.10.2018, IDF E1809945545 Value USD (DPP) 1,277,918.26 are classified under HS Code 8418.69.20.

2. The components forming the machinery for the complete Industrial cooling plant under Purchase order no 03100-18000382 commercial invoice No 5763/22.10.2018, IDF E1809945533 Value USD (DPP) 800,705.85 are classified under HS Code 8418.69.20.

3. The components forming the machinery for the complete Industrial cooling plant under Purchase order no 08122-18000273 commercial invoice No 5828/22.10.2018, IDF E1809945550 Value USD (DPP) 1,288,633.72 are classified under HS Code 8418.69.20. "

101. A plain reading of these conditions is that the Respondent was providing the classification under which the components of the complete Industrial cooling plants in partial shipments that were being imported by the *ex parte* Applicant would be classified. The Respondent has not provided any evidence of changes to the applicable schedules of the East African Community Common External Tariff it relied on at the time, or reasons why it considers its previous decision on the applicable classification of the machines imported by the *ex parte* Applicant to have been erroneous, especially given that the Respondent did state that it did undertake an audit of the said importation.

102. The reasons given by the Respondent in this respect that the *ex parte* Applicant had previously used a different classification is not logical one, given that there is evidence that the applicable schedules of the East African Community Common External Tariff allow for the manner of importation and use of the harmonized code applied for, and used by the *ex parte* Applicant to import its refrigerated Cabinets. Further, this position was confirmed by the Respondent before giving the *ex parte* Applicant the approval to import the said cabinets.

103. This court in this regard has power to set aside a decision on the ground that the decision is irrational in its defiance of logic or of accepted standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it. This principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948) 1 KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)** and is also provided for in section 7 of the Fair Administrative Action Act.

104. The Respondent's decision to issue new demand notices after it had expressly allowed the *ex parte* Applicant to use the HS Code 8418.69.20 to classify the goods it was importing on the grounds that the code was not applicable, and in the absence of any changes to the applicable schedules it had previously applied or other justifiable reason, defeats logic. In addition, the use of the said HS Code was also expressly allowed for under East African Community Common External Tariff in the circumstances of the *ex parte* Applicant's imports. This Court therefore finds that the demand notices by the Respondent dated 30th January 2019, 2nd May 2019, 4th June 2019 and 19th August 2019 were unreasonable and not legally justified.

On the ex parte Applicant's Legitimate Expectations

105. The *ex parte* Applicant on this sub-issue submitted that following the receipt of the approvals dated 11th January 2019 and 6th February 2019 from the Respondent, it had a legitimate expectation that its imports of the industrial cooling system had been allowed subject to it meeting the conditions stipulated in those approvals. Reliance was placed on the decisions in **R v. Durham County Council, ex parte Curtis and another [1995] 1 All ER 73** and **Keroche Industries Limited v. Kenya Revenue Authority & 5 Others [2007] eKLR** on when a legitimate expectation is deemed to arise. Therefore, that the Respondent breached the legitimate expectations created by its approvals by demanding taxes payable under a different HS code to the one allowed in the approvals.

106. The Respondent did not address this particular issue in its submissions, save for stating in its pleadings that a legitimate expectation cannot arise out of an illegality such as evasion of payment of taxes, nor can the Respondent act against clear provisions of a statute to meet the *ex parte* Applicant's expectations

107. A five judge bench of this Court in the case of **Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR** exhaustively discussed the doctrine of legitimate expectation and various judicial decisions on the doctrine in a decision that was affirmed by the Court of appeal . The said bench observed as follows:

> **"207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:**
>
> > ***"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.***
> >
> > ***The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other* requirement of procedural fairness. A *legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker."***

108. The Supreme Court in the **Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) e KLR** also explained the principle of legitimate expectation as follows:

> **"[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.**

[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."

109. The said Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

"[269] The emerging principles may be succinctly set out as follows:

a. there must be an express, clear and unambiguous promise given by a public authority;

b. the expectation itself must be reasonable;

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution."

110. Applying these principles to the present case, this Court having found that there was no legal and reasonable basis for the Respondent to find that the HS Code 8418.69.20 was no longer applicable to the *ex parte* Applicant's subject imports, a legitimate expectation was thereby created by the approvals given by the Respondents in the letters dated 11th January 2019 and 6th February 2019 to the *ex parte* Applicant. In addition, the *ex parte* Applicant's actions have been demonstrated to have been made pursuant to the applicable rules and procedures, a fact expressly acknowledged by the Respondent in the said approvals.

111. The Respondent has also not been able to prove to the required standard that the *ex parte* Applicant was involved in a tax evasion scheme. This Court in this regard notes that there is a difference between tax evasion and arranging one's affairs so as to reduce one's tax liability within the limits of the law, and which was done by the *ex parte* Applicant in this case with the express approval of the Respondent. In addition, tax planning which involves the legal and reasonable use of available exemptions and reliefs should be distinguished from aggressive tax avoidance involving artificial schemes and transactions.

112. Following the landmark decisions on tax evasion by the House of Lords in **W. T. Ramsay Ltd. v. Inland Revenue Commissioners, [1982] AC 300, (1981) 54 TC 101,** and **Inland Revenue Commissioners v. Burmah Oil Co. Ltd., [1982] S.T.C. 30** the key elements of an aggressive tax avoidance scheme were held to be pre-ordained series of transaction, whether or not they include the achievement of a legitimate commercial end, and into which are inserted steps that have no commercial purpose apart from the avoidance of a liability to tax that, in the absence of those particular steps, would have been payable. In the present case the Respondent has not brought any evidence to show that the consignments imported by the *ex parte* Applicant included composite transactions undertaken purely for tax avoidance reasons, or contained non- commercial elements, deliberately included or intended to operate as a tax evasion scheme. The correspondence from the ex parte Applicant was on the other hand clear as to the commercial purposes of its imports, and the legal provisions allowing for the said importation in the manner sought.

On the Propriety of the Agency Notices

113. The *ex parte* Applicant's submissions on the agency notices issued herein were that the Respondent not only issued multiple agency notices to different banks long after the relevant period had lapsed, but did so for amounts cumulatively far in excess of the amounts claimed as unpaid taxes, including against persons who was not connected to the *ex parte* Applicant. The Respondent on its part submitted that it issued agency notices on the *ex parte* Applicant's bankers and directors on 27th August 2019 pursuant to the provisions of, and its powers under section 131 of EACCMA.

114. Section 131 of EACCMA provides as follows in this regard:

(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, and the Commissioner shall in the notice specify the amount of duty to be collected by the agent, which amount shall not exceed the amount, or value of the goods, held or owing by the agent for or to the principal.

(2) The Commissioner may, by notice in writing, require any person to furnish the Commissioner within thirty days from the date of service of the notice, with a return showing detail of any moneys or goods which may be held by that person from whom duty is due under this Act.

115. The Respondent has wide powers of collection of and information on taxes under the section, and is not restricted as regards the persons it can issue agency notices to, so long as the grounds specified in the section exist. In this respect the Respondent did give explanation as regards the basis of issuing the impugned agency notices. Whether the said reasons are valid or not however is not the province of this Court as a judicial review court, as this would entail an examination on merits of the respective parties' cases.

116. This finding notwithstanding, this Court however holds that to the extent that the demand notices that were the basis of the agency notices dated 27th August 2019 were not legally justified, the said agency notices consequently also have no leg to stand on, and can no longer obtain.

On the Relief Sought

117. On the last issue as regards the relief sought, the Respondent submitted that the *ex parte* Applicant had failed to prove its case to warrant an award of damages. Further, that the Respondent had not in any way infringed on the *ex parte* Applicant's constitutional rights as alleged as all its actions were procedural and within the tenets of the law and as such, it could not be penalized for performing its statutory duty. Reliance was placed on the decision in **Allen v Gulf Oil Refinery** (citation not provided) for this position. The decision by the Court of Appeal in **Kenya Tourism Development Corporation vs Sundowner Lodge Ltd**, **Civil Appeal No. 120 of 2017** that damages cannot be awarded where there is no quantum, justification, comparables and proof by way of evidence, was also relied upon. The Respondent therefore submitted that the *ex parte* Applicant's prayer for damages has no basis in law and cannot hold.

118. The *ex parte* Applicant has sought orders of certiorari and prohibition, declarations and damages. An order of prohibition restrains a public body from acting in the manner specified in the order to restrain a threatened or impending unlawful conduct. An order of certiorari on the other hand nullifies an unlawful decision or enactment . The Court of Appeal in the case of **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** explained the circumstances under which the orders of prohibition and certiorari can issue 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….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."**

119. The demand notices issued by the Respondent herein have been found by this Court to be unreasonable and unjustified, and the order sought of certiorari to quash the said demand notices and resulting agency notices is thus merited. Consequently, an order of prohibition stopping any further demand of the sums stated in the impugned demand notices culmination in the demand for the sum of Kshs. 82,888,147 dated 19th August, 2019 and the resultant agency notices dated 27th August 2019 is also merited., to ensure that this Court does not act in vain. However, in awarding the orders sought, care should be taken not to prohibit the Respondent from undertaking its otherwise lawful statutory duties.

120. The outstanding orders of declaration and damages sought by the *ex parte* Applicants cannot however be granted by this Court for two reasons. Firstly, while the remedy of a declaration which is normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the existence or extent of a public body's powers and duties, the rights of individuals or the law on a particular issue, it has limitations if it is likely to affect other parties who are not party to the case, or where a court has not heard contested argument on the issue to which the declaration relates. In this regard, the arguments as regards the violation of the *ex parte* Applicant's constitutional rights were not sufficiently canvassed or proven for this Court to grant the declarations sought in this respect.

121. Secondly, and for similar reasons, while damages may be included in a judicial review claim, in addition to proving the breach leading to the loss and damage suffered by an applicant, there must also be sufficient detail provided of the facts as regards the pecuniary or non-pecuniary loss that has been suffered as a result of the breach alleged. In this regard, the pecuniary or non-pecuniary loss giving rise to the claim for damages was neither pleaded nor proved by the ex parte Applicant.

The Disposition

122. In the premises, I find that the *ex parte* Applicant's Notice of Motion dated 13th September 2019 is merited only to the extent of the following orders:

> **I. An order of Certiorari be and is hereby issued to remove into this Court and quash the Respondent's demand for the sum of Kshs. 82,888,147/= dated 19th August, 2019, and all the Agency Notices arising therefrom dated 27th August, 2019 for duty and penalties allegedly owed by the ex parte Applicant arising from importation of industrial cooling plant system in CKD form under the Harmonised System code ("HS Code") 8418.69.20 for its stores situated at the Junction Mall, Sarit Centre and Village Market.**
>
> **II. An order of Prohibition be and is hereby issued directed at the Respondent whether by itself, its servants, agents, officers, successors and/or assigns, prohibiting them from enforcing the demand for the sum of Kshs. 82,888,147/= dated 19th August, 2019 and all the Agency Notices arising therefrom dated 27th August, 2019 for duty and penalties allegedly owed by the ex**

parte Applicant arising from importation of industrial cooling plant system in CKD form under the Harmonised System code ("HS Code") 8418.69.20 for its stores situated at the Junction Mall, Sarit Centre and Village Market.

III. The Respondent shall meet the *ex parte* Applicant's costs of the Notice of Motion dated 13th September 2019.

123. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF NOVEMBER 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 Applicants' and Respondents' Advocates on record.

P. NYAMWEYA

JUDGE