



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MOMBASA
JUDICIAL REVIEW & CONSTITUTIONAL DIVISION
MISC. CIVIL APPLICATION NO. 67 OF 2017

REPUBLIC..... APPLICANT

VERSUS

- 1. KENYA REVENUE AUTHORITY**
 - 2. COMMISSIONER OF CUSTOMS SERVICE**
 - 3. JULIUS MUSYOKI.....RESPONDENTS**
- DARASA INVESTMENTS LIMITED.....EX- PARTE APPLICANT**

RULING

The Application

1. By way of a Notice of Motion dated 19th December, 2017 brought under Sections 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya and Order 53 Rule 3 (1) & (2) of the Civil Procedure Rules, 2010 and filed pursuant to the leave of court granted on 18th December, 2017, the Ex-parte Applicant prays for the following orders:

- a. An Order of Certiorari to remove into this Honourable court and quash in its entirety the decision by the Respondents, communicated vide the letter date 22nd November, 2017, to levy duty/tax of Kshs. 2, 548, 542, 325 on sugar imported under Entry 2017 MSA 6684598, BL: BRSS802017 for the alleged failure by the Applicant to meet the provisions of the Gazette Notice No. 4536 dated 12th May, 2017 as amended by Gazette Notice No. 9802 dated 4th October 2017 respectively.
- b. An Order of Prohibition directed towards the Respondent restricting/prohibiting the Respondents, its agents, officers and any person acting under that office from levying or demanding any duty/taxes over and above Kshs. 422,106, 560 already paid as import declaration fees, maritime fee levy in regard to sugar imported under Entry 2017 MSA 6684598, BL: BRSS802017 pursuant to the provisions of the Gazette Notice No. 4536 dated 12th May, 2017 as amended by Gazette Notice No. 9802 dated 4th October 2017 respectively.
- c. An Order of Mandamus ordering and compelling the Respondents to immediately process, clear and release on duty free basis, the Applicant's entire sugar consignment of 40,000 MT of Brazillian brown sugar imported under Entry 2017 MSA 6684598, BL: BRSS802017 as contemplated by the provisions of the Gazette Notice No. 4536 dated 12th May, 2017 as amended by Gazette Notice No.

9802 dated 4th October 2017 respectively.

d. Costs and other incidentals be borne by the Respondents.

e. Any such order or relief as the Honourable court may deem just, fit and appropriate in the circumstances of this matter.

2. The application is supported by the Statutory Statement dated 15th December, 2017 and the verifying affidavit and further affidavit of **IBRAHIM NOOR HILLOWLY** sworn on 14th December, 2017 and 31st January, 2018 respectively.

3. The Ex-parte applicant alleges that vide a Gazette Notice No. 4536 dated 12th May, 2017, the Cabinet Secretary for the National Treasury, pursuant to provisions of the East African Community Customs Management Act 2004 (EMCCMA) and the presidential declaration through Executive Order No. 1 of 2017 waived duty on imported sugar with effect from 12th May, 2017 to 31st August, 2017 and pursuant to the Gazette Notice, the applicant purchased 40,000 metric tons of Brazilian brown Sugar from M/s Sabina Engineering Company Limited in Brazil vide an invoice dated 15th July, 2017 to the tune of USD 21, 200, 000 to be paid via confirmed letter of credit from Diamond Trust Bank.

4. The applicant claims that the sugar was loaded at Santos Port onto marine vessel **ANAGEL SUN** vide a Bill of Lading (BRSS802017) dated 15th July, 2017 with the destination expressly agreed as Mombasa, Kenya, and the estimated date of arrival being on or about 28th August, 2017 as per the vessel's sailing schedule. However, the Applicant alleges that the said marine vessel was unable to get to the port of Mombasa to offload the consignment due to unfavourable weather conditions coupled with the ship's sheer size measuring 250m by 43m and a draft of 14.9m that could not allow the vessel to adequately and safely berth for purposes of offloading at the available Kenya Ports Authority berths.

5. Consequently, the Applicant contends that the vessel was compelled to take an alternative route to Jebeli Ali Port in the United Arab Emirates where the consignment was offloaded and stored at Multi Commerce FZE. On 4th September, 2017, the Applicant claims that he wrote to the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries seeking an extension of the duty waiver under Gazette Notice No. 4536 dated 12th May, 2017 to which the Cabinet Secretary responded vide letter dated 12th September, 2017 recommending duty free clearance of the Applicant's consignment on condition that the consignment should have been loaded on board a vessel heading for a port in Kenya before the expiry date of 31st August, 2017. In essence, the Applicant claims that the Gazette Notice No. 4536 dated 12th May, 2017 was amended by Gazette Notice No. 9802 dated 4th October, 2017 which now required that the consignment should have been loaded on to the ship between the period of 12th May, 2017 and 31st August, 2017.

6. The Applicant claims that when the consignment was in Dubai, it had to undergo another inspection as there was no certificate of conformity from Brazil recognized by the Kenya Bureau of Standards so as to be in tandem with Clause 6(2) of Legal Notice No. 78 of 2005 in regard to verification of conformity and to avoid the penalty of 15% levied on the CIF value of consignment. The Applicant contends that the consignment departed Jebeli Ali Port in the United Arab Emirates on board MV IRON LADY headed for the port of Mombasa with the same bill of lading (BRSS802017) dated 17th October, 2017, a certificate of origin dated 19th October, 2017 and Import Declaration Form (C61) dated 8th October, 2017 but when the ship arrived at the Port of Mombasa on or about 30th October, 2017, the Respondents declined to allow the Applicant to offload the consignment based on Entry C17 form filled by the Applicant.

7. The Applicant claims that it wrote to the Cabinet Secretary, National Treasury on 9th November, 2017 seeking assistance in clearance of the imported consignment to which the Cabinet Secretary responded vide letter dated 10th November, 2017 directing the Respondents to resolve the issue in line with the provisions of Gazette Notice No. 4536 dated 12th May, 2017 as amended by Gazette Notice No. 9802

dated 4th October, 2017.

8. The Applicant contends that the Respondents vide a letter dated 20th November, 2017 requested the Applicant to provide all relevant documents in regard to the sugar importation to which the Applicant responded vide a letter dated 21st November, 2017 annexing all the relevant documents. However, the Applicant alleges that vide a letter dated 22nd November, 2017, the Respondents claimed that the response by the Applicant was not satisfactory hence the sugar consignment did not meet the provisions of the aforementioned Gazette Notices and was therefore liable to taxation to the tune of Kshs. 2, 548, 542, 325 over and above the sum of Kshs. 422, 106, 560 already paid as import declaration fees, maritime levy, railway development levy and VAT.

9. It is this decision by the Respondents contained in the letter dated 22nd November, 2017 that the Applicant claims is illegal, unfair and was based on unfair considerations as the Applicant had satisfactorily answered the Respondent's queries.

10. The Applicant also claims that the decision was not based on any written reasons as envisaged by Article 47(2) of the Constitution and that the decision was also against the Applicant's reasonable and legitimate expectation that once the Cabinet Secretary of National Treasury had exempted the Applicant from provisions of Gazette notice No. 4536 dated 12th May, 2017 as amended by Gazette Notice No. 9802 dated 4th October, 2017 the Applicant's consignment would be offloaded and cleared duty free.

11. The Applicant alleges that it has a certificate of conformity from the Brazilian Chamber of Commerce and Industry indicating that the sugar consignment was headed for discharge at the Port of Mombasa aboard MV ANANGEL SUN. In the alternative, the Applicant contends that a failure to procure a certificate of conformity from a duly recognized agent of the Kenya Bureau of Standards is not fatal as Part 7(1) of Legal Notice No. 78 of 2005 does provide for a second inspection at the port of entry and a punitive fee of 15% charged on CIF.

12. The Applicant states that vide a letter dated 5th January, 2018, the Respondents sought to establish from the Kenya Ports Authority whether MV ANANGEL SUN did enter Kenyan waters on or about 28th August, 2017. The Respondents also sought to know from Kenya Ports Authority the size/draft of the largest vessel that can be accommodated at any conventional cargo as at 28th August, 2017. The Applicant claims that the Kenya Ports Authority responded via a letter dated 12th January, 2017 indicating that through its marine tracking system MV ANANGEL SUN departed Santos Port, Brazil between 16th and 21st July, 2017 and that due to its sheer size it could not be accommodated at the Port of Mombasa. Further, the Applicant states that it did submit to the Respondents the MV ANANGEL SUN's shipping schedule from July, 2017 to September, 2017 and its GPS co-ordinates.

13. The Applicant alleges that the change in the description of the consignment was occasioned by the second inspection conducted in Dubai by Bureau Veritas after the first inspection conducted by the Brazilian Chamber of Commerce was declined on the basis that the Brazilian Chamber of Commerce was not a recognized agent of Kenya Bureau of Standards.

14. It is the Applicant's case that the decision by the Respondents to levy full duty on the Applicant's sugar consignment was premised on a grave mistake of fact giving rise to unfairness as the Applicant had adduced documents relating to the date of offloading, inspection, origin and change of ownership.

15. It is also the Applicant's case that the Respondents acted *ultra vires* the provisions of Section 5 of the Kenya Revenue Act No. 2 of 1995 by purporting to regulate the importation of sugar contrary to the express provisions of Section 27(1) of the Sugar Act No. 10 of 2001 by requesting for documents from the Applicant in regard to *inter alia* date and place of inspection, certificate of origin and alleged change of ownership which documents do not fall within the ambit of the Respondents' mandate under the Kenya Revenue Act.

The Response

16. The Respondents opposed the motion by way of a Replying Affidavit and Further Affidavit sworn by ROSEMARY MUREITHI on 5th January, 2017 and 29th January, 2017 respectively. The said ROSEMARY MUREITHI described herself as the Chief Manager in Charge of Document Processing Center of the 1st Respondent and stated that she had the authority to depone to the replying affidavit.

17. In opposing the motion, the Deponent alleges that section 34 of EACCMA provides that the owner of cargo that arrives in Kenya via a vessel, vehicle or aircraft shall enter the cargo using form C17B (form relied on by the 1st and 2nd Respondent in assessing cargo for duty payable) and indicate the type of entry being done while section 34(2) provides that when entering goods, the owner shall furnish the 2nd Respondent with the full entry particulars supported by documentary evidence of the goods referred to in the entry.

18. The Respondents claim that pursuant to Section 34 the Applicant lodged entry no. 2017 MSA 6684598 through its customs clearing agent, Jays Investments Company Limited on 27th October, 2017 to clear 40,000 metric tonnes of Brazilian sugar under an import duty exempt status (C490) which was based on Gazette Notice No. 4536 dated 11th May, 2017 as amended by Gazette Notice No. 9802 dated 29th September, 2017.

19. The Respondents allege that the exemption of duty was based on meeting the conditions set out in the aforementioned Gazette notices and therefore the Respondents needed to scrutinize the documents availed by the Applicant to ensure conformity with the Gazette Notices. The Deponent contends that a number of discrepancies were found in the process of processing the consignment being:

a. The bill of lading indicating that the consignment was loaded onto the vessel on 17th October 2017 from United Arab Emirates to discharge at the Port of Mombasa. This was outside the Gazette Notice period of 31st August 2017 (See annexure RM-4 to the Deponent's Replying Affidavit)

b. A Certificate of Origin from Dubai Chamber of Commerce that was issued on 19th October 2017, outside the Gazette Notice period of 31st August 2017. (See annexure RM-5 to the Deponent's Replying Affidavit)

c. A Certificate of Conformity of 17th October 2017 which is a pre-shipment inspection certificate means that the consignment was physically tested and inspected for conformity on 17th October 2017. The Certificate of Conformity indicates the production date of the consignment in question was August 2017 and September 2017. (See annexure RM-6 to the Deponent's Replying Affidavit)

d. The Ship Manifest which is a conveyance document showing what is being conveyed in the vessel. The document from the vessel, MV IRON LADY V, indicate the date of loading as 24th October 2017, outside the Gazette Notice period of 31st August 2017. (See annexure RM-7 to the Deponent's Replying Affidavit)

e. The Import Declaration Form (IDF) which is the intention to import indicates the Country of supply as UAE.

f. The same Import Declaration Form (IDF) quotes a proforma invoice dated 3rd August 2017. This is not possible for a consignment allegedly shipped in July 2017. (See annexure RM-8 to the Deponent's Replying Affidavit)

20. The Respondents claim that vide a letter dated 20th November, 2017 they sought clarification from the Exparte Applicant on why they wanted the consignment cleared under duty free while it clearly did not meet the Gazette Notice threshold for duty free. The Applicant responded vide a letter dated 21st

November, 2017 but could not explain why they could not obtain a certificate of conformity from Brazil where there are KEBS agents and why the certificate of origin was issued by United Arab Emirates if the sugar indeed originated from Brazil.

21. For the aforementioned reasons, the Respondents claim that they issued a letter dated 22nd November, 2017 notifying the Applicant that the sugar consignment did not meet the provisions of duty free sugar under the aforesaid Gazette Notices.

22. The Deponent contends that the alleged inability of the vessel from Brazil to berth at the Port of Mombasa due to size and weather conditions, ought to have been corroborated by the Kenya Ports Authority.

23. The Deponent avers that that Pre-Export Verification (PVoC) for the Kenyan market is done by KEBS PVoC Partners Regionally. In Brazil, the KEBS PVoCs partners are intertek, SGS and Bureau VERITAS and the *Ex-Parte* Applicant never presented a valid Certificate of Conformity issued by a duly approved and recognized Inspection Agent in Brazil casting justifiable and reasonable doubt regarding the contention by the Applicant that the subject sugar originated from Brazil and that it was shipped on the dates indicated by the Applicant. It is the Respondents' case that the purported certificate of Conformity from Brazil that was provided by the *Ex parte* Applicant is a document that does not contain information required to ordinarily appear on a proper Certificate of Conformity raising questions as to its provenance and authenticity.

24. The Respondents allege that there is no evidence from either the Kenya Ports Authority or any other relevant Authority including the Kenya Maritime Authority that the Vessel ANANGEL SUN was ever expected at the Mombasa Port and that because of any alleged difficulties, it did not arrive as it could not berth at the port. Further, the Deponent adds that Vessel MV Anangel Sun was neither listed by Kenya Ports Authority nor Kenya Maritime Authority in their fourteen (14) days Vessel Waiters records maintained continuously, implying that the MV Anangel Sun was never predestined to sail to Kenya within the period in question.

25. It is the Respondents' case that in the certificate of conformity prepared in Dubai by the Kenya Bureau of Standards's authorized agents, Bureau VERITAS, the goods are described as "BRAZILLIAN BROWN SUGAR LUMIRA IN 50KG BAGS PRODUCTION DATE AUGUST 2017-SEPTEMBER 2017 AND EXPIRY DATE AUGUST 2019-SEPTEMBER 2019". Therefore the source of the sugar was Dubai and not Brazil.

26. It is the Respondents' case that the Applicant's consignment was loaded onto a vessel on 17th October, 2017 or thereabout thus outside the date set by Gazette Notice No. 4536 of 31st August, 2017 as the Applicant failed to prove that the consignment was loaded in Brazil on 15th July, 2017.

27. It is also the Respondents' case that they acted fairly and within their mandate in scrutinizing the Applicant's documents to discern whether they fit the parameters set by the aforesaid Gazette Notices.

Submissions

28. The Applicant filed its submissions on 23rd January, 2017 and its supplementary submissions on 13th February, 2017, while the Respondents filed their submissions on 12th February, 2017. The said submissions were highlighted in court on 14th February, 2017. **Mr. Fred Ngatia, Mr. Mosota and Mr. Tebino** appeared for the Ex Parte Applicant, while **Mr. Kennedy Ogeto, Mr. Ontweka and Ms. Mburugu** appeared for the Respondents.

29. In his submissions in support of the motion herein, Mr. Ngatia emphasized that the issues before the court should be limited to facts and circumstances that were relevant at the particular point in time. Counsel submitted that the decision by the Respondents was based on irrelevant matters. Counsel contended that in the Gazette Notice of 12th May, 2017, the Cabinet Secretary for the National Treasury

notified the country of a period within which duty free sugar was to be imported and the said notice was based on section 114 (2) of the East African Community Customs Management Act (EACCMA) and a declaration of the President of a National Disaster. Mr. Ngatia emphasized that the Gazette Notice stated partly that “sugar imported by any person with effect from the date of this notice to the 31st August, 2017”. Counsel argued that according to the Notice the origin of the sugar was not significant.

30. Mr. Ngatia submitted that the aforementioned Gazette Notice was amended vide Gazette Notice no. 9802 dated 4th October, 2017 which indicated that duty shall not be payable on sugar which will have been loaded into a vessel between 11th May, 2017 and 31st August, 2017 destined to a port in Kenya. Again, Counsel pointed out that in this notice the source or origin of the sugar was irrelevant.

31. Counsel submitted that vide a letter dated 20th November, 2017, the Respondents claimed that the documentation by the Applicant showed various inconsistencies which included the date of loading, date and place of inspection, certificate of origin and change of ownership. Counsel submitted that the Applicant responded vide a letter dated 21st November, 2017 explaining the alleged inconsistencies, but the Respondent vide a letter dated 22nd November, 2017 simply found that the inconsistencies had not been satisfactorily addressed thus the duty free exemption would not apply.

32. Mr. Ngatia submitted that the sugar was loaded in a port in Brazil within the period allowed but the vessel with the consignment could not be berthed at the Mombasa Port hence the vessel had to go to a port in Dubai to have the cargo loaded and transhipped into a smaller vessel.

33. Counsel submitted that the duty to act fairly applies to public law decision making bodies and that there is a presumption that unless there is a particular reason why the requirements of fairness should not apply, a decision of a public body must be made in a procedurally fair manner. Counsel argued that the Respondent’s decision disregarded and ignored all the documents from Santos, Brazil and concentrated on the mistaken belief that the consignment had emanated from Dubai.

34. Mr. Ngatia pointed out that under Article 47(2) of the Constitution, if a right or fundamental freedom of a person is likely to be adversely affected by the administrative action, the person has the right to be given written reasons. Counsel contended that the letter dated 22nd November, 2017 through which the Respondents communicated their decision to levy full duty on the Applicant’s sugar consignment did not give reasons for the said decision, but only indicated that the Applicant’s explanation was not sufficient. Counsel argued that the decision made was so significant that if reasons had been given it would have informed the ex-parte applicant on whether or not to institute the instant proceedings or submit further documentation.

35. Emphasizing that the Ex parte Applicant had acquired a legitimate expectation, Mr. Ngatia submitted that a legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. In this instant case, Counsel contended that the letter dated 21st September, 2017 from the Cabinet Secretary of the National Treasury to the Respondent advised that the Applicant’s consignment be cleared duty free on the condition that the said consignment should have been loaded before the expiry of 31st August, 2017 as envisaged by Gazette Notice no. 4536 dated 12th May, 2017. Counsel added that the Applicant had supplied the Respondents with all requisite documents to show that the consignment originated from Brazil and had been loaded on or about 15th July, 2017 thus the Applicant should benefit from the duty free quota as stipulated in the Gazette Notice. Further, Counsel pointed out that the Bill of Lading BRSS802017 dated 15th July 2017 that originated from Santos, Brazil, Certificate of Conformity from the chamber of commerce and the bill of lading dated 17th October, 2017 from Dubai, all share the same bill of lading no. BRSS802017 thus the reasonable expectation would be for the consignment to be processed duty free.

36. Mr. Ngatia submitted that it is trite law that a decision will be unreasonable within the meaning of “*Wednesbury Unreasonableness*” if it has oppressive or unduly harsh results that a reasonable public

body could not countenance them. Counsel cited the case of **R. versus Inland Revenue Commissioners, ex parte National Federation of Self-Employed Small Business [1982] AC 617**, HL where the court held that:

“...the modern case law recognizes a legal duty owed by the Revenue to the general body of the taxpayers fairly: to use their discretionary powers so that, subject to the requirements of good management, discrimination between one group of taxpayers and another does not arise; to ensure that there are no favourites and no sacrificial victims.”

37. Counsel contended that on or about 30th October, 2017 when MV IRON LADY arrived at the Mombasa port, the Applicant had already paid the sum of Kshs. 422, 106, 560 in the form of VAT and other fees and now the Respondent demands another colossal sum of Kshs. 2.6 Billion which is highly unreasonable and unduly harsh. Counsel also submitted that the Ex Parte Applicant was among a group of 14 other sugar importers who were granted the import duty tax exemption by the Cabinet Secretary of the National Treasury and all the other sugar importers were duly cleared by the Respondents making the decision by the Respondent discriminatory on the Applicant.

38. Mr. Ogeto, learned Counsel for the Respondents in opposition to the motion submitted that the Applicant had not exhausted its alternative statutory remedies before instituting these proceedings. Counsel stated that the jurisdiction of this court was improperly and prematurely invoked as there were other remedies provided under Sections 229(1) and (2) as well as 230 of the East African Community Customs Management Act, 2004. Counsel argued further that Section 9 of the Fair Administrative Action Act, 2015 forbids the High Court from reviewing decisions prior to exhaustion of alternative remedies. In support of his assertion, Counsel cited the case of **Samson Chembe Vuko v. Nelson Kilumo [2016]** where the Court of Appeal held that the doctrine of primary jurisdiction has constitutional underpinning in Article 159(c) requiring this court to promote, and not usurp, alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

39. Further, Mr. Ogeto submitted that Section 12 of the Tax Appeal Tribunal Act, 2013 gives jurisdiction to the Tribunal over disputes from the decisions of the Respondents, while Section 13 of the same Act gives the High Court appellate jurisdiction over such disputes. Counsel contended that the Applicant should have sought the prescribed administrative remedies first before coming to this court.

40. Counsel also pointed out that the Applicant had not demonstrated exceptional circumstances nor applied for exemption by this Court under Section 9(4) of the Fair Administrative Action Act, 2015 from its duty to exhaust the alternative remedies available under the aforementioned statutes. In the alternative, Counsel contended that the Applicant had to demonstrate that judicial review was more convenient, beneficial and efficacious than an application for review to the Commissioner followed by an appeal to the Tribunal.

41. In terms of the fairness of the Respondents' decision, Mr. Ogeto submitted that the Applicant was afforded an adequate and fair hearing prior to the decision dated 22nd November, 2017. Counsel stated that the Respondents requested the Applicant to avail information relating to the date of loading, date and place of inspection, certificate of origin and change of ownership in relation to the consignment in issue. Counsel submitted that the Applicant responded that it owned the consignment; that the consignment had been transhipped through Jebel Ali as the vessel did not discharge in Kenya; that there was no doubt the sugar originated in Brazil and inspection was done in Dubai only to meet the PVOC requirements; that the certificate of Origin was not significant as it was known that the United Arab Emirates was not a sugar producer. However, these responses were not satisfactory to the Respondents hence the Respondents' decision in the letter dated 22nd November, 2017 to levy full import duty on the suit cargo.

42. Counsel conceded that the 1st Respondent has a duty under Article 47(2) of the Constitution and Section 4(2) of the Fair Administrative Action Act to supply written reasons to every person affected by any of its administrative action. However, Mr. Ogeto contended that the Applicant was informed in writing of the Respondents' decision vide a letter dated 22nd November, 2017 and the text of the said

letter provided reasons for the said decision.

43. In relation to the decision being reasonable, Mr. Ogeto submitted that the decision was reasonable as the Respondents considered inconsistencies relating to the date of loading, date and place of inspection, certificate of origin and change of ownership which are all relevant factors that a prudent customs enforcer would take into consideration in assessing if duty is payable on a shipment. In addition, Counsel stated that under sections 4 and 20 of the Standards Act, Cap 496, verification for conformity and a certificate of conformity are mandatory requirements for the entry of any imported goods into Kenya. Thus, the Kenya Bureau of Standards appoints inspection bodies in the countries of origin of goods to undertake verification of conformity to Kenya Standards or approved specifications and in this case the KEBS PVoCs partners for Brazil where the sugar allegedly originated are Intertek, SGS, and Bureau Veritas who would have inspected the sugar. Therefore, Counsel argued that the lack of a valid certificate of Conformity from a duly approved and recognized inspection agent in Brazil casts justifiable and reasonable doubt regarding the country of origin of the sugar.

44. Mr. Ogeto submitted that the Applicant was trying to invite this court to substitute the Respondents' views and findings for its own, which is wrong. Counsel cited the case of **Republic v Kenya Revenue Authority ex parte Yaya Towers Limited [2008] eKLR** where it was held that:

“It is important to remember in every case that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question.”

45. In answer to the allegation that the Applicant's legitimate violation had been violated, Mr. Ogeto submitted that there was no legitimate expectation contrary to the law. Counsel argued that the Gazette Notices only exempted sugar loaded into a vessel destined to a port in Kenya from 12th May, 2017 to 31st August, 2017 and despite the opportunity given to it, the Applicant never presented evidence to prove that the purported 40,000 metric tons of brown Brazilian sugar consignment upon the M/V Anangel Sun's cargo matched the description of the exempted sugar. Counsel insisted that the Applicant's consignment did not fit the description and conditions in the Gazette Notice 4536 dated 12th May 2017 and Gazette Notice 9802 of 4th October 2017 and that no promise was made that the Applicant would not pay tax.

46. In relation to the demurrage charges, Mr. Ogeto submitted that the issue lies squarely in the realm of private law and cited the case of **Republic v Kenya Ports Authority ex-parte Messina (K) Ltd [2011] eKLR** where Ojwang J (as he then was) stated:

“It may well be that the Applicants sustained some injury in terms of their profits or related matters; but if they have valid claims in this regard, I hold that such, belong squarely to the domain of private law, and are unrelated to the public law remedy of judicial review”.

47. Mr. Ogeto concluded that it was upon the Applicant to demonstrate to the court that based on the grounds upon which the reliefs are sought, the Respondents acted contrary to the law, regulations and procedures but the Applicant has failed to do so.

48. In response to the submissions by Mr. Ogeto, Mr. Ngatia submitted that the decision in the letter dated 22nd November, 2018 was made pursuant to Gazette Notice No. 9802 dated 4th October, 2017 and was therefore not in the purview of the Tax Appeals Tribunal as it was not made pursuant to any tax law. Counsel cited the case of **Republic v. Independent Electoral and Boundaries Commission Ex Parte National Super Alliance (NASA) Kenya & 6 others [2017]eKLR** where Judges Joel Ngugi, G.V Odunga and John M. Mativo faced with the question of exhaustion of statutory remedies stated that:

“Courts must undertake an extensive analysis of facts, regulatory scheme involved, the nature of interests involved-including level of public interest involved and the polycentricity of the issue and hence the ability of a statutory forum to balance them.”

49. Mr. Ngatia submitted that the Tax Appeals Tribunal is not the correct forum to hear this matter as a careful analysis of the Tax Appeals Tribunal Act 2013 and the Tax Procedures Act, 2015 reveal that the dispute here is not the type of dispute envisaged in the said statutes.

50. Mr. Ngatia submitted that it was unreasonable and unfair for the Respondents to rely on the letters from the Kenya Ports Authority (KPA) and the Kenya Maritime Authority (KMA) to prove the allegation that the ship MV ANANGEL SUN from Brazil was unable to berth at the Port of Mombasa. Counsel contended that the letters from the said authorities do not form part of the documents that the Respondents ordinarily rely on in coming up with a decision under the provisions of the Gazette Notice No. 9802 of 4th October, 2017 or under the EACCMA and such letters cannot supersede or replace documents presented by the Applicant. Further, Counsel stated that an importer cannot be required to produce evidence that a shipping line communicated with various authorities.

The Determination

51. I have carefully analysed the application and the submissions by Counsel. For proper determination of the matter, I have formulated the following issues for determination by this Court:

- a. Whether this matter is properly before this court, and if not whether the Ex Parte applicant should have exhausted other alternative remedies provided under the East African Community Customs Management Act, 2004 and the Tax Appeals Tribunal Act, 2013.
- b. Whether the cargo the suit property herein was loaded destined for a port in Kenya during the period covered under the Gazette Notice No. 4536 dated 12th May 2017 and No. 9802 dated 4th October 2017.
- c. Whether the Judicial Review remedies sought by the Ex Parte Applicant should be granted.
- d. Who is to pay the costs herein.

Whether this matter is properly before this court and if not, whether the Ex Parte applicant should have exhausted other alternative remedies provided under the East African Community Customs Management Act, 2004 and the Tax Appeals Tribunal Act, 2013.

52. The Respondents herein submitted that this court's judicial review jurisdiction was improperly and prematurely invoked by the Applicant before it exhausted other available alternative remedies. It was the Respondents' contention that Sections 229(1) and (2) and 230 of the East African Community Customs Management Act, 2004 as read with Sections 2 and 13 of the Tax Appeals Tribunal Act, 2013 provide alternative remedies that should have been invoked by the Applicant as they are more convenient, beneficial and efficacious. Further, the Respondents claim that Section 9 of the Fair Administrative Action Act, 2015 forbids the High Court from reviewing decisions prior to exhaustion of alternative remedies.

53. The Applicant on the other hand argued that the decision in the letter dated 22nd November, 2017 was made pursuant to Gazette Notice No. 9802 dated 4th October, 2017 and was therefore not in the purview of the Tax Appeals Tribunal as it was not made pursuant to any tax law. Neither was it made pursuant to a disagreement on the quantum of tax payable. To the contrary, the Ex Parte Applicant's case is that the issue here is based on a principle of law, that is, whether the Ex Parte Applicant is entitled to import tax exemption under the aforesaid Gazette Notices. The issue does not involve disagreement on quantum of tax payable.

54. Section 229(1) and (2) and 230 of the East African Community Customs Management Act, 2004 provide as follows:

299. (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.

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

Section 9 of the Fair Administrative Action Act, 2015 Provides as follows:

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

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

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

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

(5) Any person aggrieved by an order made in the exercise of judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

While Section 12 of the Tax Appeal Tribunal Act provides:

12. A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant law, upon giving notice in writing to the Commissioner, appeal to the Tribunal.

55. From the above provisions of law, it is clear that there are alternative remedies available in tax related disputes. In the case of **Republic vs. National Environment Management Authority [2011] eKLR**, the Court of Appeal held that where there are other alternative remedies provided by statutes, they should be utilized first before granting any judicial review orders. The court stated as follows:

“...The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances than an order of judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it.”

56. However, the applicability of the alternative remedies to this matter is in dispute. In order to determine this issue it is important to analyze and consider the history of this matter and conduct of the Respondents in these proceedings.

57. These proceedings were initiated by the ex-parte applicant on 18th December, 2017 when it filed a certificate of urgency and Chamber Summons seeking the leave to apply for judicial review orders. The Respondents similarly filed a certificate of urgency on 20th December, 2017 seeking to set aside the injunction that had been issued on 18th December, 2017 pursuant to the certificate of urgency filed by the ex parte applicant. Consequently, the orders issued on 18th December, 2017 were set aside and orders issued in favour of the Respondents.

58. Again on 27th December, 2017, the Ex-parte applicant filed another certificate of urgency and on 29th December, 2017, yet again the Respondent filed another certificate of urgency. In both instances orders were issued in favour of the ex parte Applicant. On 8th January, 2018, the parties came before this court and the ex parte Applicant complained that the orders previously issued had not been complied with. This court again issued orders directing that the consignment on board MV IRON LADY be offloaded and stored in JB MAINA Warehouse. The Respondents were displeased with these orders and thus lodged an appeal before the Court of Appeal where stay orders were issued. It is therefore clear that the Respondents have fully by their own conduct submitted themselves to the jurisdiction of this court. They have been granted orders in this matter. At no time did the Respondents raise the issue of jurisdiction or alternative remedies except at the submissions stage.

59. I should think that this would have been an issue that the Respondents would have raised once these proceedings were initiated. It would appear that the issue of jurisdiction as raised by the Respondents is a mere afterthought. All indications are that the Respondents have accepted the jurisdiction of this court over these proceedings. It would therefore be absurd for them to now claim that this matter is prematurely before this court as other alternative remedies were available to the Applicant. In **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] KLR 1**, the court held as follows:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

60. In the opinion of this court, and pursuant to the finding in the above case the Respondents ought to have raised the question of jurisdiction at the earliest opportunity being the onset of these proceedings and not at the submissions stage. The Respondents in my view have by their participation in these proceedings willfully submitted to the jurisdiction of this court. They cannot now, at the point of submissions, purport to turn their back on this court.

61. In addition, it is the view of this court and indeed as submitted by Mr. Ngatia, that the issue in this matter is not one to be dealt with by Tax Appeals tribunal. There is yet no dispute over quantum of tax payable. The issue appears to me to be on a principle of law: whether or not under the Gazette Notices No. 4536 dated 12th May, 2017 and No. 9802 dated 4th October, 2017 the suit cargo was exempted from import duty tax. The determination of that principle of law is, in the finding of this court, a matter clearly within the jurisdiction of this court. Therefore, it is the finding of this court that it has the jurisdiction to hear and determine the matter before it.

b) Whether the cargo the suit property herein was loaded destined for a port in Kenya pursuant to the said Gazette Notices

62. The applicant submitted that the Respondents acted unfairly, unreasonably, violated their legitimate expectation and did not give reasons for the decision in the letter dated 22nd November, 2017. On the other hand the Respondents contend that there is no evidence of illegality, irrationality and procedural impropriety on their part.

63. The chronology of events leading up to the decision issued vide the letter dated 22nd November, 2017

has been explained in detail by both parties and none of the parties dispute the said chronology of events. As such, I will not repeat the same but will only highlight a few crucial details.

64. Vide a Gazette Notice No. 4536 published on 12th May, 2017 (a copy of which is attached to the verifying affidavit of IBRAHIM NOOR HILLOWLY and marked as “INH-1), the Cabinet Secretary for the National Treasury allowed duty not to be paid on sugar imported by any person with effect from the date of the Notice to the 31st August, 2017. The said Notice reads as follows:

“IT IS notified for the general information of the public that in accordance with Section 114(2) of the East African Community Customs Management Act, 2004, and as a consequence of the declaration by the President and Commander in Chief of the Kenya Defence Forces through Executive Order No. 1 of 2017 that the drought and famine in parts of Kenya is a national disaster, duty shall not be payable for the following items:

a. Sugar imported by any person, with effect from the date of this Notice to the 31st August 2017.”

65. It is pursuant to this Notice that the Ex parte applicant alleges that it decided to purchase some 40,000 metric tonnes of brown Brazilian sugar from Ms. Sabina Engineering at a cost of USD 21,200,000 (a copy of the proforma invoice dated 11th May, 2017 is annexed to the affidavit of IBRAHIM NOOR HILLOWLY and marked as “INH-2”). A copy of a commercial invoice dated 15th July, 2017 which relates to the shipment of the sugar is also annexed to the Affidavit of IBRAHIM NOOR HILLOWLY and marked as “INH-2”. Further, the ex parte Applicant claimed that a bill of lading No. BRSS8802017 dated 15th July, 2017 was issued by Pearl Shipping Services and the sugar was loaded onto marine vessel ANANGEL SUN at Santos Port with the destination being the port of Mombasa (a copy of the bill of lading is annexed to the affidavit of IBRAHIM NOOR HILLOWLY and marked as “INH-3”).

66. The ex parte applicant claims that the vessel mentioned above arrived at the Port of Mombasa on or about 28th August, 2017 but was unable to berth or offload the consignment due to its sheer size and unfavourable weather conditions. The Applicant claimed that the ship was compelled to set sail to Jebel Ali Port in the United Arab Emirates where the consignment was offloaded and stored at Multi Commerce FZE. The applicant then claims that it sought extension of time of the duty waiver from the Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries who in turn recommended the same to the Cabinet Secretary for the National Treasury. It is due to this that the Gazette Notice No. 4536 published on 12th May, 2017 was amended by Gazette Notice No. 9802 published on 4th October, 2017 which read as follows:

“IT IS notified for the general information of the public that the Gazette Notice No. 4536 of 2017, is amended as by-

i. In item (a), by deleting the word “imported” and substituting therefor the words “loaded into a vessel destined to a port in Kenya.”

67. The implication of the said amendment was that for the duty not to be payable on the sugar, the sugar needed to be loaded onto a vessel destined for a port in Kenya between the period of 12th May, 2017 and 31st August, 2-17.

68. On 8th October, 2017, the Applicant alleges that the consignment departed the Jebel Ali Port in United Arab Emirates on board MV IRON LADY enroute the Port of Mombasa and arrived at the port of Mombasa on or about 30th October, 2017 but the Respondents declined to have the consignment offloaded. The Respondents sought the assistance of the Cabinet Secretary for National Treasury who directed that the issue be resolve in line with the aforementioned Gazette Notices.

69. At this point, the Respondents wrote to the Applicant vide a letter dated 20th November, 2017

requiring the Applicant to provide additional information and clarify on issues relating to the date of loading, date and place of inspection, certificate of origin and change of ownership of the sugar consignment in the United Arab Emirates. The Applicant claimed that it responded to the said letter vide a letter dated 21st November, 2017 and explained the alleged inconsistencies. The 1st Respondent then wrote to the Applicant vide a letter dated 22nd November, 2017 indicating that the response by the Applicant was not satisfactory and therefore the Applicant was liable to pay tax/duty amounting to Kshs. 2, 548, 542, 325 as the consignment did not meet the provisions of the aforementioned Gazette notices. It is the decision contained in the letter dated 22nd November, 2017 that is the subject of these proceedings.

70. It is trite law that Judicial Review proceedings are not concerned with the merits of the decision but rather with the decision making process. In the case of **Cortec Mining Kenya Limited vs. Cabinet Secretary, Attorney General & 8 others [2015] eKLR** the Court of Appeal discussed the judicial review remedies as follows:

“...certiorari issues to quash decisions for errors of law in making such decisions or for failure to act fairly towards the person who may be adversely affected by such decision. Prohibition is directed to an inferior tribunal or body from continuing proceedings in excess of its jurisdiction or in contravention of the laws of the land. The order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same.”

71. The Respondent claims that the Applicant did not satisfactorily answer to the inconsistencies which it had raised in the letter dated 20th November, 2017 concerning the date of loading, date and place of inspection, certificate of origin and change of ownership. The Applicant on the other hand claimed that it did respond indicating that the sugar was loaded on 15th July, 2017; inspection was done in Dubai solely to meet the PVOC requirements; certificate of origin from the United Arab Emirates was insignificant as the United Arab Emirates is not known as a sugar producing country and there was no change of ownership at any point.

72. Both parties seem to dispute the period within which the sugar was loaded onto a vessel destined to a port in Kenya. This is a significant issue in determining whether or not the consignment met the provisions of the Gazette Notice No. 4536 published on 12th May, 2017 as amended by Gazette Notice No. 9802 published on 4th October, 2017. However, this court does not have expansive liberty to entertain this issue as it goes beyond the realm of Judicial Review proceedings. To delve deeply into this issue would be tantamount to addressing the merits and demerits of the decision made on 22nd November, 2017. This was reiterated in the case of **Republic vs. Attorney-General & 4 Others, ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji [2014]**, where the court held that:

“Judicial review applications do not deal with merits of the case but only with the process. In other words judicial review only determines whether decision-maker had jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision-maker took into account relevant matters or did take into account irrelevant matters”.

73. Yet, this court must of necessity consider the historical background and the material facts of the issues. Indeed a superficial approach to this issue cannot be fair. Article 47 (1) reads as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (emphasis added)

74. The terms “*lawful*” and “*reasonable*” can only be construed properly if the merit of the decision is also looked at, albeit from a distance. How is a lawful or reasonable decision made? One must look at the circumstances surrounding the impugned transaction. In this case the issue is whether or not the Ex Parte Applicant had satisfied both aforesaid Gazette Notices. If it is found that the Ex Parte Applicant had satisfied these Gazette Notices, and yet the Respondents denied it its rights, that decision would neither be

lawful nor reasonable. So it is important to look at the facts and history of the matter here.

75. Did the Ex Parte Applicant load the cargo within the required time? The Supplementary Affidavit of IBRAHIM NOOR HILLOWLY sworn on 31st January, 2017 in response to the Further Affidavit of ROSEMARY MUREITHI sworn on 29th, January, 2017 narrates the chronology of events. The affidavit, which was not challenged by the Respondents, states in Response to the affidavit of ROSEMARY MUREITHI that the Ex parte Applicant has a Certificate of Conformity from the Brazilian Chamber of Commerce and Industry indicating that the sugar consignment was headed for discharge at the Port of Mombasa aboard MV ANANGEL SUN. The same is attached as annexure “INH-2” in the Verifying Affidavit of IBRAHIM NOOR HILLOWLY. The deponent stated that the failure to procure a certificate of conformity from a duly recognized agent of the Kenya Bureau of Standards was not fatal as Part 7(1) of the Legal Notice No. 78 of 2005 does anticipate such an eventuality as it provides for second inspection (pursuant to Part 5 of the Legal Notice No, 78 of 2005) at the port of entry and a punitive penalty of 15% charged on the CIF. The deponent further explained that vide a letter dated 5th January, 2018 from the Respondents to the Kenya Ports Authority, the Respondents sought to establish *inter-alia* whether indeed MV ANAGEL SUN did enter Kenyan waters, and enquired as to the largest vessel that could be accommodated as at 28th August 2017. A copy of the said letter was annexed and marked as “INH-2”.

76. Record shows that vide a reply dated 12th January 2018 by the Kenya Ports Authority to the Respondents, the Kenya Ports Authority did confirm *inter-alia* that through its marine tracking system, the MV ANANGEL SUN did indeed depart from Santos Port, Brazil between 16th and 21st July 2017 and further that due to its sheer size, the MV ANANGEL SUN could not be accommodated at the Port of Mombasa. The letter was annexure “INH-3”.

77. Further and in the same vein, vide a letter dated 29th January 2018 to the Kenya Ports Authority, M/s Seaforth Shipping (K) Limited (an agent of the vessel MV ANANGEL SUN) sought to confirm whether the MV ANANGEL SUN could have been accommodated at the Mombasa Port. In reply, the Kenya Ports Authority vide a letter dated 29th January 2018, did confirm *inter-alia* that due to the MV ANANGEL SUN’s size, the same could not be accommodated at the Port of Mombasa.

78. From the above this court is persuaded that the MV ANANGEL SUN was indeed at the Port of Santos, Brazil between 16th and 21st July 2017 which date was well within the ambit of Gazette Notice No. 4536 dated 12th May 2017 as amended by Gazette Notice No. 9802 dated 4th October 2017.

79. This court is further persuaded that the MV ANANGEL SUN, which was laden with the Ex-Parte Applicant’s consignment, could not be accommodated at the Port of Mombasa due to its sheer size and hence could not be recorded in the vessels waiting list as intimated by the Respondents.

80. Record also shows that in addition to the Bill of Lading, Proforma Invoice and Certificate of Compliance from the Brazilian Chamber of Commerce, the Ex Parte Applicant submitted to the Respondents the MV ANANGEL SUN’s shipping schedule from July 2017 to September 2017 and GPS co-ordinates. (Copies of the schedules are annexed as “INH-6”). This court has no reason to doubt those documents.

81. The Ex Parte Applicant has also adequately explained that the change in the description of the consignment was occasioned by the second inspection conducted in Dubai by Bureau Veritas, an agent of Kenya Bureau of Standards in August 2017 after the first inspection conducted by the Brazilian Chamber of Commerce was declined for not being a recognized agent of the Kenya Bureau of Standards. The first inspection of the sugar consignment was done by the Brazilian Chamber of Commerce and Industry and it was the Ex Parte Applicant’s clearing agent, Jays Investments Company Limited, that advised the Applicant to do the inspection again with a KEBS certified agent to avoid penalties and save time at the Port of Mombasa during entry because the consignment would have to undergo LOCAL INSPECTION by KEBS at the point of entry. (See annexure “INH-7”). This court is persuaded by the averment by the Ex Parte Applicant that the KEBS Partner known as Bureau VERITAS stationed in Dubai stated that they

could not act on a document (Import Declaration Form IDF) whose country of supply read Brazil but they would accept a document whose country of origin read DUBAI since the second inspection was being carried out in Dubai. It is clear that it is this condition from Bureau VERITAS that led the clearing agent of the consignor, MULTI COMMERCE FZC, to generate a commercial invoice for the Ex Parte Applicant to be able to get an Import Declaration Form, and be able to get the Certificate of Conformity from a KEBS Certified Partner Bureau VERITAS. This also appears to this court to be the reason why the productions date of the sugar is indicated as AUGUST 2017, SEPTEMBER 2017 because this is when it was being inspected for the second time in Dubai. This also appears to be the reason why the Pre-Export Verification was issued on 19th October, 2017. This court is satisfied with the explanation as to why all documents were now reading that the sugar consignment was from Dubai as the country of supply, that is, Invoice, Import Declaration Form (IDF) and Certificate of Conformity. A Certificate of Origin was issued by the DUBAI CHAMBER OF COMMERCE but maintaining the Country of Origin to be BRAZIL, and the Bill of Lading remained the same throughout the journey and the transaction. This is the information used during the entry of the sugar consignment by the Ex Parte Applicant's clearing agent in Form C17B.

82. This court is satisfied, and it is quite evident that the sugar consignment in question was loaded into a vessel destined to a port in Kenya between 12th May 2017 and 31st August 2017.

83. Further, the Ex Parte Applicant annexed to the Supplementary Affidavit of IBRAHIM NOOR HILLOWLY sworn on 31st January 2018 a copy of a letter dated 27th November 2017 and marked as "INH-7" written by Jay Investment Company Ltd to the Commissioner of Customs & Border Control. It is worth noting that the said letter was written after the decision of the Respondents contained in the letter dated 22nd November 2017 requiring the Ex Parte Applicant to pay duty.

84. In the said letter, Jay Investments Company Limited (the Ex Parte Applicant's clearing agent) explains in detail the alleged inconsistencies which the Respondents had claimed that the Ex Parte Applicant had not addressed satisfactorily. The letter contains crucial dates and the events that occurred on those dates in respect of the sugar consignment. It also expounds on the reasons as to why the sugar appeared to have originated from Dubai and not Brazil. The Respondents did not respond to this letter. The conclusion that can be drawn by this court is that indeed the Ex Parte Applicant's sugar consignment was loaded into a vessel destined to a port in Kenya between the period of 12th May 2017 and 31st August 2017 as required by Gazette Notice No. 4536 of 12th May 2017 as amended by Gazette Notice no. 9802 of 4th October 2017. Therefore, the decision by the Respondents in the letter dated 22nd November, 2017 is not just unreasonable and unlawful, but is procedurally also deficient.

c) Whether the Judicial Review Remedies sought by the Ex Parte Applicant should be granted

85. The ex parte applicant seeks an order of certiorari to quash the decision made vide the letter dated 22nd November, 2017. For any applicant to be granted this remedy, he or she must show that the decision maker did not act fairly or the decision maker considered irrelevant matters or that the decision maker acted unreasonably or that he or she did not follow the laid down procedure or that he or she did not have jurisdiction to act or that the decision maker acted ultra vires.

86. Article 47 of the Fair Administrative Action Act provides as follows:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an

independent and impartial tribunal; and

(b) promote efficient administration.

Article 47 (2) states that a person, that will be adversely affected by an administrative action, has the right to be given reasons for the action. The same is reiterated in Section 6 of the Fair Administrative Action Act.

87. The 1st Respondent communicated its decision vide a letter dated 22nd November, 2017 (a copy of the said letter is annexed to the affidavit of IBRAHIM NOOR HILLOWLY and marked as “INH-15”). The said letter reads in part as follows:

“We have reviewed your submission in respect of the above entry against the provisions of the Gazette Notice No. 9802 dated 04.10.2017 and have noted several inconsistencies relating to the date of loading , date and place of inspection, certificate of origin and change of ownership. These issues have not been satisfactorily addressed.

In light of the foregoing, you are hereby notified that the subject sugar consignment does not meet the provisions of the said Gazette Notice.

We therefore recommend that you pay taxes amounting to Kshs. 2,548, 542, 325 in addition to what has already been paid, to facilitate further processing and clearance of the consignment.”

88. The letter does not indicate the reasons as to why the Respondent found that the issues had not been addressed satisfactorily. The letter does not give a chance to the applicant to explain their side of the matter. In essence, the Respondent does not give the reasons for its decision. The Respondents ought to have indicated the inconsistencies that they had noted to help the Applicant understand its decision. This I should think, would be the fairest and the most reasonable thing to do considering the impact of its decision. The impact of the Respondents’ decision was payment of a duty of Kshs. 2,548, 542, 325 which is a colossal sum considering the Applicant had already paid a sum of Kshs. 422, 106, 560. The Applicant cited with the approval of this court the case of **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR** where the Court of Appeal held that:

“54. Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.” (emphasis added)

89. As stated above the Respondents should have offered some proof in support of their claim that the Applicant did not address the issues satisfactorily. It is unreasonable for the Respondents to give a simple blanket excuse.

90. According to the *Wednesbury Unreasonableness*, a decision is unreasonable if it is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. The Respondent should have considered the nature of the interest concerned and the circumstances surrounding the case and found the need to give elaborate reasons for its decision. The Respondents themselves while citing the case of **Bato Star Fishing (Pty) Ltd vs. Minister of Environmental Affairs and Tourism [2004] ZACC 15** submitted that factors determining whether a decision is reasonable or not will include the nature of the decision, the identity

and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Yet, these are the very attributes lacking in the Respondent' decision of 22nd November 2017.

91. One would ask, in which sense is the 1st Respondent unreasonable? The simple answer is as follows: The Ex Parte Applicant together with 13 other persons responded to the provisions of the Gazette Notice No. 4536 dated 12th May, 2017 and pursuant thereto managed to import the sugar into the country free of import duty tax. The 14 persons were all gazetted. Of these, 13 persons did not experience any delay and it is presumed that their cargo entered the country free of import duty. However, the Ex Parte Applicant for the reasons now well documented herein, experienced a delay. It however immediately communicated its predicament to the Cabinet Secretary for National Treasury who graciously caused the amendment of the Gazette Notice no. 4536 dated 12th May 2017 by Gazette Notice No. 9802 dated 4th October 2017. Clearly, the need for this amendment was to accommodate the Ex-Parte Applicant or any other applicant whose vessel was running late. The second Gazette Notice therefore created hope and expectation in the Ex-Parte Applicant which even enabled it, at great costs, to sail vessel MV ANANGEL SUN to a port in Dubai for the transshipment of the cargo into a smaller vessel- MV IRON LADY- which could berth in Mombasa port.

92. These two Gazette Notices therefore had created a legitimate expectation in the Ex-parte Applicant that its sugar would enter the country free of import duty. The principles of legitimate expectation were enumerated in the case of **Abul Waheed Sheikh & Another vs. Commissioner of Land & 3 others [2012] eKLR** which relied upon the case of **J.P Bansal vs. State of Rajasthan & Anor, Appeal (Civil) 5982 of 2001** where the Supreme Court of India stated as follows:

“The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions and ors. Vs. Minister for the Civil Service (1985 AC 374 (408-409) (commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced...An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to class of persons.”

93. The Ex-Parte Applicant is a business entity. It is entitled to gain from what it legitimately expected would be given. In fact the letter dated 21st September 2017 from the Cabinet Secretary National Treasury to the 1st Respondent advising that the Ex-parte Applicant's sugar be cleared duty free provided the same had been loaded during the stipulated period emboldened the Ex-parte Applicant to proceed with the importation.

94. The Ex-parte Applicant therefore legitimately expected not to pay duty amounting to over Kshs. 2.5 billion. This is not a small sum of money. To demand it from a party who did not expect such a demand would be profoundly unfair, unreasonable and unjust. This profound sense of unfairness is compounded when it is taken into the context of this case where 13 other parties who were also gazetted to import sugar duty free with the Ex-parte Applicant are allowed to do so without restraint. It brings into focus the issue of discrimination.

95. The Ex-parte Applicant has shown that it loaded its sugar into a vessel destined for a port in Mombasa within the relevant period contained in the Gazette Notices. It is also true that in both gazette notices there is no reference to the source or origin of the sugar. However, despite the ex-parte applicant offering adequate explanation as to why the sugar ended up in Dubai, the Respondents are not satisfied. This despite the fact that the major transport document, indeed the title to the goods, that is, the Bill of Lading, remains the same throughout the transaction. On what grounds then, if not unexplained discrimination, did the Respondents clear sugar of the 13 importers duty free and deny the Ex-parte Applicant the same facility for which it had acquired legitimate expectation? This court is satisfied that the Ex-parte applicant's Notice of Motion before this court is merited and that the sugar, the subject matter of this suit, is entitled to be cleared free of import duty pursuant to the provisions of the aforesaid Gazette Notices.

96. On the issue of costs, the same shall follow the event.

97. There was a minor issue as to whether the 3rd Respondent, Julius Musyoki's name should be struck out of these proceedings. My short finding on the issue is that as a decision maker the 3rd Respondent is relevant to these proceedings, and as administrator whose decisions affect the public, he has been properly sued herein.

98. For the foregoing reasons, Orders are issued as follows:

a) An Order of Certiorari to remove into this Honourable court and quash in its entirety the decision by the Respondents, communicated vide the letter date 22nd November, 2017, to levy duty/tax of Kshs. 2, 548, 542, 325 on sugar imported under Entry 2017 MSA 6684598, BL: BRSS802017 for the alleged failure by the Applicant to meet the provisions of the Gazette Notice No. 4536 dated 12th May, 2017 as amended by Gazette Notice No. 9802 dated 4th October 2017 respectively.

b) An Order of Prohibition directed towards the Respondent restricting/prohibiting the Respondents, its agents, officers and any person acting under that office from levying or demanding any duty/taxes over and above Kshs. 422,106, 560 already paid as import declaration fees, maritime fee levy in regard to sugar imported under Entry 2017 MSA 6684598, BL: BRSS802017 pursuant to the provisions of the Gazette Notice No. 4536 dated 12th May, 2017 as amended by Gazette Notice No. 9802 dated 4th October 2017 respectively.

c) An Order of Mandamus ordering and compelling the Respondents to immediately process, clear and release on duty free basis, the Applicant's entire sugar consignment of 40,000 MT of Brazillian brown sugar imported under Entry 2017 MSA 6684598, BL: BRSS802017 as contemplated by the provisions of the Gazette Notice No. 4536 dated 12th May, 2017 as amended by Gazette Notice No. 9802 dated 4th October 2017 respectively.

d) The costs of the Application shall be for the Ex Parte Applicant.

Dated, Signed and Delivered in Mombasa this 22nd day of February, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mosota & Tebino for the Applicant

Mr. Ogeto & Ms. Mburugu for the Respondents

Mr. Kaunda Court Assistant