



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 342 OF 2016

STANDARD RESOURCES GROUP LTD.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER GENERAL

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

COMMISSIONER OF CUSTOMS

& BORDER CONTROLS.....3RD RESPONDENT

MAKUPA TRANSIT SHADE LIMITED.....4TH RESPONDENT

JUDGMENT

1. **Standard Resources Group Limited**, the petitioner, is a steel importer while the 1st respondent is the Attorney General whose mandate is, among others, to represent the national government in civil proceedings. The 2nd respondent is head of the agency established under section 3 of the **Kenya Revenue Authority** Act, a government agency responsible for collecting and receiving revenue on behalf of the government. The 3rd respondent, the **Commissioner of Customs and Border Controls**, is an employee of the 2nd respondent who assesses and collects customs duty while the 4th respondent is a CFS provider as a customs shade thus an agent of the 3rd respondent.

2. The petitioner imported a consignment of steel bars which arrived at the Port of Mombasa on or about 26th May 2016. The petitioner was required to clear the consignment and pay customs duty and VAT within 21 days to secure release of its consignment lest it would attract more storage and demurrage charges.

3. It is the petitioner's case that it declared its goods as required and after custom duty was assessed, it paid the assessed custom duty and VAT amounting to **Kshs37, 503,713** and on 8th June 2016 the 3rd respondent confirmed that customs duty and VAT had been paid. However a while later the 3rd respondent without any notice or justification, demanded extra or additional customs duty and VAT from the petitioner in violation of the constitution, the law and the petitioner's fundamental rights and freedoms.

4. The petitioner avers that although section 122(4) of the EACCMA Act reserves to the 3rd respondent the right to re-assess duty payable in case of understatement of value or inaccuracy in the information availed for purposes of assessing customs duty, there was no such understatement of the value with regard to the petitioner's consignment. The petitioner further contends relying on section 34 of the Act that although the 3rd respondent may under that section examine goods declared in order to determine the accuracy of the entries made, this has to be done with the knowledge and in the presence of the importer.

5. The petitioner further avers that even when exercising his powers under section 122(c), the 3rd respondent must do so in a manner that is expeditious, efficient, lawful and procedurally fair as required by Article 47(1) of the constitution. It contends that even after extra or additional customs duty was imposed, the 3rd respondent did not comply with Article 47(2) as no reasons were given for the 3rd respondent's decision to make such a demand for **Kshs31, 845,047**.

6. The petitioner also contends that the delay in releasing its consignment on the pretext of extra customs duty, lead to the petitioner incurring losses since it was not able to get its goods and was not given an opportunity to know why extra customs duty had been imposed and or be

present when physical examination of its goods was done. The petitioner states that although it requested for release of its goods, the 2nd and 3rd respondents declined and the 3rd respondent never explained the source of the **extra Ksh31,845,047/-**. This, the petitioner avers, forced it to seek the court's intervention to have the goods released.

7. As a consequence, petitioner contends, it suffered loss of special damages amounting to Ksh67, 059,570.16. and therefore, filed the petition dated 10th August 2016 and amended on 16th October 2017, seeking the following reliefs:

1. A declaration that the decision of the 3rd respondent through his Chief manager- Customs and Border Control MSA Regional Hqs contained in a letter dated 15th July 2016 to impound the petitioner's imported goods in respect of entry No.2016MSA6030784 was arbitrary, illegal, unlawful, unconstitutional, a contravention of its rights under Articles 10, 27, 35(2), 40, 47, 50 and 73 of the Constitution and therefore, null and void.

2. A declaration that the petitioner's right to equality and freedom against discrimination under Article 27 of the constitution has been contravened in assessing the customs duty plus VAT payable.

3. A declaration that the respondents have contravened the petitioner's rights under Articles 10, 27, 35(2), 40, 47(1), 50 and 73 of the Constitution of Kenya, 2010.

4. An order of certiorari to remove to the High Court and quash the decision of the 3rd respondent through his Chief manager Customs and Boarder Control MSA Regional HQs contained in a letter dated 15th July 2016 to purportedly impound the petitioner's imported goods in respect of Entry Number 2016MSA6030784.

5. An order of mandamus to compel the 3rd respondent to unconditionally release to the petitioner's goods in respect of entry Number 2016MSA6030784 in which customs duty of Kshs37,503,713/- has been duly paid for by the petitioner.

6. An order of prohibition to prohibit the 3rd respondents, its officers agents or employees or otherwise whosoever from seizing the petitioner's goods in respect of entry Number 2016MSA6030784.

7. A declaration that no further custom duty penalties and interests are due to the respondents under section 135(2) of the EACCMA.

8. (a) an order that respondents do pay customs warehouse rent and port charges and any other charges including penalties, interest and taxes from the expiration of 21 days from the date of arrival of the cargo until payment in full.

9. (b) A declaration that if which is denied, the 4th respondent is entitled to be paid demurrage charges after 8th June 2016 then it is the 1st to 3rd respondents who are obliged to pay the same.

10. General damages for violation of fundamental rights and freedom of the petitioner.

11. Costs of the suit.

12. Interests on 8), 9) and 10 above.

13. Any such other order as this Honourable Court shall deem just

1st Respondent's Response

8. The 1st respondent filed grounds of opposition dated 10th November 2017 and filed in court on 20th November 2017, contending that the petition does not disclose any constitutional violations or breaches against the 1st respondent; that in assessing customs duty and VAT payable, the 3rd respondent was acting within its legal mandate; that the petitioner has not demonstrated that the 3rd respondent acted in contravention of the law in confirming accuracy of the information provided by the petitioner during the re- assessment of customs duty in respect of the petitioner's goods and that the petitioner has not demonstrated that the assessment of customs duty over its products was different from that of other importers in the same category.

9. The 1st respondent further contends that the petitioner has not shown that it was denied an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair in the circumstances. It is also contended that the petition is frivolous, bad in law and geared towards preventing the 3rd respondent from exercising its legal mandate. The 1st respondent therefore contends that the petitioner has not shown that the 3rd respondent contravened the law, exceeded his mandate, breached rules of natural justice, considered extraneous matters or that he was actuated by malice in the performance of his duties.

2nd and 3rd Respondents' Response

10. The 2nd and 3rd respondents filed a replying affidavit by **Paul Boiywo** sworn on 13th November 2017 and filed in court on 14th November 2017. The affidavit contains general denial in respect of averments in the amended petition. The deponent states that section 34 of **EACCMA Act** requires an importer to enter goods within 21 days and that those goods are only released after payment of the requisite

customs duty in line with section 122 of the Act, the Fourth Schedule to the Act and other requirements. He deposes that after expiry of 21 days the 3rd respondent begins to charge warehouse rent for the extra days the goods remain uncollected.

11. According to **Mr. Boiywo**, customs duty is determined after declaration of the goods but the declared customs duty may be adjusted in accordance with section 122 of the Act after verification of such goods. He deposes that the petitioner's goods were not released because the petitioner had not paid full import duty and VAT. **Mr. Boiywo** states, therefore, that customs duty was adjusted upwards because the petitioner had understated the value of the goods and that the understatement was supported by the values stated in the two sales contracts presented by the petitioner in its bundle of documents.

12. The deponent contends that the first sales contract in the petitioner's documents signed on 8th January 2016 gave the price as **FOB USD 255** per metric ton while the second sales contract signed on 11th January 2016 gave the price as **CIF USD 285**, implying that other costs were only **USD 30**, making the cost of the goods too low.

13. **Mr. Boiywo** further deposes that according to registration documents, the seller and the petitioner are related with seller owning 999 shares in the petitioner which means the import documents were for purposes of deceiving and avoiding paying full customs duty. He deposes that the petitioner is a new importer who had not been profiled and that the management analysis used to select the petitioner's goods for further scrutiny to verify authenticity and validity of the documents presented as well as physical verification, revealed that the petitioner had manipulated documentation to evade tax. He contends that the petitioner had also stated that another importer had imported deformed steel bars at **USD 343** per metric ton which lead the 2nd and 3rd respondent to conclude that the petitioner had not explained why there should be such a difference.

14. **Mr. Boiywo** further deposes that the 2nd and 3rd respondents used an identical transaction dated 16th January 2016; that examination of the goods was done in the presence of a clearing agent hence the petitioner was represented in terms of sections 147 and 148 of the Act. For that reason, **Mr. Boiywo** contends, the 3rd respondent did not make a prejudicial decision against the petitioner. He stated that if the petitioner felt that the decision was prejudicial in uplifting the customs duty, it should have appealed to the Commissioner under section 229 of the Act.

15. He also contends that the petitioner could have applied for release of the goods on security pending determination of the issue of customs duty. **Mr. Boiywo** therefore denies that the 2nd and 3rd respondents contravened the petitioner's right to fair administrative action guaranteed under Article 47(1). He states that the 3rd respondent had every reason to demand an extra **Ksh31, 385.047/-**. He also contends that demurrage charges and special damages require proof and so is with regard to bank guarantee charges but which was not done. According to him, the 2nd and 3rd respondent promptly complied with the court order upon being served and released the goods.

4th Respondent's response

16. The 4th respondent filed a response to the petition dated 20th November 2017 and filed in court on 29th November 2017, denying the petitioner's allegations against it. It contends that as at 25th October 2016, storage handling charges stood at 66.8million which the respondent wants paid by the petitioner and had filed a cross petition dated 24th November 2017 to that effect.

17. The 4th respondent in essence disputes the petitioners allegations against it contending that it did not do anything wrong against the petitioner. It maintains that storage charges payable to the 4th respondent, as a CFS, is raised independently of the 2nd and 3rd respondents and that cargo is only released upon payment of customs duty and VAT and on the orders of the 3rd respondent.

18. According to 4th respondent, whether or not there is a dispute between an importer and KRA and whatever the result of the dispute, it never alters the terms of engagement between the importer and the 4th respondent. The 4th respondent also denies that it is an agent of KRA, contending that it is entitled to be paid its dues despite the fact that the petitioner's consignment was released pursuant to a court order.

Petitioner's submissions

19. **Dr. Kamau Kuria**, learned Senior Counsel for the petitioner, submitted highlighting their written submissions dated 24th January 2018 and filed in court on the same day, that the respondents violated the petitioner's human rights and fundamental freedoms including the right to equal protection of the law guaranteed in Article 27 of the constitution, by exercising power arbitrarily as well as violating constitutional values and principles in Article 10 of the constitution.

20. Learned Senior Counsel contended that on 7th June 2016, the 2nd and 3rd respondents assessed duty payable for the petitioner's consignment at **Kshs37, 503,713** which amount was duly paid, and as such, the respondents were under obligation to release the petitioner's goods which was not done until 26th November 2016 following a court order.

21. **Dr. Kuria** contended that instead of releasing the goods, the 2nd and 3rd respondents came up with a second assessment for additional customs duty of **Ksh31, 845,047**, without giving the petitioner an opportunity to be heard or reasons for the demand of extra customs duty, thus violated the petitioner's right to fair administrative action guaranteed under Article 47(1) of the Constitution.

22. Learned Senior Counsel relied on the decision of **Geothermal Development Company Ltd v Attorney General & 3 others** [2013] eKLR to support their contention that the respondents' action violated Articles 47, 40, 50(1) and 35(b) of the Constitution and that the petitioner was entitled to information on why he should pay extra customs duty and VAT. **Dr. Kuria** argued that refusal to release the goods was an issue between the 2nd and 3rd respondents on the one hand and the 4th respondent on the other. He contended that the 4th respondent having

refused to release the goods it raised a bill for alleged storage charges although no one should raise charges based on his own failures or wrongs. He was of the view, that if the 4th respondent intended to collect charges after the date the petitioner wanted goods released, it should have sought indemnity from the 2nd and 3rd respondents.

23. Learned Senior Counsel went on to submit that the imposition of extra customs duty was illegal taking into account the process that was followed in arriving at the extra amount. He argued that a citizen is taxed to the extent only allowed by law; that storage charges are payable up to 7th June 2016 but not after payment of duty and relied on the case of *Muneka v Ganthi* [1977] SC 597 for the submission that equality and arbitrariness are sworn enemies. With regard to the Attorney General, learned Senior Counsel contended that neither a response nor submissions were filed and that where a party does not file a replying affidavit in opposition to a case, he is deemed to have admitted the averments in the claim.

24. **Dr. Kuria** contended, relying on Articles 22 and 27 of the constitution, that the court has jurisdiction to grant all the reliefs sought and relied on the case of *Kamau v Attorney General* [1969]EA 29 which quoted the decision of *Ashby v White* (1703) 2Ld. Rym 938, that if a plaintiff has a right he must of necessity have the means to vindicate it and a remedy if he is injured in the enjoyment or exercise of it; and that indeed it is a vain thing to imagine a right without a remedy for want of right and remedy are reciprocal. Learned counsel contended that due to the delay in releasing the steel bars, the petitioner could not satisfy its customers' contracts, thus suffered loss due to contravention of Article 40 of the constitution where the petitioner's rights to property including those arising from contracts was violated.

25. According to Senior Counsel, the petitioner had a legitimate expectation that on importing the goods into the county, they would be allowed in and his business would run normally but due to the 2nd and 3rd respondents' refusal to release the goods, they violated the petitioner's right to be heard. On legitimate expectation learned counsel relied on *Council of Civil Service Unions & others v Minister for Local Civil Service* (1985) AC 374(408-409). He also relied on the case of *Nabro Properties Ltd v Sky Structures Ltd & others* [202] 2KLR 299 for the submission that a person cannot rely on his own wrong.

26. Senior Counsel further relied on the decision in *John Mining & Another v Governor of Birmingham County* (Petition No. 2 and 2A of 2014 for the submission that no person, state officer or state organ is above the law and accused the 2nd and 3rd respondents of acting as if they were above the law. He also relied on the decision in *Republic v National Land Commission & 2 others Ex parte Airways Holdings Limited* [2016] eKLR where the court voided a decision because the rules of natural justice had not been followed. He urged the court to hold that the respondents contravened the petitioner's rights and are therefore liable to pay compensation for it. He also relied on the decision in *Republic v Communication Authority of Kenya & another Ex parte Legal Advice Centre* [2015] eKLR, contending that since the respondents refused to release goods they violated the rule of law among other authorities.

1st Respondent's Submissions

27. **Miss Wawira**, learned counsel for the 1st respondent, contended that the law empowers the 3rd respondent to charge and collect tax; that in assessing customs duty and tax, the 3rd respondent was merely discharging his legal mandate and that the petitioner has not shown that there was violation or contravention of any law during the process of ascertaining the accuracy of the amount the petitioner had declared.

28. Learned counsel further submitted that the petitioner has not shown the unconstitutional taking of the petitioner's property by the 3rd respondent; that the prayers sought are unavailable and denied the petitioner's contention that tax authorities were acting as if they were above the law. Counsel blamed importers for tending to under declare the value of imported good.

29. **Miss Wawira** went on to contend that in this particular case, the 3rd respondent had demonstrated that after the petitioner had declared the value of its goods, the 3rd respondent followed the law, namely; the *EACCMA Act* and arrived at the correct customs duty and VAT payable. Counsel submitted, therefore, that the 3rd respondent acted legally in arriving at the tax payable.

2nd and 3rd Respondents' Submissions

30. **Mr. Lemiso**, learned counsel for the 2nd and 3rd respondents submitted, highlighting their written submissions dated 23rd January 2018 and filed in court on the same day, that the petitioner made a declaration on the imported goods and paid the declared customs duty of Ksh37,509,717 being self-assessed duty. Learned counsel contended that under section 127(4) of *EACCMA Act*, the 2nd and 3rd respondents have power to verify a declaration made by an importer or tax payer and that it was on that basis that the 2nd and 3rd respondents made the verification and discovered that the customs duty payable was not in tandem with the self-declaration.

31. Learned counsel submitted that the Fourth Schedule to the Act gives methods for determining customs duty and that after a doubt was raised, the 3rd respondent used the method allowed that is identical goods declared in the same year, which had been declared higher than the petitioner's goods. He contended that by using that method, the 3rd respondent arrived at an additional assessment of **Ksh31, 841 047/-** which was demanded from the petitioner and the decision was communicated by letter dated 15th July 2016. **Mr. Lemiso** submitted, therefore, that the 3rd respondent followed the law in arriving at the second assessment. He contended that once the petitioner received the second assessment he could have had recourse section 229 as read with section 230 of *EACCMA Act* to seek a review of the assessment if dissatisfied, a process it skipped.

32. According to **Mr. Lemiso**, determination of customs duty payable is the responsibility of the 3rd respondent so long as it is done within the law which was the case. He denied that the 2nd and 3rd respondents declined to release the goods after they were served with the court order. On special damages, learned counsel submitted that they are not grantable because they ought to have been specifically proved. He was of the same view with regard to interest on bank guarantees because it was issued pursuant to a court order. He also contended that the claim for legal fees is not payable as it is a claim for special damages which was not proved.

4th Respondent's Submissions

33. **Mr. Akanga**, learned counsel for the 4th respondent submitted, highlighting their written submissions dated 20th November 2017 and filed in court on 29th November 2017 that the 4th respondent was brought into this dispute after it was cited for contempt. He contended that tax issues are matters between the petitioner and the 2nd and 3rd respondents.

34. Learned counsel contended that the 4th respondent, as a customs Shade and CFS, is not involved in assessing payment or reviewing tax payable except allowing access to the 2nd and 3rd respondents for purposes of ascertaining duty payable. He argued that the 4th respondent only releases goods upon receiving release orders from the 2nd and 3rd respondents and that as a custom shade; the 4th respondent holds the goods on behalf of all interested parties, the petitioner and 2nd and 3rd respondents. **Mr. Akanga** submitted therefore, that upon receiving release orders from the 2nd and 3rd respondents, the 4th respondent would then agree with the petitioner (importer) on the payable storage charges which are then paid before goods are released.

35. Learned counsel went on to submit that the court ordered the petitioner to deposit Kshs. 20 million for extra duty for goods to be released and that at the time the goods were released they had been at the 4th respondent's premises for 120 days attracting **Kshs.67million** in storage charges which is unpaid hence the petitioner has no claim against the 4th respondent. In **Mr. Akanga's** view, the 4th respondent only received formal release order on 8th November 2016 and promptly released the goods because it is not an agent of the 2nd and 3rd respondent when it comes to customs duty or VAT matters. He contended, therefore, that demurrage due to the 4th respondent ought to be paid by the petitioner. He however argued that the rest of the claim including bank guarantee charges and legal fees, are not payable by the 4th respondent to the petitioner. Learned counsel agreed with the 2nd and 3rd respondents that the petitioner skipped the process of appeal, allowed under sections 229 – 231 of the Act.

Rejoinder

36. In a brief rejoinder, **Dr. Kuria** submitted that a petition is the prescribed procedure in matters for redress of violation of rights and fundamental freedoms and relied on the decision in **Speaker of the National Assembly v James Njenga Karume** [1992] eKLR. Learned Senior Counsel contended that there was no other procedure for proving pecuniary loss other than through affidavits attached to the petition. Senior Counsel referred to the petitioner's affidavits on record submitting that the pecuniary loss claimed is real and is grantable. Learned Senior Counsel wondered why the 4th respondent was urging the court to accept its loss of **Kshs.66, 878, 500** which is a special claim yet it contends that the petitioner cannot claim its special loss.

37. According to learned Senior Counsel, the 4th respondent's contention that it could not release goods from the warehouse without the 2nd and 3rd respondents' orders, means that if the 2nd and 3rd respondents are wrong in law by not releasing the goods, then the 4th respondent should look up to the 2nd and 3rd respondents to pay storage charges and no one should benefit from his own wrong doing.

Analysis and Determination

38. I have considered this petition, responses, thereto; submissions by counsel for the parties and authorities relied on. In my view, the question that arises for determination is whether the 2nd and 3rd respondents violated the petitioner's right to fair administrative action in the manner it came up with re-assessed customs duty and VAT payable for the petitioner's consignment.

39. The facts of this case are not in dispute. The petitioner imported steel bars and followed the normal procedure for declaring duty and paid customs duty and VAT. Despite this fact, the goods were not released when the petitioner sought to have them. The 3rd respondent did a re-assessment and demanded extra customs duty and VAT. The petitioner declined to pay the additional charges contending that its right to fair administrative action had been violated and no written reasons were given. The 2nd and 3rd respondents on their part have argued that they were performing their duties as required by the EACCMA Act and regulations made there under and for that reason they did not violate the petitioner's right for fair administrative action as alleged.

40. The right to fair administrative action is a constitutional right that is now embedded in Article 47(1) of the constitution. The Article confers on every person the right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 47(2) goes on to add that if a right or fundamental freedoms 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.

41. As one of the fundamental rights in our Bill of Rights, the right to fair administrative action is primarily intended to protect people from the state, state organs and public bodies' administrative actions that violate this fundamental right. Article 47(1) and (2) generally impose a duty on the state to give effect to this right by acting lawfully, reasonably and fairly and to give written reasons where the action taken infringes or is likely to violate one's rights.

42. Exercise of this administrative action calls on the state or its organs and public officers to observe the principle of legality which is an incident of the rule of law and a founding value in our constitution. **Where exercise of public power is at variance with this principle, it is inconsistent with the constitution and therefore invalid. This will lead to a review of that administrative action and may be nullified.** (See **State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited** [2017] ZACC 40)

43. In the case of **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** (CCT16/98) 2000 (1) SA 1, the Constitutional Court of South Africa stated that;

“Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”

44. The Court of Appeal appreciated the essence the right to fair administrative action in Article 47(1) of our constitution in the case of Judicial Service Commission v Mutava Mbalu[2014] eKLR, when it observed [at Paragraph 22] that fair administrative action refers broadly to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional and statutory duties guided by constitutional principles and policy considerations. The court went on to state that ;

“[23]...Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

45. The Constitution guarantees the right to fair administrative action just like any of the other fundamental rights in the Bill of Rights. Fundamental rights are meant to protect human beings primarily against the State. And in that respect, the right to fair administrative action is of significance in our constitutional context because it is used to check administrative law which conferred wide discretionary power to public administrators and bodies who sometimes used their discretion as an instrument of oppression with little regard to the rights of those against whom they acted. Article 47 is therefore intended to be a constitutional control over these administrative bodies to ensure that they do not abuse their power and that individuals concerned receive fair treatment whenever administrative actions are taken against them.

46. The petitioner’s contention is that the 2nd and 3rd respondents’ action of re assessing customs duty and VAT and going ahead to demand payment from the petitioner was an administrative action that fell within the ambit of Article 47 (1) and, therefore, the 2nd and 3rd respondents were required to comply with this Article but did not, thus violated constitutional dictates. In this regard, the petitioner contends that it was not told why and how the duty was increased and no written reasons were given for it as required by Article 47(1) and (2). The 2nd and 3rd respondents on their part contend that they were performing their duties as required by the **EACCOMA Act** hence there was no violation of the petitioner’s fundamental rights.

47. The petitioner declared and paid the assessed duty for its imported goods. However, the 2nd and 3rd respondents, as can be seen from the responses and submissions, were of the view that the duty declared and paid was less and, therefore, conducted a re-assessment after which they demanded more duty from the petitioner. They also declined to release the petitioner’s goods until the extra customs duty was paid. The goods were only released after the court issued an order to that effect.

48. The petitioner contention is that the 2nd and 3rd respondents did not inform it of the intention to reassess duty or how they arrived at the new tax. But according to the respondents, the Act and regulations give them power to reassess imported goods and adjust duty payable and further that the procedure for determining duty payable is provided for in the Act, that is; self-declaration and where in doubt, the 3rd respondent uses identical previous declarations or assessments to determine duty. In this case, the 2nd and 3rd respondents contend that they used the previous identical transactions and the duty paid to come up with the new assessment. It would appear they did this without the petitioner’s involvement.

49. The Constitution in Article 47(1) imposes a duty on administrative bodies to act expeditiously, efficiently, lawfully, reasonably and in a manner that is procedurally fair. They are also obligated to give written reasons where their actions affect rights of other persons. The 2nd and 3rd respondents certainly had statutory power under **EACCOMA Act** to assess customs duty and where possible demand extra duty from an importer, in this case, the petitioner. However in doing so, they had to act reasonably and in a procedurally fair manner.

50. In that regard, I am in agreement with the exposition of the law that ***“as a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well”***(Geothermal Development Company Ltd v Attorney General & 3 others (supra)).

51. The 2nd and 3rd respondents did not call upon the petitioner to show why they doubted the duty declared and paid; how they intended to reassess the duty and even after doing so, how they had come up with the demanded extra customs duty. There is no evidence at all that they involved the petitioner in any way even when they were examining its consignment. The 2nd and 3rd respondents did not disclose to the petitioner the identical transactions they were to rely on to determine the extra customs duty. They only come up with a figure and demanded for payment without any explanation. The figure they came up with was also nearly equivalent to the custom duty already paid. In the end, the duty to be paid would be by an increase of about 100 percent which the petitioner argues was arrived at arbitrarily and the respondents offered no justification for it.

52. Section 120 of the Act deals with computation of import duty. It provides that

(1) “Subject to subsection (3) and section 94, import duty shall be paid at the rate in force at the time when the goods liable to such duty are entered for home consumption: Provided that in the case of goods imported overland, the time of entry of such goods for home consumption shall be deemed to be the time when the import duty on the goods is paid.

(2) Subject to the provisions of the Customs laws and of section 94, export duty shall be paid at the rate in force, at the time when the goods liable to such duty are entered for export: Provided that where any export duty is imposed, or the rate of any existing export duty is varied, between the time goods are entered for exportation and the time of exportation of such goods, export duty shall be paid at the rate in force at the time of exportation of the goods.

(3) Where goods are entered in accordance with section 34 before the arrival at the port of discharge of the aircraft or vessel in which such goods are imported, the import duty upon the goods shall be paid at the rate in force at the time of arrival of such aircraft or vessel at such port of discharge.”

53. Section 122(1) is to the effect that where imported goods are liable to import duty, the duty of such goods is to be determined in accordance with the Fourth Schedule and import duty should be paid on that value. Subsection 2 states that upon request the importer is entitled to an explanation in writing as to how the customs value of the importers goods was derived. Subsection (3) provides that nothing in the Fourth Schedule should be construed as restricting or calling into question the right of the officer to satisfy himself or herself as to the truth of the declaration presented to custom for valuation purposes.

54. Paragraph 2 of the Fourth Schedule states that customs value of imported goods is the transaction value or the price actually paid or payable for the goods when sold for export and according to paragraph 3, transaction value of identical goods may be used to determine customs duty. The paragraph further states that where the customs value of imported goods cannot be determined under paragraph 2, it can be determined by use of transaction of identical goods or use the transaction of identical goods sold in Partner States under paragraph 4. The 2nd and 3rd respondents have, therefore, argued that they applied the law as provided for above and used identical transactions to determine custom duty payable for the petitioner’s goods.

55. The petitioner contends, and it has not disputed by the respondents, that it paid duty of Kshs37,503,213 on 7th June 2016 but when its officers went to collect the goods, the 2nd, 3rd and 4th respondents declined to release the goods on oral allegations that full customs duty had not been paid. No formal demand for the alleged extra customs duty was made or reasons given for the demand or how it was arrived at. A formal letter was only issued on 15th July 2016 after the petitioner informed the 3rd respondent by letter dated 1st July 2016 that it had appealed against his verbal demand of extra customs duty. The 3rd respondent later sent a letter purporting to reject the petitioner’s appeal.

56. If the 3rd respondent was acting within his legal mandate, why did he not inform the petitioner immediately that he had an issue with the declaration of value of its goods and the customs duty paid, what the problem was and what he intended to do? Further, why was a formal demand, which is not denied, not given until 15th July 2015, two weeks after the petitioner had informed the 3rd respondent that it had lodged an appeal against his verbal decision? This is a clear indication that there was much more to do with this dispute than a mere question of under-declared customs duty.

57. I have gone through the 2nd and 3rd respondents’ responses to this petition in the form of replying affidavits, but could not find any documents that show the identical transactions the 2nd and 3rd respondents used in determining the extra customs duty. Where the issue of what customs duty was payable is raised, and the 2nd and 3rd respondents claim that they were correct in assessing that extra customs duty and that they used identical transactions to determine the duty payable, they were under obligation to satisfy the court that the petitioner was wrong in its declaration and that the 2nd and 3rd respondents were right in what they did. The 2nd and 3rd respondents could only do so by showing to the court’s satisfaction the documents they relied on in arriving at the disputed customs duty. Failure to do so would only be taken to mean that there were no such identical transactions and that the 3rd respondent acted arbitrarily in the exercise of his discretion.

58. The 2010 Constitution changed the way of governance and public service in this country. Article 2(1) decrees the constitution as the Supreme law that binds all persons, state organs and public officers. Article 3(1) obligates every person to respect, uphold and defend the constitution. The Constitution further states in Article 4(2) that the country is a democratic state founded on the fundamental values in Article 10. In that respect, Article 10(1) reiterates that national values and principles of governance bind all state organs, state officers, public officers and all persons whenever they applies or interprets the Constitution; enact, apply or interpret any law; or make or implements public policy decisions. Some of the values as documented in Article 10 (2) include the rule of law, integrity, transparency and accountability.

59. Article 47 in some way calls on the public administrators to apply the principles of transparency and accountability in their actions. That is why they are required to act in a manner that is lawful, reasonable and procedurally fair. In that regard, for the rule of law to be entrenched in our democratic state, public officers must act within the law. Article 259 requires of the courts to interpret the constitution so as to promote its purposes, values and principles and advance the rule of law, and human rights and fundamental freedoms in the Bill of Rights. That done, we will give effect to the true values and principles in the constitution as espoused in Article 10.

60. Taking the above exposition into account, the 2nd and 3rd respondents who were **“applying the law”**, had a constitutional obligation to act transparently and be accountable on their actions, including in assessing customs duty. They could not hide under the discretion conferred on them by the *EACCMA Act* and act without regard to the values and principles in our constitution. In this respect, I agree with the court’s observation in *Geothermal Development Company Ltd v Attorney General & 3 others (supra)* that **“Article 232 enunciates various values and principles of public service including“(c) responsive, prompt, effective, impartial and equitable provision of services” and “(f) transparency and provision to the public of timely, accurate information.”** The 2nd and 3rd respondents, as public servants, had a duty to act transparently which they did not do.

61. Moreover, the 2nd and 3rd respondents must appreciate the fact that section 7(1) of the Sixth Schedule to the Constitution directs that all law in force immediately before the effective date continues in force and should be construed with alterations, adaptations, qualifications and

exceptions necessary to bring it into conformity with the Constitution. That means the **EACCMA Act** must be read and construed in a manner that makes it not only consistent but also in conformity with the constitution, so that when the constitution requires transparency and accountability in the execution of public duty, the founding values of our constitution must be infused in these public actions so that there is no room exercise of discretionary power in a manner that violate these foundational constitutional principles.

62. Flowing from the above discourse, therefore, it is clear to me and I so find and hold that the 2nd and 3rd respondents did not act in accordance with constitutional dictates when they sought to slap the petitioner with extra customs duty. They not only infringe the petitioner's right to fair administrative action but also violated the foundational values of transparency and accountability entrenched in our constitution and which bind all public officers in the execution of their duties and performance of their functions.

Reliefs grantable

63. On the basis of the 2nd and 3rd respondents' violations, the petitioner has urged this court to allow the petition and award compensation under various heads including loss of **Kshs16,979,012.8** in steel bars price fluctuation, **Ksh1,383,434** bank guarantee charges, legal fees of **Ksh1,200,000** and demurrage charges from the 4th respondent amounting to **Ksh47,497,123,36**. Also claimed is **5% charge** based on CIF value penalty due to late payment to the supplier. The respondents have on their part argued that these claims are not payable since they are in form of special damages which were not specifically proved.

64. It is true that the petitioner's goods were not released as soon as it wanted. The consignment was only released after a court order had been issued to that effect and for that reason, the petitioner has urged the court to order compensation. The nature of the petitioner's claim as I understand it is, first, on the differential price between the period the goods were due for release and when they were finally released. This in my view, required evidence to satisfy the court that at the time the goods were released and sold, there was such a significant price differential that the petitioner suffered some special loss warranting compensation.

65. The petitioner ought to have shown evidence by way of sales notes or receipts the price the goods should have been sold had they been released on 8th June 2016 and the prices they were eventually sold at after their release to enable the court determine whether indeed there was actual loss. There is also no guarantee that the goods would have been sold out by the date they were released since there are no signed contracts to show that there were actual buyers who had placed orders and the price they were to pay for the goods save for the delay in releasing those goods.

66. It is also cardinal principle of law that this form of special damages be specifically proved. This is because such a claim represents what the petitioner must have actually lost and wants to be put back to the position he would have been before the loss complained of. In the case of **Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited** [2016] eKLR the Court of Appeal stated that **it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit**. The Court of Appeal went on to observe that the appellant in that appeal apart from listing the alleged loss and damage, did not lead any evidence at all in support of the alleged loss and damage. **"As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not credible documentary evidence in support of the alleged special damages."** The Court said.

67. And in the case of **David Bagine v Martin Bundi (CA No. (Nrb) 283 of 1996)**, the Court of Appeal, referring to the judgment by **Lord Goddard CJ in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177** observed that **"It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage., it is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."**

68. Taking the above authorities into account, and in the absence of clear evidence regarding the loss, it would be speculative to allow the petitioner's claim on this loss. Legal fee falls under the category of costs where a party is successful. It is not awardable as loss or special damages. However since the bank guarantee was issued as a result of a court order and the court having determined that the petitioner was not to blame, it is entitled to recover this expense.

69. With regard to demurrage, all I can say is that this is claimed by the 4th respondent as cost for storage of the goods and the petitioner is not entitled to it. And on the claim for 5% charge of the CIF value due to the supplier for late payment, I do not think this is payable. The petitioner is assumed to have purchased goods and that is why it declares the cost of the goods for purposes of assessing and paying customs duty and VAT. If goods were received on credit that was a private arrangement between the petitioner and the supplier which cannot be lawfully passed on to the respondents.

70. The 4th respondent has also claimed that it is entitled to storage charges for 120 days from the petitioner amounting to over Ksh41 million. This has been resisted by the petitioner contending that the 4th respondent was to blame for the delay in releasing the goods. The petitioner has argued that since the 2nd and 3rd respondents were responsible for the delay in releasing the goods, the 4th respondent should claim from them.

71. Having determined that the 2nd and 3rd respondents' action was inconsistent with the constitution and illegal, the delay in releasing the petitioner's goods was equally unlawful. This means the petitioner was not to blame for the delays in releasing the goods and the resulting storage cost. The petitioner having paid customs duty and VAT and actually went for the release of the goods only to be told that they could not be released, the petitioner had done all that it was required to do and cannot pay for the 2nd and 3rd respondents' unlawful action.

72. On the other hand, the petitioner was ready to collect the goods and pay for storage charges and would have done so if it were not for the 2nd and 3rd respondents' insistence on some extra customs duty. In my considered view, the 4th respondent is entitled to storage charges up to the time the petitioner was ready to collect its goods that is 8th June 2016. Beyond that, the withholding of the goods was unlawful and no lawful or justifiable claim can be based on an unlawful detention of the petitioner's goods.

Conclusion

73. Having carefully considered this petition, responses, submissions, authorities and the law, I am satisfied that the 2nd and 3rd respondents acted in a manner that violated one of the core values of our constitution namely transparency and accountability. They also violated the petitioner's right to fair administrative action as demanded by Article 47(1) and failed to give reasons for their action as required by Sub Article (2) thereof.

74. Consequently and for the above reasons, I find the petition merited and I allow it as follows;

1) A declaration is hereby issued that the decision of the 3rd respondent through his Chief manager- Customs and Border Control Mombasa Regional Headquarters contained in a letter dated 15th July 2016 to impound the petitioner's imported goods in respect of entry No.2016MSA6030784 was arbitrary, illegal, unlawful, unconstitutional, a contravention of the petitioner's rights under Articles 10, 27, 35(2), 40, 47, 50 and 73 of the Constitution and is therefore, null and void.

2) A declaration is hereby issued that the 2nd and 3rd respondents contravened the petitioner's rights under Articles 10, 27, 35(2), 40, 47(1), 50 and 73 of the Constitution

3) An order of certiorari is hereby issued quashing the decision of the 3rd respondent through his Chief manager Customs and Boarder Control Mombasa Regional Headquarters contained in the letter dated 15th July 2016 to purportedly impound the petitioner's imported goods in respect of Entry Number 2016MSA6030784.

4) A declaration is hereby issued that no further customs duty, penalties and interests are due and payable to the 2nd and 3rd respondents under section 135(2) of the EACCMA Act.

5) A declaration is hereby issued that the 4th respondent is not entitled to be paid by the petitioner demurrage charges after 8th June 2016.

6) The 2nd and 3rd respondents do pay costs of the petition to the petitioner including the cost of the bank guarantee, to be agreed or ascertained by the taxing officer of this court if not agreed.

Dated, Signed and Delivered at Nairobi this 23rd day of November 2018

E C MWITA

JUDGE