REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVEIW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 170 OF 2010

IN THE MATTER OF AN APPLICATION FOR ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS PURSUANT TO LEAVE GRANTED THEREFOR BY THE HON. LADY JUSTICE WENDOH ON 4TH MAY 2010

AND

IN THE MATTER OF THE LAW REFORM ACT, ORDER LIII OF THE CIVIL PROCEDURE RULES

AND

THE EAST AFRICA CUSTOMS MANAGEMENT, ACT OF 2004

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER GENERAL,

KENYA REVENUE AUTHORITY.....RESPONDENT

***EX PARTE* MOUNT KENYA BOTTLERS LTD**

AND

GAMMA VILLA LIMITED.....INTERESTED PARTY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th May, 2010, the *ex parte* applicant herein, **Mount Kenya Bottlers Ltd,** seeks the following orders:

1. **An order of certiorari to remove into this High Court for the purpose of being quashed, the decision(s) of the Respondent, his officers and/or agents made on dates unknown to the Applicant but embodied in letters under the hand of two delegates of the Respondent's in (a) an agent appointment notice dated 7th April, 2010 under the hand of one P. N. Iraki and expressed to have been issued on behalf of the "*Commissioner of Investigation and Enforcement*" for the recovery of a sum of Kshs. 63,789,724.00 from the Applicant's bankers Messer's Kenya Commercial Bank Limited, Nyeri Branch and (b) a second agent appointment notice dated 22nd April 2010 under the hand of one Mrs. M.W. Njuguna expressed to have been issued for the "*Commissioner, Customs Services Department*" for the recovery of a sum of Kshs. 69,048,048.00 from the Applicant's bankers Messer's Kenya Commercial Bank Limited, Nyeri Branch.**
2. **An order of prohibition directed to the Respondent, prohibiting the Respondent whether directly or through its officers and /or agents restraining the Respondent from enforcing any recovery measures referred to and embodied in the two letters dated 7th April 2010 and 22nd April 2010 to the Applicant's bankers Messer's Kenya Commercial Bank Limited, Nyeri Branch or at all, or seeking to recover the sums of Kshs. 63,789,724.00 and/or Kshs. 69,048,048.00 and/or any other communication sum by/or on behalf of the Respondent in the same regard.**
3. **An order of mandamus directed to the Respondent to produce the customs files, custom release orders, signon release orders, airway bills, forms C 17 B, payment receipts, computer print outs and certificate(s) in relation to all consignments related to the Respondent's demand and threats mentioned in the foregoing paragraphs, for purposes of review by an independent auditor appointed by this Honourable Court for the ascertainment whether any amounts are owing from the Applicant to the Respondent.**
4. **Costs of this application be provided for.**

Ex Parte Applicant's Case

2. The application was based on the following grounds:

1. **The decision by the Respondent made and/or arrived at to enforce recovery measures against the Applicant is tainted with illegality to the extent the Respondent, his officers and/or delegates seek to rely upon the provisions of an inapplicable Act, the *East Africa Community Customs Management Act, 2004* (hereinafter referred to as "the EACCMA)which Act, not being an Act of Parliament, has not been properly incorporated into the Laws of Kenya by reason of certain failings on the part of the officers of the Respondent, and thus is relying on an Act which has no force of law in the Republic of Kenya.**
2. **The decision by the Respondent made and/or arrived at to enforce recovery measures against the Applicant is tainted with illegality to the extent the Respondent is seeking to recover sums which have already been fully paid to the Respondent and the goods the subject matter of the duties alleged to be due and owing released to the Applicant's and as such no jurisdiction exists to collect the duties in the two separate notices referring to the exact same goods, and in particular;**
    i. **The Applicant is, by reason of specific regulations made by the Applicant in relation to the clearing of goods, prohibited from directly clearing goods imported into the country on a regular basis except by the engagement of a duly licensed clearing and forwarding agent.**
    ii. **The Applicant has, through its customs agent Gamma Villa Limited licensed and duly authorized by the Respondent to clear goods into the Republic of Kenya settled customs/duty/taxes in the sum of Kshs. 52,060,606.00 and the Respondent through its officers duly released all the consignments relating to the amounts demanded.**
    iii. **To the extent the Respondent's officers are in full control of the licensing of customs clearing and forwarding agents, the system of payment of duties, audit of payments prior to release of goods, investigation and procedures of release of the goods the subject matter of the duty, the Applicant did not and could not possibly have any**

ability to supervise and or ensure the full compliance with the procedure relating to the Respondent's operations for the collection of duties.

iv. **The decision of the Respondent to enforce the recovery measures in respect goods the subject matter of the duties has been made despite the fact that the Respondent's officers, servants and/or agents are fully aware that the Applicant did make payments through Messrs Gamma Villa Ltd, a Customs Agent licensed by the Respondent, and on the strength of the payment so made the clearance of each and every consignment related to demands and the agent appointment notices referred hereinabove was effected without due regard for the payment made by the Applicant, and without any or any sufficient notice relating to any irregularities in the settlement of duties at the time of payment and release of the goods.**

3. **The Respondents' action in issuing the two agents appointment notices dated 7th April and 22nd April 2010 for the separate sums of Kshs. 63,789,724.00 and Kshs. 69,048,048 is unreasonable, oppressive and is demonstrably based on an ulterior motive to the extent the Respondent is seeking to recover two substantial sums using officers from two separate departments in respect of the same transaction which action would result in settlement of the disputed sum at least two times over without any lawful justification as to the double recovery in relation to goods for which payment has already been made.**
4. **The Respondent in arriving at the decision to cause the issuance of the said agent appointment notices has taken into account maters it ought not to have, and failed to take into account matters it should have to the extent the Respondent stands to recover the duties it alleges to be due multiple times. In particular, the Applicant avers that the said decision is unreasonable and manifestly unjust to the extent the Respondent stands to obtain the taxes multiple times in the following manner:**
    i. **From the payment in the sum of Kshs. 52,060,606.00 already paid by the Applicant though the Respondent's authorized clearing and forwarding agent on the strength of which the goods were released to the Applicant and in respect of which the Respondent has not provided any, or any sufficient reason as to why its institutions have been used as a conduit for fraud, and/or corruption;**
    ii. **The Applicant is, by reason of a requirement for placement of performance bonds by duly licensed clearing and forwarding agents, entitled to recourse by the calling up of the said bonds to recover any amounts which may be found not to have been duly settled by any such clearing and forwarding agent.; and**
    iii. **Albeit illegally, unreasonably and unjustly the Respondent shall not stand the benefit of having access to at least four separate sources of funds in respect of only one transaction being (i) the original in the sum of Kshs. 52,060,606 proof of which has already been provided to the Respondent's officers (ii) from a performance bond which ought to be place by every single duly licensed clearing and forwarding agent and should cover the said sum of Kshs. 52,060,606 and any penalties and interest that should be payable in that respect, (iii) from the agent appointment notice dated 7th April 2010 in the sum of Kshs. 63,789,742.00 from the Applicant's bankers; and (iv) from the agent appointment notice in the sum of Kshs. 69,048,048 from the Applicant's bankers the latter two of which are now sought to be challenged in these proceedings.**
5. **The decision on the demand for tax and the eventual issuance of the Agency Notice, and the process by which it was arrived at, are in breach of the principle that justice must not only be done, but must manifestly and clearly be seen to be done to the extent the Applicant shall be penalized for actions which are wholly within the control of the Respondent, its officer, agents and/or delegates.**

3. According to the applicant, it is a bottler of carbonated drinks of various brands under the Coca Cola Company franchise, and in the course of such production, the Applicant engages in the importation of raw materials, among them, concentrates, for the manufacture of the afore stated products.
4. The Applicant averred that it was aware that under the provisions of the various Acts of Parliament including the ***Customs & Excise Act***, and under the ***East Africa Community Customs***

Management Act, 2004, (the EACCMA) the Respondent notified the tax paying members of the public that it does license various customs clearing agents, who are authorized by the Respondent to provide clearing services to importers/owners of goods in the position of the Applicant. The applicant is therefore prohibited by the Respondent, pursuant to the above mentioned laws, from engaging either personally or through any other person, in the process of customs clearance, other than the Respondent's licensed customs clearing agents.

5. Accordingly, between October 2008 and October 2009, the Applicant engaged one Customs Agent known as **Gamma Villa Limited** who, under the license and authority of the Respondent, on various dates in that period collected, cleared and forwarded various consignments of concentrates to the Applicant. In the process of clearing and forwarding such consignments, **Gamma Villa Ltd** informed the Applicant through various invoices, that it had paid all taxes due from the Applicant for the said period, on the basis of which the Applicant paid, in re-imbursement, to the said Customs Agent, a total sum of Kshs 52,060,600/=.
6. The Applicant averred that on or about the 30th of November, 2009, having been duly informed that all duties due to the Respondent had been settled and further having received the actual goods for which the duties had been settled, it received a letter from the Respondent's officers demanding for unpaid taxes amounting to Kshs 79,887,261.00 on the basis that the documents submitted by the Applicant had major discrepancies and hence the consignments had been cleared fraudulently. On 28th December 2009 the Applicant wrote to the Respondent's officer challenging the said demand in its entirety.
7. According to the Applicant, the above demand was made after a request made by the Respondent through a letter dated 14th of October, 2009 addressed to the Applicant, requesting the Applicant to avail for examination and reconciliation all documents declared to customs by the said clearing agent, which the Applicant complied with through a letter dated 2nd November, 2009 by forwarding all the documents received by the Applicant from the said Customs Agent, Gamma Villa Limited. On 22nd of January, 2010, the Applicant received a letter from the Respondent making a demand for a new and/or adjusted amount of Kshs 63,789,724.00 in taxes, which did not bear any explanation on why the amount differed from the earlier demand of Kshs 79,887,261. In the said demand, the Respondent threatened to institute recovery measures and to enforce such recovery measures by among other avenues, criminal prosecution to recover the alleged outstanding amount.
8. It was averred that seeking to understand the reasons behind the demands and obtain details about the discrepancies in the demanded amounts, the Applicant's Managing Director, vide a letter dated 12th March 2010, requested the Commissioner of Investigations to call for a tripartite meeting with the Customs Agent concerned with the consignments the genesis of the demands by the Respondent herein.
9. The Applicant disclosed that further to the above, the Respondent issued two other demand letters dated 11th February 2010, transmitted to the Applicant on the 17th March 2010, threatening to institute recovery measures in the same tenor as the contents of the letter dated 22nd January 2010.
10. Despite the objection as well as the communications above the Respondents issued two separate agency notices dated 7th April 2010 and received on 23rd April 2010 and a second one dated 22nd April 2010 to the Applicant's Bankers Kenya Commercial Bank from two separate departments for two different sums in respect of the same goods.
11. In a rejoinder to the replying affidavit the Applicant reiterated that it is one of several bottlers under the Coca Cola system who import concentrate from the same supplier, Coca Cola Swaziland which concentrate falls under tariff number 330210 00 which bottlers include Nairobi Bottlers, Equator Bottlers, Coastal Bottlers, Kisii Bottlers and Rift Valley Bottlers. The said bottlers all regularly import concentrates which is purchased at the same unit price and as such it is highly unusual that any falsification of values would have occurred without a serious lack of vigilance on the part of officers of the Respondent at the port of entry.
12. The Applicant added that the receipts and import documentation which was supplied from the Interested Party and given to the Respondent was in all material respects the document usually provided by the Respondent and even bore a stamp from the Kenya Bureau of Standards showing the goods had been cleared by the said Government Agency, unlike the purported "original" copy which have different customs figures and do not contain the said stamp by the Kenya Bureau of

Standards to show that the same have been utilized for clearance.

13. According to the Applicant, the ***EACCMA*** is not an Act of the Kenyan Parliament pursuant to the provisions of section 9 of the ***Interpretation and General Provisions Act, Chapter 2*** of the Laws of Kenya hence its provisions have not been properly brought into force in the Republic of Kenya.
14. With respect to the allegations that the *ex parte* Applicant was responsible for an *"under valuation"* of import values of the goods the subject matter of these proceedings, the Applicant contended that the said goods were cleared for entry into the country despite the stringent statutory measures put in place under the ***Customs & Excise Act*** and the said ***EACCMA*** which the Respondent relies upon and believed that any lapse in payment of duties could only have occurred with the cooperation, connivance or in collusion between the Respondent's officers and the Interested party herein. According to the Applicant, contrary to the averment that there was a "tentative" "assessment" of Kshs. 79,887,261.00 in respect of the *ex parte* Applicant which was later "adjusted" and or "reconciled" leaving a balance of Kshs. 63,789,724.00, the purpose for the inquiries was, in fact, to investigate the conduct of the perpetrators of a fraud which was believed to have occurred in relation to the subject matter of these proceedings in respect of which the *ex parte* Applicant fully cooperated with the officers of the Respondent and recorded statements with the Investigations and Enforcements Department.
15. The Applicant contested the allegation that the Interested Party herein had been suspended since according to the Applicant based on a Statement of Accounts incorrectly sent to *ex parte* Applicant by the said Interested Party, it would appear that the agent still continued to operate in connection with its clearing and forwarding business.
16. According to the Applicant, it is the Respondent's responsibility to safeguard *"much needed Government revenue"* by ensuring that no goods are cleared using fraudulent documentation which can only be done with the connivance, negligence or exceptional complacency in online verification of payments by persons clearing goods over an extended period of over 9 months. Further it is the Respondent's responsibility to ensure that questionable dealings are properly investigated and the liable persons brought to book and charged with any related offences and all steps taken to recover sums from the proper fraudsters. However, to date, no evidence has been presented to demonstrate that this was done in the present case. To the contrary, the available evidence seems to suggest that despite holding them liable for fraudulent activities, the Respondent has allowed the persons responsible to continue operating.

Interested Party's Case

17. The application was supported by the interested party, Gamma Villa Limited.
18. According to the interested party, it had been the Applicant's clearing agent since the year 1996, for a period of 14 years duly authorized and licensed to do clearing and forwarding business during which period the interested party dutifully pays all what was assessed by the respondent in terms of import duties for various cargo both airborne and seaborne for the applicant. These invariably are concentrates for manufacture of soft drinks and at times heavy machinery for manufacturing of soft drinks.
19. According to the interested party, the copies of receipts for payment of all duties levied by KRA for the year 2008/2009 relied upon by the Applicant were true copies of payments made to KRA and averred that the allegations that it never paid any duties to KRA were untrue. The interested party asserted that its Managing Director attended a request made by the enforcement officer KRA and answered all the questions put to him and gave them all the original documents that were in their possession in support of their claim that all the duties assessed had been paid in full and that these documents are the same ones relied upon by the Applicant in these proceedings.
20. The interested party averred that neither itself nor its Chief Officer had ever been charged with any allegations of fraud or forgery concerning subject duty payments. To the interested party, the replying affidavit filed by the Respondent was devoid of any facts and was full of blatant falsehoods and allegations of fraud without putting a single piece of evidence in support thereof for failure to disclose the period when the post clearance audit was conducted by KRA and the period under which the inquiry was done.
21. With respect to the allegations that the receipts produced by the applicants as evidence of duty payment were false, the interested party averred that there was no affidavit put forward by

National Bank officials deposing to the truthfulness of the allegations therein and showing any comparable bank receipts which the court can be called upon to examine and read fraud. Further, the affidavit has not shown any Forensic Audit Report done by a document examiner or such other expert that shows that the receipts initials are the work of fraud. To the interested party, the documents exhibited were clearance documents and receipts for duty payments which were complete with stamps and signatures of the clearing officers and there was no proof that the said documents which were over 100 were false.

22. The interested party contended that during the entire of the year 2010 and 2011 the interested party operated under the license of KRA and was always in full compliance of duty payments and no claim was ever made to the interested parties during this time.
23. While the National Bank of Kenya purportedly disowned the receipts, it was contended by the interested party that there was no explanation as to the various stamps in all the receipts, initials and signatures therein made by the Kenya Bureaus of Standards and KRA and there was no affidavit from either KEBS or KRA disowning any of the stamps therein and in particular the signatures shown in those stamps yet these were known signatures of officers in these two institutions. It was the interested party's case that the challenge to the said documents ought to be by a document examiner and not by a mere letter of denial by a person who is a party to the transaction in issue.
24. While the respondent conceded that goods were cleared by the interested party upon the various documents being presented to KRA officials, the respondent did not disclose to the Court what action if any they have had taken against their own Officials if the receipts used for the clearance were false. This, according to the interested party, was evidence that no such false documents were used and that is why no such officers have been taken to court, and indeed to criminal action has ever been undertaken against the interested party.
25. To the interested party, the respondent is a Public Authority charged with enormous powers as far as payment of duties are concerned and as such it is expected by the law to act fairly, without oppressing any parties and in particular make its decision on fair play and cannot accuse tax payers with serious allegations without any proof. While failure to pay duty that is due as well as use of false documents to avoid duty is a serious criminal offence which cannot go unprosecuted, the interested party wondered why to date no charges have been preferred against any person regarding the issue before the court.
26. To the interested party, the applicant was within its rights to seek the orders sought.
27. The Applicant in its submissions cited several legal provisions and contended that the consignments the subject of these proceedings were cleared over an extended period of 12 months using the Respondent's statutory, manual and computerised systems which included elaborate verification procedures. However despite the rigorous statutory checks and balances to protect Government revenue by granting the Respondent and its officers various powers of verification and seizure, the Respondent claims that it failed to detect any irregularity while the goods were under customs control thereby allowing what the Respondent considered fraudulent entry of the consignments. It was submitted that the information about the nature of the consignments in issue was available both from the past transactions and from the transactions by other companies in the bottling industry.
28. It was submitted that the only parties who were in control of any portion of the transaction were the interested party and the Respondent, the latter of whom has a responsibility to ensure that goods are not cleared without proper duties being paid. It was submitted that the Applicant was not a party to the transaction and was not aware of any fraud alleged to have been perpetrated by the interested party and following the discovery of the fraud the Respondent did take steps to deal with the matter. The Applicant submitted that the fraud which led to the loss of revenue could not have taken place without collusion between the Respondent and the interested party and this was evidenced by the fact that no prosecution had been instituted against the culprits.
29. In support of its submissions the Applicant relied on In **R vs Kenya Revenue Authority & The Commissioner General, ex parte Unilever Tea Kenya Limited Misc. Civil. Appl. No. 1109 of 2005** in which **Musinga, J** (as he then was) held as follows:

"It cannot be denied that in law, the interested party was an agent of the applicant. The fact that the interested party had earlier been vetted by KRA does not make him an agent of

KRA. However, all the goods that were imported by the applicant and cleared by the interested party were under the control of KRA as per section 12 of the Customs and Excise Act and section 14 of the Value Added Tax Act. This control included the rigorous checking of all the documents accompanying the said goods. The procedure of clearing goods is closely controlled by KRA. Although it was alleged by KRA that the interested party presented various false document which were vital for clearing of the applicant's goods, all of those documents were inspected and passed by officials of KRA. The applicant had no hand in such scrutiny. KRA cannot therefore simply allege that there was fraud in clearing the goods and lay all blame upon the applicant…One of the requirements of KRA before a person is registered as a clearing agent is provision of a bond under Regulation 259 of the Customs and Excise Regulations. The agent undertakes that he "shall faithfully and uncorruptly perform his/their duties as agent to the satisfaction of the Commissioner". I agree with the applicant that this clearly requires KRA to have a watchful eye over all clearing agents to ensure that they perform their duties faithfully. In the event that corrupt officials of KRA collude with corrupt clearing agents to pocket money that is paid as duty by a principal through a clearing agent, it would be unjust to require the principal to shoulder the burden of making another payment in respect of the same duty….It is an accepted principle of commercial law that where an agent acts without or in excess of authority or in fundamental breach of a contract between him and a principal the agent will be personally liable for such acts."

30. According to the Applicant, to the extent that it is admitted that the Respondent does have some powers in relation to collection of customs revenue, the Application does not seek to have the decision reversed on its merits, but rather that the court intervenes to examine if the process of the decision making was conducted in the manner expected of the exercise of administrative authority. According to the Applicant, the failure by the Respondent to deal in the manner set down by statute with the root of the fraud alleged to have occurred, despite more than ample evidence to that effect, is an illegal act because the Respondent failed to apply the Act in the manner in which it was intended, acted in abuse of its discretion and therefore outside the purview of its powers.
31. It was further submitted that the Respondent's action was unreasonable and would lead to a manifestly unjust outcome as its effect would be to require the Applicant to make numerous payments for the settlement of duties which were released to the interested party by the Respondent. In support of this position the Applicant relied on **Sir Wade's** text on ***Administrative Law***.

Respondent's Case

32. The Respondent opposed the application and in so doing filed two affidavits sworn by **Joseph Kuguru**, an Assistant Commissioner with the Respondent.
33. According to the Respondent, it is a statutory body established under the provisions of the ***Kenya Revenue Authority Act*** (Cap. 469 of the Laws of Kenya) (hereinafter referred to as "the KRA Act") and acts as an agent of the Government for the collection and receipt of all revenue and in so doing is responsible for administering and enforcing all provisions of written laws set out in Part I & II of the First Schedule to the Act, among them the ***EACCMA*** and Regulations, 2005.
34. Based on legal advice, it was contended that the ***EACCMA*** is an Act of the East African Community in accordance with Article 62 of the Treaty for the establishment of the East African Community. In accordance with the Treaty for the establishment of the ***East African Community Act, 2000*** an Act of the Community shall from the date publication of the Act in the Gazette have the force of law in Kenya and shall come into operation on the date of its publication in the Gazette or if it is provided in that Act some or all of its provisions shall come into operation on some other date whether before or after the date of publication.
35. It was contended by the Respondent that:

    1 The ***East African Community Customs Management Act, 2004*** came into force in Kenya on the 14th day of January 2005, the date of its publication in the East African Community Gazette No. 1 of 14th January 2005.

2 The date of commencement of the Act was the 1st day of January 2005 being the date provided in the Act as the date of commencement of the Act.

3 The Gazette in relation to Acts of the Community refers to the East African Community Gazette.

36. According to the Respondent, its officer pursuant to its powers under the ***EACCMA*** carried out a post clearance audit of the Applicant Company's imports which had been cleared on their behalf by their agents, **Gamma Villa Limited** and the initial audit findings established a tentative assessment of Kshs. 79,887,261.00 as the documents in the custody of the Applicant Company in respect of their imports did not tally with documents submitted to the Respondent for customs purposes. Vide a letter dated 28th December 2009, the Applicant Company disputed the demand of tax and provided additional information and following a further reconciliation of the Applicant Company's records based on further information provided, the Respondent's officers did a final reconciliation and sent the Applicant Company a final amended demand letter for Kshs. 63,789,724.00.
37. According to the Respondent, the audit leading to the tax assessment established that from the records and documents provided by the Applicant, the taxes payable on the imports by the Applicant Company amounted to Kshs. 65, 511,497.00 yet from records in the custody of the Respondent, the importer had only paid a total of Kshs. 1, 721,773.00 leaving a variance of Kshs. 63, 789,724.00 forming the basis of the tax demand. It was contended by the Applicant that the variance of Kshs. 63, 789,724.00 was the result of undervaluation of import values by the Applicant Company's agents for customs purposes hence resulting in gross underpayment of duties on the Applicant Company's imports. To the Respondent although the Respondent is responsible for licensing clearing and forwarding agents, the agents act on behalf of the taxpayer who is the principal hence the appointment of an agent does not absolve the principal from liability under the ***EACCMA***.
38. It was disclosed that the payment of Kshs. 52,060,606.00 alleged to have been made to the Respondent through its Bankers, **National Bank of Kenya Limited** were found to be fraudulent and the receipts annexed to the verifying affidavit were disowned by the Bank.
39. The Respondent averred that a meeting held with the Respondent's officers on 9th February 2010 did not bear much fruit and on 11th February 2010 the Respondent made a final demand for the taxes and in order to safeguard much needed Government revenue, the Respondent through its Investigation & Enforcement and Customs Departments issued agency notices on 7th April 2010 and 22nd April 2010 to the Applicant's Bankers to recover the outstanding taxes in the amount of Kshs. 63, 789,724.00 and Kshs. 69, 048,048.00 respectively, the latter amount having taken into account accrual of interest and penalty. The issuance of two (2) separate agency notices were subsequently realised by the Respondent and by a letter dated 4th May 2010 the Respondent issued a clarification to the Applicant's Bankers advising them to honour only one of the two agency notices issued and by implication withdrawing the agency notice dated 7th April 2010 for Kshs. 63, 789,724.00.
40. In the Respondent's view:

1 The role of the Respondent is revenue collection and it cannot be called upon to adjudicate over a dispute between the Applicant Company and its agent.

2 Although the Respondent is responsible for the system of audit payment, clearance and release of goods, the same is done on the basis of documents present and does not take away the powers of the Respondent to subsequently carry out post clearance audits to confirm compliance with the provisions of the ***East African Community Customs Management Act, 2004***.

41. That the role of the Respondent towards agents is limited to licensing and suspension thereof hence Applicant party should pursue its agent to establish how the monies paid to it for tax were otherwise utilized.

42. The Respondent however disclosed that on completion of the investigations herein, it suspended the clearing and forwarding license for **Gamma Villa Limited**, the Applicant Company's agent and although an agent is, on licensing, required to deposit a performance bond which is realizable on non-compliance with the provisions of the ***East African Community Customs Management Act, 2004*** and Regulations 2005 or any conditions set by the Respondent, the guarantee amount in the instance case was not sufficient to set off the taxes outstanding in respect of the Applicant Company's imports.
43. To the Respondent, customs duty attaches to the goods and the Government stands to lose a colossal amount of revenue in the circumstances of the current application. It asserted that its actions were guided by law and cannot be said to be in anyway oppressive, unreasonable or based on an ulterior motive.
44. In further rejoinder to the further affidavit filed by the Applicant, the Respondent averred that:

i. Clearance of imports is done by the importer or his duly appointed agent who makes an import declaration and provides supporting documents.
ii. The customs importation procedure is based on self assessment where the importer or his agent declares the value of the goods and pays taxes on the declared value. Any under declaration can only be established through a subsequent audit or investigation.
iii. The role of customs is to facilitate importation and the Respondents officers will clear goods on the face of the import declaration form and supporting documents presented by the importer or his agent.

45. It was the Respondent's position that the entries were not genuine and the mere fact that they purport to contain a stamp from the Kenya Bureau of Standards (KEBS) does not make them genuine. In any event KEBS would only be concerned with the quality and standard of the goods being imported and would not be able to ascertain the authenticity or otherwise of the import declaration form. Further the purported original entries do not bear the stamps by the Kenya Bureau of Standards (KEBS) for the reason that the entries belonged to other importers in whose possession the genuine original entries are.
46. The Respondent asserted that under the provisions of the ***EACCMA***, the Respondent is empowered to conduct inspections and audits to verify the accuracy of entries and for that purpose to question any persons involved directly or indirectly in the business.
47. With respect to the statement of account sent to the Applicant by the interested party, the Respondent's position was that the same was a document from the interested party which had no relation with the Respondent and so could not support the averment by the Applicant that the clearing agent was still conducting business.
48. In its submissions the Respondent reiterated the foregoing and explained that in conducting the post clearance audit of the Applicant's imports which had been cleared by the Applicant's agent, **Gamma Villa Limited**, for the period 1st January, 2009 to 14th October, 2009, the Respondent was enforcing its powers donated under sections 235 and 236 of ***EACCMA***. It submitted that its duty under section 145 of the same Act is limited to licensing and/or suspending, revoking or refusal to renew licences for the clearing agents. It is however not mandated to appoint an agent on behalf of an importer since the choice of which agent to appoint is left to the free will of the importer, on whose instructions the agents act.
49. To the Respondent, although the definition of the term "owner" under ***EACCMA*** includes "every person acting as agent for the owner", under sections 147 and 148 of ***EACCMA***, this does not absolve the importer from liability. In this case, the Respondent submitted, the applicant did not provide any evidence that indeed the short levied duties amounting to Kshs 63,789,724.00 were paid to the Respondent and hence cannot shift the burden to the Respondent. According to the Respondent this sum was due pursuant to section 135(1) of ***EACCMA***.
50. The Respondent further submitted that though the invoices relied upon by the Applicant as proof of payment were disowned by National Bank, the Applicant has not adduced any contrary evidence. It was submitted that despite disputing fraud, the Applicant had not taken any steps against its agent, the interested party and failed to prove the allegations collusion of fraud between the Respondent and the said interested party. In any case, if there was fraud as alleged by the Applicant, the Applicant cannot divorce itself from the actions of the interested party, who at all

material times was the Applicant's agent. To the Respondent, this is not the proper forum where issues of fraud can be ventilated. In support of this submission the Respondent relied on **Nyamu, J's** decision in **Republic vs. Commissioner of Lands exp Somken Petroleum Company Limited [2005] KLR** for the proposition that a party to fraud cannot rely on the same and that no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated.

51. According to the Respondent, its action which was meant to lawfully and procedurally protect the revenue cannot be termed as unreasonable and relied on **Pili Management Consultants vs. Commissioner of Income Tax Civil Appeal No. 154 of 2007** for the holding that this Court is concerned with the process as opposed to the merits of the Respondent's decision hence the Court cannot go into the computation of the amount due.

Determinations

52. I have considered the issues raised in this application by way of affidavits, Statement of Facts, grounds and submissions by the respective parties.

54. The Applicant contended that the ***EACCMA*** is not an Act of the Kenyan Parliament pursuant to the provisions of section 9 of the ***Interpretation and General Provisions Act, Chapter 2*** of the Laws of Kenya hence its provisions have not been properly brought into force in the Republic of Kenya. In my view, to make decisions based on an instrument which has not acquired the force of law would be a basis for quashing the said decision or prohibiting its implementation. Such decision would not only be premature but outrightly unlawful. **Lord Diplock's** decision in **Council of Civil Service Unions vs. Minister for the Civil Service 1AC, 374** in which he defined procedural impropriety widely holds thus:

"I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

55. Where therefore the procedure stipulated is that certain steps be taken before a particular legal instrument is operationalised, to act on the same before the said steps are undertaken would be a breach of the procedural process necessary for the instrument to be acted upon.

53. Section 9 aforesaid provides:

(1) Subject to the provisions of subsection (3), an Act shall come into operation on the day on which it is published in the Gazette.

(2) (Deleted by 18 of 1968, Sch.).

(3) If it is enacted in the Act, or in any other written law, that the Act or any provision thereof shall come or be deemed to have that provision shall come or be deemed to have come into operation accordingly.

54. In my view section 9(1) provides the general principle but the said general principle is subject to the exception in subsection (3) thereof. Therefore where in any Act, it is provided that the Act will come into operation at a specified time, or on the occurrence of a particular event, that Act will be deemed to have come into operation at such time or upon that occurrence, notwithstanding the fact that the same has not been published in the Gazette.

55. According to the preamble to the ***East African Community Customs Management Act, 2004***, it is:

"An Act of the Community to make provisions for the management and administration of Customs and for related matters".

56. The ***EACCMA*** is therefore one of the Acts of the East African Community established by the ***Treaty for the Establishment of the East African Community***. According to ***EACCMA***, its date of commencement was the date appointed by the Council. It is therefore clear that as opposed to those Acts to which section 9(1) of Cap 2 apply, the date of the coming into operation of ***EACCMA*** was the date appointed by the Council. It follows that section 9(1) of Cap 2 was inapplicable to the ***EACCMA*** and therefore the objection raised with respect to the operationalisation of the Act before Gazettement has no legal validity.
57. The second issue is whether the Respondent was entitled to carry out Post Clearance Audits to verify the accuracy of the entries after the goods had been released from Customs control. In this respect sections 235 and 236 of the ***EACCMA, 2014*** are couched in the following terms:

235 (1) ***The "proper officer" may, within five years of the date of importation, exportation or transfer or manufacture of any goods, demand for documents relating to the goods, to answer any question in relation to the goods; and to make declaration for audit purposes.***

236 The Commissioner shall have the powers to- (a) verify the accuracy of the entry of goods or documents **(b)** ***question any person;*** **(c)** ***inspect the premises of the owner of the goods or; and*** **(e)** ***examine the goods.***

58. In my view, the Customs Officer is supposed to verify the accuracy of the entries made by the clearing agent within the shortest time possible in order to facilitate the release of the goods and mitigate the accrual of demurrage and customs warehouse rent hence the reason for conferment of the powers under section 235 and 236 of the ***EACCMA*** to conduct Post Clearance Audits to verify the accuracy of the entries after the goods have been released from Customs control. Therefore the mere fact that goods have been released to the importer does not preclude the Respondent from carrying out post clearance audit to verify the accuracy of the declarations made at the time of the clearance of the goods and where the said audit disclose that as there was an undervaluation of import values by the Applicant Company's agents for customs purposes hence resulting in gross underpayment of duties on the Applicant Company's imports, the importer will be liable to make good the difference. The general rule was propounded in Mombasa Civil Appeal No. 157 of 2007 between **Commissioner Customs and Others vs. Amit Ashok Doshi & Two Others** where the Court cited **Tarmal Industries Ltd vs. Commissioner of Customs and Excise [1968] EA 471** and held that:

"The High Court of Tanzania (Georges, C.J) held that there was no estoppel against statute and that although Commissioner initially erred in deciding the substance was not dutiable and possibly was negligent not to have analyzed the sample the Commissioner was bound under the law to correct the matter and levy duty on the basis that the substance had always been dutiable. His lordship after a consideration of the authorities said in part at page 482 para E:-

> **'The fact that he failed to do so, on the authorities above cited cannot him from carrying out his duty when he discovers the original error. Indeed, his earlier classification under item 108 (k) was in breach of S. 195 of the East African Customs Management Act. It was a breach of statutory duty and in that sense it was not lawful and estoppel cannot be raised against him to prevent him from correcting that act. Naturally one reaches such conclusion with a certain measure of reluctance as it is undoubtedly hard on the defendant company to be called upon long after the event to find such a substantial sum, which would not have been payable but for the plaintiff's negligence in the first instance in not having pellets which were sent to him for examination properly tested. One can well understand, however, that on balance it is preferable that the law should be as it is. It is not in the interest of consistent application of the law that errors should be sanctified as principle…'"**

59. Section 147 of the ***EACCMA*** provides as follows:

A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.

60. Section 148 of the same Act, on the other hand provides *inter alia* as follows:

An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence.

61. Therefore where an importer fails to pay the taxes, or part thereof he cannot be heard to say that he is not liable for the shortfall due to illegal actions perpetrated by the agent since the liability of the agent does not preclude him from meeting his own obligations to pay taxes. Under the said sections both the owner of the goods and its agent are liable under the Act.

62. Dealing with sections 145, 146, 147 and 148 of the Act, **Korir, J** in **Republic vs. Kenya Revenue Authority ex parte African Boot Company Limited Nairobi Misc. Cause No. 54 of 2010** expressed himself as follows:

"A look at the above quoted Part XI of the Act clearly shows that the Commissioner of Customs only licences customs agents. The agents however act on behalf of the importers of goods. The person who appoints the agents to carry out a particular transaction is the importer. That means the customs agent becomes the agent of the importer and not the Commissioner of Customs. The respondent therefore does not foist a particular customs agent on a taxpayer. The tax payer is the one who goes out to look for a particular agent to clear goods on his behalf...When a Customs agent engages in fraudulent activities, the importer cannot ask the respondent for compensation. The importer has to bear the loss with fortitude and find a way of recovering the money misappropriated from the customs agent."

63. Similar circumstances arose in **Republic vs. Kenya Revenue Authority ex parte Alltex EPZ Limited Nairobi High Court Judicial Review Application No. 709 of 2008** in which **Majanja, J** held:

"The language of the statute leaves no doubt that the legislature intended that for purposes of collection of duty, the owner of the goods would be liable for the actions of the agent whatever the circumstances."

64. In Mombasa Court of Appeal Civil Appeal No. 157 of 2007 – **The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel**, the Court of Appeal held that if the process of verification would ultimately result in the applicant being required to pay duty and taxes, the Respondent would not lawfully be estopped from exercising its statutory duty and recovering the duty imposed by the law which should have been paid but for the fraud of the importers and that it would be contrary to public policy to shield the applicant through judicial review from operation of the law and allow him to retain unaccustomed goods contrary to the law. I accordingly associate myself with the position adopted by **Lenaola, J** in **Pharmaceutical Manufacturing and 3 Others vs. KRA and 2 Others [2014] eKLR** that:

"...the 1st Petitioner cannot therefore devise methods of avoiding tax and then claim that it had been exempted of the same."

65. Therefore, although the term "owner" under ***EACCMA*** in wide enough to cover the importer's agents, under sections 147 and 148 of ***EACCMA***, the importer is not absolved from liability simply because its agent is deemed as "owner" for the purposes of the Act. Accordingly, the contention by the Applicant that the Respondent ought only to have recovered the shortfall from the interested party does not hold.
66. It is however my view that in exercising its statutory powers under section 235 and 236 of the ***EACCMA***, the Respondent must ensure that such exercise of power is fair and just to the person against whom the same is being exercised. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] eKLR** while citing **Reg vs. Secretary of State for the Environment Ex Parte NottinghamShire Country Council [1986] AC**:

"A power which is abused should be treated as a power which has not been lawfully exercised…Thus the courts role cannot be put in a straight jacket. The courts task is not to interfere or impede executive activity or interfere with policy concerns, but to reconcile and keep in balance, in the interest of fairness, the public authorities need to initiate or respond to change with the legitimate interests or expectation of citizens or strangers who have relied, and have been justified in relying on a current policy or an extant promise. As held in *ex parte Unilever Plc* (*supra*) the Court is there to ensure that the power to make and alter policy is not abused by unfairly frustrating legitimate individual expectations...The change of policy on such an issue must a pass a much higher test than that of rationality from the standpoint of the public body...A public authority must not be allowed by the court to get away with illogical, immoral or an act with conspicuous unfairness as has happened in this matter, and in so acting abuse its powers. In this connection Lord Scarman put the need for the courts intervention beyond doubt in the *ex-parte Preston* where he stated the principle of intervention in these terms: "I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case, it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law." The same principle was affirmed by the same Judge in the House of Lords in *Reg vs. Inland Revenue Commissioners, ex-parte National Federation of Self Employed and Small Business Ltd [1982] AC 617* that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and also that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. In other words it is unimportant whether the unfairness is analytically within or beyond the power conferred by law: on either view, judicial review must reach it. Lord Templeman reached the same decision in the same case in those helpful words: "Judicial review is available where a decision making authority exceeds its powers, commits an error of law commits a breach of natural justice reaches a decision which no reasonable tribunal could have reached or abuses its powers." Abuse of power includes the use of power for a collateral purpose, as set out in *ex-parte Preston,* reneging without adequate justification on an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals. I further find as in the case of *R (Bibi) vs. Newham London Borough Council [2001] EWCA 607, [2002] WLR 237,* that failure to consider a legitimate expectation is a failure to consider a relevant consideration and this would in turn call for the courts intervention in assuming jurisdiction and giving the necessary relief."

67. As was held in **Republic vs. Commissioner of Co-operatives ex-parte Kirinyaga Tea Growers Co-operative Savings and Credit Society Ltd [1999] 1 EA 245** (CAK) at page 249, statutory powers can only be exercised validly if they are exercised reasonably, rationally and properly and no statute ever allows any public officer to statutory power arbitrary or capriciously. It similarly held in **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] eKLR** at page 20 that it is now an accepted principle in this field of law that statutory powers and duty must be exercised and performed reasonably.

68. Therefore it is my view that public authorities must exercise their power diligently, fairly and prudently. This was the position in **Doody vs. the Home Secretary of State [1993] 1 All ER 151** where it was held that:

"Where an Act of Parliament confers administrative power there is a presumption that it will be exercised in a manner which is fair."

69. Therefore it is my view that public authorities must exercise their power diligently, fairly and prudently. This was the position in **Doody vs. the Home Secretary of State [1993] 1 All ER 151** where it was held that:

"Where an Act of Parliament confers administrative power there is a presumption that it will be exercised in a manner which is fair."

70. A public exercise of power whether permitted or otherwise in a manner that frustrates the purpose for which the power is granted amounts to abuse of the same. This was the position adopted in **Republic vs. Commissioner of Customs Exparte Mulchand Ramji & Sons Limited [2010] eKLR** in which it was held that:

"A power may be abused in various ways for example when one acts beyond the limits of power, or acts irrationally or acts for an improper purpose or seeks to frustrate the legitimate expectation of another. A public body or officer is expected to act fairly in decision making, so that if he dies not, then he is deemed to abuse his powers….In the instant case, I have found above that there seems to be no legal or factual basis upon which the Respondent decided and classified the goods…and therefore abused its powers and unfairly exercised its discretion"

71. That abuse of power is one of the grounds upon which a taxing authority's powers can be challenged was appreciated in **Re Preston [1985] 1 A.C. 835**, page 836 paragraphs B and C where it was held that:

"a taxpayer could challenge a decision taken by the commissioners in exercising their statutory powers and duties if he could show that they had failed to discharge their statutory duty towards him or that they had abused their powers..."

72. The duty to act fairly, on the other hand was emphasised in by **Scarman L.J.** in **H.T.V. Ltd vs. Price Commission [1976] I.C.R. 170** at page 189, which was cited by **Lord Templemann** in ***Re Preston*** (supra) at page 866 paragraph A and B where the Judge expressed himself as follows:

"Agencies such as the Price Commission must act fairly. If they do not, the High Court may intervene either by prerogative order to prohibit, quash or direct a determination as may be appropriate, or, as sought in this case, by declaring the meaning of the statute and the duty of the agency...It is a commonplace of modern law that such bodies must act fairly...It is not really surprising that a code must be implemented fairly, and that the courts have power to redress unfairness."

73. A public exercise of power whether permitted or otherwise in a manner that frustrates the purpose for which the power is granted amounts to abuse of the same. This was the position adopted in **Republic vs. Commissioner of Customs Exparte Mulchand Ramji & Sons Limited [2010] eKLR** in which it was held that:

"A power may be abused in various ways for example when one acts beyond the limits of power, or acts irrationally or acts for an improper purpose or seeks to frustrate the legitimate expectation of another. A public body or officer is expected to act fairly in decision making, so that if he dies not, then he is deemed to abuse his powers….In the instant case, I have found above that there seems to be no legal or factual basis upon which the Respondent decided and classified the goods…and therefore abused its powers and unfairly exercised its discretion"

74. In this case the Respondent's case is that following the post clearance audit, it found that the Applicant's imports were undervalued and that the receipts purportedly issued by the ***National Bank of Kenya*** were not genuine. That finding was arrived at following inquiries made by the Respondent to which the Applicant responded. The findings arising from such investigations were obviously findings of fact and this Court can only interfere therewith if it is shown that the same were unreasonable in the sense that the same were either irrational or disproportionate. This was the position adopted by **Majanja, J** in **Republic vs. Kenya Revenue Authority & another Ex-Parte Bear Africa (K) Limited** the learned Judge cited with approval the decision of **Githua J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** as follows;

"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. Once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."

75. The principle of unreasonableness was restated by **Lord Greene** in the now celebrated case of **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation [1948] 1 KB 223** in which it was held at page 229 that:

"**It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."**

76. **De Smith's Judicial Review** (sixth edition) states at page 559 that:

"Although the terms irrationality and unreasonableness are these days used interchangeably, irrationality is only one facet of unreasonableness. A decision is irrational in the strict sense of that term if it is unreasoned; if it is lacking ostensible logic or comprehensible justification. Instances of irrational decisions include those made in an arbitrary fashion perhaps by spinning a coin or consulting an astrologer or where the decision simply fails to add up-in which in other words there is an error of reasoning which robs the decision of logic…Less extreme examples of the irrational decision include those in which there is an absence of logical connection between the evidence and the ostensible reasons for the decision, where the reasons display no adequate justification for the decisions or where there is absence of evidence in support of the decision."

77. Unreasonableness, according to **De Smith, Woolf and Jowell, 7th Edition** at para 11-029, includes decisions which have been accorded manifestly inappropriate weight; strictly "irrational"

decisions, namely, decisions which are apparently illogical or arbitrary; uncertain decisions; decisions supported by inadequate or incomprehensible reasons; or by inadequate evidence or which are made on the basis of a material mistake or material disregard of fact.

78. **Sedley, J's** decision **R vs. Parliamentary Commissioner for Administration, ex parte Balchin and Another [1998] 1 PLR 1**, at page 11 holds that:

"What the not very apposite term "irrationality" generally means in this branch of the law is a decision which does not add up-in which, in other words, there is a error of reasoning which robs the decision of logic."

79. It is however appreciated that the courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

80. In this case, the Applicant contends that the Respondent did not consider relevant material before arriving at the decision to issue agency notices. These relevant matters, according to the Respondent were mainly the failure by the Respondent to take action against the interested party. The question that arises is whether in arriving at a decision to commence recovery action for underpaid taxes, the Respondent is under an obligation to take action against the clearing agent first. Whereas, this Court may well form the view that the prudent thing to do would have been to take appropriate legal action against the interested party before recovering the shortfall from the Applicant, it has not been shown that the Respondent was under an obligation to do so. Failure to take one of the many options available to a person does not in my view necessarily amount to irrationality. Accordingly, as stated above this Court must strive to apply an objective standard which leaves to the Respondent the full range of choices which the legislature is presumed to have intended. This was the position taken in **Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL** where the following words of caution were given:

"It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show"

81. The Court's role in such matters was explained in ***Judicial Review Handbook*** by **Michael Fordham** (Third Edition) p.249- 256 as hereunder:

"Every public body has its own role and has matters which it is to be trusted to decide for itself. The courts are careful to avoid usurping that role and interfering whenever it might disagree as regards those matters. "

82. That a clearing agent is an agent of the importer is not in doubt. However, there may be circumstances where it might be unfair to saddle the importer with the actions or omissions of the agent and this position was appreciated by **Musinga, J** (as he then was) in **R vs Kenya Revenue Authority & The Commissioner General, ex parte Unilever Tea Kenya Limited Misc. Civil Appl. No. 1109 of 2005** where the learned Judge held as follows:

"It cannot be denied that in law, the interested party was an agent of the applicant. The fact that the interested party had earlier been vetted by KRA does not make him an agent of KRA. However, all the goods that were imported by the applicant and cleared by the interested party were under the control of KRA as per section 12 of the Customs and Excise Act and section 14 of the Value Added Tax Act. This control included the rigorous checking of all the documents accompanying the said goods. The procedure of clearing goods is closely controlled by KRA. Although it was alleged by KRA that the interested party presented various false document which were vital for clearing of the applicant's goods, all of those documents were inspected and passed by officials of KRA. The applicant had no hand in such scrutiny. KRA cannot therefore simply allege that there was fraud in clearing the goods and lay all blame upon the applicant…One of the requirements of KRA before a person is registered as a clearing agent is provision of a bond under Regulation 259 of the Customs and Excise Regulations. The agent undertakes that he "shall faithfully and uncorruptly perform his/their duties as agent to the satisfaction of the Commissioner". I agree with the applicant that this clearly requires KRA to have a watchful eye over all clearing agents to ensure that they perform their duties faithfully. In the event that corrupt officials of KRA collude with corrupt clearing agents to pocket money that is paid as duty by a principal through a clearing agent, it would be unjust to require the principal to shoulder the burden of making another payment…It is an accepted principle of commercial law that where an agent acts without or in excess of authority or in fundamental breach of a contract between him and a principal the agent will be personally liable for such acts."

83. In this case, it was alleged that there must have been corrupt collusion between the interested party, the Applicant's agent and the Respondent's agents. If that is the position, the importer may well be justified in demanding that action betaken against the agent and the Respondent's agents. Accordingly, I associate myself with the sentiments of **Korir, J** in **R vs. Kenya Revenue Authority & Another ex parte Krones Les Centre East Africa Limited [2012] eKLR** that:

"In a case where a customs agent has been involved in fraudulent activities, it would be more beneficial to the taxing authority if it went after the agent. The importer does not normally deal directly with the taxing authority's employees and the only people who can collude to defraud the taxman of his dues are the employees of the clearing agent and the employees of the taxman. The only way the taxman can fight corrupt activities is to demand taxes from the clearing agent. The taxing authority also has powers to cancel the licence of a rogue clearing agent. Going after the importer would seem unfair in a situation where there is clear evidence that the clearing agent has misappropriated the money meant for clearing the goods and corruptly cleared the goods."

84. The Applicant's allegation was however a mere conjecture as the Applicant did not adduce evidence to that effect. Such conjecture in my view cannot be the basis upon which this Court can hold that the conduct of the Respondent militates against its decision to recover customs due from the Applicant. Whereas, it may well be unfair to subject the Applicant to double payments in respect of the sums it remitted to its agents, such unfairness cannot be blamed on the Respondent. As rightly submitted, that is an issue between the Applicant and its agent.
85. Where the Respondent is not sure whether tax has been paid or not it may well be unreasonable for the Respondent to insist that the importer pays the same without carrying out a verification of the same. This is the distinguishing feature between this case and the position in the ***BOC Case*** where this Court expressed itself as follows:

"In my view, whereas I agree that the Respondent could choose to seek the payment of taxes from either the Applicant or the interested party, that discretion would only be properly exercised if the Respondent was certain that taxes and duty had not been paid."

86. Where however such verification has been undertaken which leads the Respondent to the conclusion that the taxes were in fact never paid, as was the contention in the instant case, such conclusion can only be challenged by way of a merit challenge by way of an appeal rather than by

way of a process challenge in judicial review.

87. The law is now trite that the determination whether taxes are due and if so how much, is not a matter for the judicial review Court. The question whether a judicial review court is the proper forum to deal with the issue whether or not taxes are due and if so how much has been the subject of judicial decisions in this jurisdiction. As was held by the Court of Appeal in **Pili Management Consultants Ltd vs. Commissioner of Income Tax, Kenya Revenue Authority Civil Appeal No. 154 of 2007**:

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

88. I similarly associate myself with the decision of **Korir, J** in H.C. Misc. Civil Application No.36 of 2011; **Republic vs. Kenya Revenue Authority; Ex-Parte: Bata Shoe Company Limited**, where the Court confronted with the issue whether certain payments made by the Ex-parte Applicant to a Procurement Centre (CFS) were costs associated with design of production and hence should be brought to charge under the fourth Schedule of ***EACCMA*** that deals with valuation held:

"The Applicant appears to be urging this Court to determine that the payments made to CFS were buying commissions…What the Applicant is asking this Court to do may be done by an appellate court. Acting as urged by the Applicant would be a usurpation of the Respondent's powers. The Respondent is mandated in law to assess tax and it should be allowed to do its work. Even if the Court decides to be the taxman, it does not have in its possession the documents presented to the Respondent by the Applicant in support of its claim that whatever it paid CFS were buying commissions. I therefore reject the Applicant's application in relation to the service charges/buying commissions."

89. In other words the issue whether or not tax is due and payable ought to be left to an appellate Tribunal as opposed to a judicial review Court since such issues go to the merit of the decision rather than the process.

90. The parties ought to appreciate the parameters of judicial review as opposed to an appeal. Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**

91. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an

ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

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

93. The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155. To do that would amount to this Court sitting on appeal on the decision made by the Respondent.

94. I also associate myself with the expressions in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR,** that:

"**...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision**…**I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter...**"

95. In this case the Respondent had the power to carry out the post clearance audit as it did. Before arriving at its decision it was of course obliged to carry out investigations and in so doing was enjoined to hear the parties concerned. From the material on record it would seem that the Respondent received representations from the Applicant and the National Bank of Kenya on the issue whether the interested party duly paid the amount due. According to the Respondent the Bank disputed the alleged payments and disowned the receipts alleged to have been issued by it. Confronted with two conflicting versions, the Respondent was at liberty to decide which version to believe and it would seem that it believed the Bank's version. Whereas that decision may well have not been correct the issue of the correctness thereof is a mater which is beyond the scope of these proceedings. Suffice it to say that the Respondent in its decision could have made a right decision or a wrong one on the merits but that does not warrant the quashing of its decision in these kinds of proceedings.

96. Having considered the issues raised in this application, apart from the issues touching on the process, which I find no merit in, it is my view and I so hold that the other issues challenge the merits of the Respondent's decision and the same ought to have been challenged by way of an appeal rather than judicial review.

Order

97. In the result the Notice of Motion dated 7th May, 2010 fails and is dismissed with costs to the Respondent.

98.Orders accordingly.

Dated at Nairobi this 23rd day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyaribo with Mr Jelle for Mr Ojiambo, SC for the Applicant

Mr Josiah Nyangweso for Miss Wangui Mwaniki for the Respondent

Mr Businge for Mr F. N Njanja for the interested party

Cc Mutisya