REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 323 OF 2013

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

Ex-parte

UNITED MILLERS LIMITED

JUDGEMENT

The ex-parte Applicant ("Applicant"), United Millers Limited, through the notice of motion dated 2nd October, 2013 prays for Orders that:

> **"1. An Order of Certiorari quashing the Respondent's decision to suspend customs clearance and/or entry into the Republic of Kenya of all the goods imported by the applicant and detain the applicant's goods already at the various ports of entry.**
>
> **2. An Order of Mandamus compelling the Respondent by itself, its agents, and/or its servants otherwise howsoever to immediately resume customs clearance of all the goods imported into the country by the applicant and to release all the applicant's goods detained at the ports of entry.**
>
> **3. An Order of damages against the Respondent for all the losses sustained by the applicant arising from the suspension of clearance of their goods and all other losses consequential and/or incidental thereto.**
>
> **4. An Order that the costs of this application be in the cause."**

The application is supported by the verifying affidavit of Shilen Gadhia the Finance Manager of the Applicant company, the statutory statement and the chamber summons application for leave which were all filed in Court on 11th September, 2013. Kenya Avenue Authority (KRA) is named as the Respondent.

According to the papers filed by the Applicant in Court, the Applicant is a manufacturer of various milling and nutritional products for local consumption and export. It is the Applicant's case that

sometime back the Respondent initiated a post clearance audit on the Applicant's exports for the years 2008 to 2013. After the audit, the Respondent concluded that some goods which were indicated to have been exported were not exported but diverted into the local market leading to loss of tax revenue amounting to Kshs.48 million. The Applicant contends that documents were submitted to the Respondent showing that the goods had indeed been exported but the Respondent has failed, refused and or neglected to adduced evidence to back its allegations. It is the Applicant's case that thereafter the Respondent proceeded to block its access to the Simba System by posting a message to the effect that: **"UNITED MILLERS HAS PENDING ISSUES WITH CUSTOMS-THUS WE ARE UNDER INSTRUCTIONS TO REFER ITS DOCUMENTS TO DC-CBM."** The net result was that the Applicant's goods could not be cleared through the Simba System. Further, that the Respondent had informed the Applicant that all its goods could not be cleared to enter the country.

According to the statutory statement, the Applicant faults the Respondent's decision on the grounds that:

"4.1 The Respondent has no power in law to detain goods at the Port of entry especially after it has collected all taxes and duties in connection with the same.

4.2 The said decision was made in excess of jurisdiction and was therefore ultra vires.

4.3 The said decision was made without due process, was unconstitutional as it violates various provisions of the Constitution of Kenya, 2010 and was made in violation of the Applicant's fundamental rights and freedoms.

4.4. The said decision was made contrary to the law in that it was made in violation of the rules of natural justice.

4.5 The Respondent did not give the Applicant an opportunity of being heard or of making representations upon the decision which affected the applicant exposing it to huge financial and other losses besides threatening to completely paralyze their operations before making the said decision. Furthermore, the applicant was not given an opportunity to show cause why the said decision should not be made.

4.6 The said decision was not founded upon the basis of fact as by law required and is defective and accordingly null and void for want of compliance with the provisions of the law applicable thereto.

4.7 The said decision is unreasonable, oppressive and excessive by reason of the following:

(a) The excuse being used by the Respondent as the basis for the said decision (the allegation that some goods indicated by the applicant to have been exported previously, were never actually exported) is contrary to the weight of the evidence already submitted to Kenya Revenue Authority in the form of documents actually confirming that the said goods were actually exported and even indicating the details of the Kenya Revenue Authority officers who oversaw the exportation exercise.

(b) The Respondent collected all the customs duties and taxes payable in respect of a consignment of goods imported by the applicant and thereafter proceed to detain the goods at the port of entry leading to the accrual of demurrages.

(c) The respondent made the said decision which threatens to completely paralyse the applicant's business and expose it to huge losses despite the fact that the applicant has all along co-operated in the PCA exercise, and has submitted all information and documents required, and answered all questions raised, without any demonstration that any information documents or answers given to the Respondent by the applicant has been found to be untrue or contained any untruth.

(d) The alleged fraud has not been proved or established to have happened as a fact. The Respondent could only resort to making the said decision where it is shown that the alleged tax loss had been proved, verified, assessed, and demanded but there has been a refusal to pay on the part of the applicant, which has not happened.

(e) The Respondent has completely paralysed the business of the applicant and exposed it to huge losses running into billions of shillings because of an alleged loss of revenue amounting to Kshs.48,000,000/- when the said Respondent actually owes the applicant Kshs 78,0000,000/- in uncontested but unpaid tax refunds.

4.8. In the premises it is only fair and just that the orders sought herein be granted by this honourable court."

The Respondent opposed the application through the replying affidavit sworn on 27th November, 2013 by Caroline Nyagechi on Acting Senior Revenue Officer in the Co-ordinated Border Management Section of the Export Management Unit of the Customs Services Department. Ms Nyagechi averred that on 28th May, 2013, the Respondent issued a demand notice on the Applicant for the sum of Kshs.48,631,169.00 in accordance with Section 13 of the Value Added Tax Act, 2013. The demand was made since the Applicant was unable to prove that the goods had been exported and it was therefore presumed that the goods had been consumed locally, but on a VAT free basis.

She deposed that on 5th November, 2012 the Respondent had introduced a pilot road manifest E112 for purposes of controlling and monitoring exports. Among the 21 companies selected for piloting the new road manifest system was the Applicant. The road manifest was aimed at controlling the movement of goods for export from the exporter's premises to the border points. Each company was expected to give a weekly report on their exports to the Respondent's Export Management Office for reconciliation purposes and to monitor the effectiveness of the new procedure.

Upon carrying out online reconciliation, the Respondent's officers noticed that a number of goods verified and sealed for export from the Applicant were not reaching the exit points. Through emails, and letters dated 26th February, 2013, 10th April, 2013, 10th April, 2013, 18th April, 2013, 10th May, 2013, 13th May, 2013 and 26th May, 2013 the Applicant was requested to prove exportation of the identified goods. The Applicant replied to the Respondent's letters by letters dated 8th April, 2013 and 16th April, 2013 but failed to adduce evidence to support the claim that the goods had been exported. The inspection and verification reports produced by the Applicant only showed that the goods in issue were confirmed to be in the containers and trucks at the departure point, but there was no evidence that the goods had actually exited the border.

The Respondent's officers at the border points were alerted about this state of affairs and they confirmed that the goods were never received despite being sealed for export. As correspondences were being exchanged the Applicant's company director and clearing agent presented to the Respondent's officers rotation numbers and on further scrutiny and confirmation, all the rotation numbers were found not to be genuine. The Applicant's password in the Simba System was therefore suspended so that the Applicant could not export any goods pending clearance of the outstanding queries.

On 28th May, 2013 a demand notice for Kshs.48,631,169.00 was issued to the Applicant who did not respond to the same but instead filed these proceedings. The Respondent's Post Clearance Audit (PCA) Department carried out a comprehensive audit on the Applicant which covered exports for a period of five years. Ms Nyagechi further deposed that the Respondent's biggest concern was the fictitious exports by the Applicant which would have led to unjustified claims for VAT refunds. She averred that the burden of proving export of the goods lies with the Applicant, and not the Respondent. The Respondent's case is that the Applicant did not produce all the information required from them in order to prove that the goods had been exported as alleged.

Further, that all the certificates of export allegedly obtained from Namanga border point were forged and

some certificates produced at a later date came after the period expected for exit had expired. It is the Respondent's assertion that in order to confirm that goods meant for export have actually left the country, an exporter must produce an exit report, rotation numbers and the certificates of export. The Respondent contends that the Applicant failed to produce these documents at the point of verification leading to the logical conclusion that the goods did not exit the country.

Ms Nyagechi deposed that the Respondent is willing and ready to vary its demand if the Applicant can prove exportation. She avers that the Respondent's officers conducted various audits and held numerous meetings with the Applicant in order to establish the truth of the matter. She averred that the Applicant was producing documents several months after the audit had been concluded. She deposed that the Respondent had commenced investigations into the authenticity of the said documents. She deposed that it is normal for Respondent to reduce the amount demanded so long as the Applicant produces documents to prove exportation of the goods. She queries the Applicant's decision to file these proceedings instead of raising an objection with the Respondent.

On the authenticity of the export certificates presented by the Applicant, she averred that about eighty certificates allegedly obtained from Namanga border point were all fake as input into the Respondent's computer system of the certificate numbers or entry numbers displayed a message that read: **"no certificate of export corresponding to this criteria found."**

Further, that upon inputting details such as the stations and certificate numbers, it was confirmed that those certificate numbers were actually issued for different means of transport, by different officers and for different years. She deposed that the rotation numbers are normally issued by a verification officer at the point of receiving or confirming that the goods declared in the entry are contained in the vessel declared to be the means of transport. According to her, the rotation numbers presented by the Applicant were forged as the Respondent's records revealed that the rotation numbers were for different goods, exported using different vessels with different dates of export.

According to the Respondent the Applicant contravened **sections 16, 31(1), 195, 203, 204, 234, 236** and **251(i)** of the **East African Community Customs Management Act, 2004 (EACCMA).** Further, that the suspension of the Applicant's password was done in compliance with **Section 145** of the **EACCMA**.

As for the Applicant's claim that the Respondent owed it VAT refunds, Ms Nyagechi averred that an officer from the refunds department would swear an affidavit in response to the allegation. She, however, pointed in the letter dated 27th March, 2013 annexed to the verifying affidavit of Shilen Gadhia it was indicated that the Applicant was seeking to off-set taxes amounting to Kshs 79,976,000/= for the year 2012 with installment tax amounting to Kshs.92,496.000/=.

In rebuttal to the Respondent's replying affidavit, Shilen Gadhia swore a supplementary affidavit on 19th March, 2014. Through the said affidavit, she asserts that the Applicant followed the established procedure with regard to exportation of the goods in question.

She revealed the procedure that was used when exporting goods and averred that goods would be loaded at the Applicant's premises in the presence of KRA officials who would then affix their seals onto the trucks of the Applicant's customers after confirming that all the goods had been loaded. She asserted that upon the loading and sealing of the said trucks and once the goods left the premises of the Applicant, they passed into the possession, custody and responsibility of the customers. At the border point, the Respondent's officers would remove the seals affixed at the Applicant's premises after confirming that the same had not been tampered with. The Respondent's officers would then prepare and issue certificates of export confirming that the goods had in fact crossed the border. The certificates were issued to the customer and not the Applicant but the Applicant would then obtain copies of the certificates from the Respondent's offices.

It is the Applicant's case that the copies of the certificates exhibited in Court were issued with regard to the goods that were sealed in its premises. They belonged to their customers and bore the mark of the Respondent with indication of the time it was processed, the exit point and the names and designations of

the officers who prepared them. It is the Applicant's case that the certificates originated from the Respondent's offices and the Applicant is therefore a stranger to the Respondent's allegation that the certificates were forged. The Applicant asserts that if the certificates were indeed forged, then they were forged by employees of the Respondent or third parties.

The Applicant's Finance Manager averred that the Applicant is not aware that any investigation into the alleged forgery has been conducted and neither was the Applicant informed about the alleged forgeries prior to the filing of the Respondent's replying affidavit.

It is the Applicant's case therefore that the Respondent's decision is unreasonable, was in excess of jurisdiction, amounts to abuse of power and was made in error of both fact and law.

Looking at the evidence placed before the Court, and the submissions made by the parties it is apparent that the key question is whether judicial review orders should issue in the circumstances of this case.

A summary of the facts is important at this point. The Applicant is a Kenyan based manufacturer. The manufactured goods are for local consumption and export. In 2012 the Respondent introduced a pilot road manifest for the purpose of controlling and monitoring exports. The Applicant was one of the twenty one companies selected for piloting the new road manifest. This meant that goods for export would be physically verified by a KRA proper officer prior to stuffing into trucks. Customs seals would then be fixed once the proper officer accepted the Applicant's entry documents. The entry would then be lodged online with the details contained in the entry form. Once the cargo reached the border station, a proper officer would confirm that the customs seals had not been tampered with. The stuffing date and the date for exit would be verified. The Respondent's proper officer would then use a unique password to input a message in the Respondent's Simba System indicating that the cargo had been verified and officially allowed to exit. The exit date would also be recorded.

In the course of the piloting of the road manifest, it came to the attention of the Respondent's officers that some of the trucks that had been stuffed at the Applicant's premises with cargo for export had not reached the prescribed exit border stations. Exchange of correspondences on the issue commenced and the Respondent eventually shut out the Applicant from its Simba System. The Applicant could therefore not export or import goods. It was at that point that the Applicant approached this Court.

On 17th September, 2013 this Court granted leave to the Applicant to commence judicial review proceedings. The parties entered a consent on the issue of stay to the effect that the Applicant would access the Simba System on condition that it submitted a bank guarantee for Kshs.48,631,169 within seven days from the date of the consent.

It is the Applicants' case that once the trucks were stuffed, loaded and left its premises, the goods ceased to be in its power, possession or custody and became the responsibility of the customer. The Respondent's case is that the Applicant remained the owner of the goods up to the prescribed exit border point.

Section 2 of **EACCMA** defines an owner of goods as including **"any person other than an officer acting in his or her official capacity being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or the person in possession of, or beneficially interested in, or having control of, or power of disposition over, the goods."**

This definition is not helpful in the circumstances of this case. Assistance can, however, be found by considering the tax implications of the exports by the Applicant. The importance of ensuring that the goods had exited the country was to enable the Applicant claim **Value Added Tax** (VAT) refunds. Export of goods are zero-rated as per **Section 8** of the **Value Added Tax Act, Cap 476 (VAT Act)** and the **Fifth Schedule** of the same **Act**.

Kriegler, J in the South African case of **METCASH TRADING LIMITED v THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE AND ANOTHER**, **Constitutional Court of**

South Africa Case CCT 3/2000 at paragraph 18 explained the nitty-gritty of VAT as relates to exports as follows:

> **"A special feature of VAT relates to exports. VAT is payable only on consumption in South Africa and as a result output tax is not payable on goods sold and exported. In the arcane language of the Act, they are zero-rated. Therefore a merchant who buys and sells goods in South Africa and also sells some goods that are exported does the periodic calculation by adding up all input taxes for deduction from the sum of output taxes but, in calculating the latter, includes no output tax on the value of the exports. No output tax is payable on the exported goods but a full credit is given for the input tax. This exemption, which aims at promoting exports and enhancing their competitiveness in the world market, holds self-evident benefits for export-oriented vendors. Unfortunately those benefits not only attract honest exporters but are a notorious magnet for crooks who devise all manner of schemes to exploit the system to their advantage."**

In Kenya VAT functions in the same way like in South Africa. Considering that the duty drawback can only be claimed upon prove of export, it is the duty of the exporter to establish that the goods did indeed exit the country. The argument by the Applicant that the cargo left its control once the vehicles exited its premises cannot hold. It has a duty to ensure that the goods have left the country since its claim for refund is premised on the fact that the cargo has exited Kenya. To agree with the Applicant would be shifting the burden of prove of export from the taxpayer to the taxman.

This position is, in my view, supported by Section 138 of EACCMA which states inter alia:

> **"138. (1) Drawback of import duty may on exportation or the performance of such conditions as may be prescribed, be allowed in respect of such goods, such amount, and on such conditions, as may be prescribed.**
>
> **(2) Where the owner of any goods claims, or proposes to claim, drawback in respect of goods, then, as a condition to the grant of such drawback, he or she shall-**
>
> **(a) .....**
>
> **(b) make and subscribe a declaration on the prescribed form to the effect that the conditions under which drawback may be allowed have been fulfilled and, in the case of goods exported or put on board any aircraft or vessel for use as stores-**
>
> **(i) that such goods have actually been exported or put on board for use as stores, as the case may be;**
>
> **(ii) ....."**

In **Metcash** (supra), Kriegler, J opined that the burden of proving that an assessment of VAT by the tax collector was wrong belonged to the merchant. This is how he put it in paragraph 22 of his judgment:

> **"Manifestly section 31 constitutes evaluable weapon in the hands of the Commissioner. The prospect of having the Commissioner independently assess both the underlying amount and the VAT that is to be paid thereon must in itself be a powerful disincentive for recalcitrant, dishonest or otherwise remiss vendors. But the compulsive force of this mechanism of the Act goes a good deal further. The dissatisfied vendor can, by lodging an objection under Section 32 of the Act and, that failing, by noting an appeal under section 33 or 33A, both compel the Commissioner to reconsider the assessment and have its correctness reconsidered afresh by an independent tribunal. But the burden of proving the Commissioner wrong then rests on the vendor under section 37. Because VAT is inherently a system of self-assessment based on a vendor's own records it is obvious that the incidence of this onus can have a decisive effect on the outcome of an objection or appeal. Unlike income tax, where assessments can elicit**

genuine differences of opinion about accounting practice, legal interpretations or the like, in the case of a VAT assessment there must invariably have been on adverse credibility finding by the Commissioner; and by like token such a finding would usually have entailed a rejection of the truth of the vendor's records, returns and averments relating thereto. Consequently the discharge of the onus is a most formidable hurdle facing a VAT vendor who is aggrieved by an assessment: unless the Commissioner is precipitating credibility finding can be shown to be wrong, the consequential assessment must stand."

The Applicant before this Court asserts that it produced export clearance forms from the Respondent's officers. The Respondent's case is that those documents were not authentic.

Assuming that the documents were indeed not authentic, who would benefit from such state of affairs? Why would the Respondent's officers issue fake certificates of clearance? They would issue such certificates if they were bribed. Who would bribe them? Is it the exporter (in this case the Applicant) or the importer (in this case the Applicant's customer)? The customer would gain nothing from bribing the Respondent's officers. The Applicant had everything to gain from bribing the Respondent's officers. It would claim VAT refunds where it was not entitled to do so. The Applicant was therefore the beneficiary of any forged clearance certificates. It cannot be allowed to benefit from an illegality.

This point was clearly brought out by J. G. Nyamu, J (as he then was) in **REPUBLIC v COMMISSIONER OF LANDS EX-PARTE SOMKEN PETROLEUM COMPANY LIMITED (2005) eKLR** when he opined that:

"The circumstances of the stamping of the documents are such both the employees of the Commissioner of Lands and an employee or two of the advocates presenting the documents and by extension the applicants were prima facie involved in a fraudulent transaction- to defraud the collector of Stamp duty revenue. In short it is a fraud upon revenue . I hold that it would be contrary to the doctrine of public policy for the applicant to seek a judicial review remedy in a transaction so tainted with fraud on revenue

Moreover the stamping of the documents upon which the applicant relies in seeking relief is contaminated by "turpis causa" and the rule has long been established that "ex turpi causa oritur non action." This maxim means that no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated - see .....GORDON v METROPOLITAN [1910] 2 K.B – 1080 at pg 1098. In SCOTT v BROWN [1892] 2 Q.B. 724 at pg 1128, Lindley L. J. held as follows:

> **"No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duty brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality."**

Even in Judicial review I find that a transaction tainted with fraud or illegality cannot be enforced and the damage if any must lie where it fell unless it can be recovered without pleading illegality or fraud, when the party purporting to enforce took part."

The Applicant cannot be allowed to use fake documents to prove export of the goods in question. The Applicant ought to have demonstrated to the Respondent by production of valid documents that the goods had left Kenya.

The next question is whether the Applicant was given a hearing. The Applicant's Finance Manager in the supplementary affidavit sworn on 19th March, 2014 averred that they only learned in Court that the clearance certificates which they had tendered to the Respondent were allegedly forged. The Applicant's case is that since the Respondent alleged forgery then it ought to have proved the forgery.

It is necessary to go through the exhibited documents in order to establish whether what the Applicant

states is correct. The Applicant presented a bundle of documents to the Court as evidence that the goods in question were **"actually exported and the exports were actually verified and approved by the Respondent's officials"** – see paragraph 6 of the verifying affidavit of Shilen Gadhia sworn on 10th September, 2013.

The Applicant was, however, economical with facts as it failed to disclose what led to its blockage from the Respondent's Simba System. Ms Caroline Nyagechi in her replying affidavit exhibited several correspondences between the Applicant and the Respondent. The theme running through the correspondences is the demand of evidence by the Respondent, from the Applicant, that certain trucks which had been stuffed in the Applicant's premises had exited Kenya through the designated border points. The Applicant's reply was that the trucks had exited the country.

The Respondent was not satisfied with the Applicant's answers and on 28th May, 2013 the Respondent wrote a demand letter to the Applicant as follows:

> **"RE DEMAND FOR TAXES**
>
> **The entries in the attached sheet were released from Nakuru for exportation to various countries but were consumed locally on VAT free basis.**
>
> **You are therefore requested to make payments amounting to Kshs.48,631,169 as per section 13 of the VAT act CAP 476 to LTO for locally consumed goods on receipt of this letter. Thereafter present yourself to Export Management Office, times towers 4th floor to allow subsequent facilitation of offence compounding as per section 203 and 209 of the EACCMA act.**
>
> **Otherwise enforcement action will be taken against you within 7 days from the date of this letter.**
>
> **You co-operation will be highly appreciated."**

There is no evidence placed before the Court to show that the Applicant responded to the demand notice. This demand letter could be what led to the Respondent's blockage of the Applicant from the Simba system. Looking at the documents placed before the Court by the Respondent, it is clear that the Applicant was all along aware that the Respondent was not satisfied with whatever documentation it had presented to prove that the goods had exited Kenya. The Respondent may not have informed the Applicant that the documents it had presented were forged. However, the Applicant knew that the documents had not been accepted. I therefore find that the Respondent acted lawfully and within the rules of natural justice in the manner it dealt with the Applicant.

The last question is whether the exclusion of the Applicant from the Respondent's Simba System was lawful and or reasonable. The Respondent's case is that the decision was lawful.

At paragraph 33 of the Respondent's replying affidavit it is averred that:

> **"THAT we realized that that the vessels with the goods in issue were sealed with customs seals. The Applicant's password was suspended based on the provision of Section 145 of the EACCMA 2004."**

Section 145 of **EACCMA** provides:

> **"(1) The Commissioner may license persons to act as agents for transacting business relating to the declaration or clearance of any goods or baggage other than accompanied non-manifested personal baggage of a person travelling by air, land or sea.**
>
> **2. The Commissioner shall not license any person to act as agent under this Act unless the**

Commissioner is satisfied that, that person has the capability, office equipment, a registered office and documents to effectively transact business in accordance with the provisions of this Act and any other conditions as may be prescribed by regulations.

3. The Commissioner may refuse to issue a licence or may by order, suspend, revoke or refuse to renew, any such licence on the ground that the applicant or holder has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reason that the Commissioner may deem fit."

Section 145(3) EACCMA allows the Commissioner, among other things, to revoke or suspend the licence of an agent who has been found guilty of an offence under the Customs laws or has been convicted of an offence involving dishonesty or fraud, or for any other reasons that the Commissioner may deem fit. In the present case, there is no evidence that the Applicant or its authorized agent had been found guilty or convicted of any offence involving dishonesty or fraud. It is therefore assumed that the Commissioner blocked the Applicant for other reasons the Commissioner deemed fit.

Such power as granted to the Commissioner ought to be exercised reasonably. Was the power exercised properly in this case? One of the exhibits presented to Court by the Applicant is a letter dated 27th March, 2013. This is a letter addressed to the Respondent by PKF Taxation Services Ltd, the Applicant's tax agent. The letter states:

"UNITED MILLERS LIMITED

PIN NO. P000626492H INTENTION TO OFFSET 2012 BALANCE OF TAX AND 2013 IN STALMENT TAXES

We wish to inform you that our client is due to settle tax liabilities for 2012 balance of tax amounting to kshs.79,976,000 on 30 April, 2013 and 2nd,3rd and 4th instalment taxes for 2013 amounting to Kshs.92,496,000. Kindly off-set the amount payable against the client's outstanding VAT refund claim submitted to you on 24th August, 2012 (copy attached). Find below the analysis:

	Kshs
VAT Claim of 17th August 2012	**(250,811,222)**
2012 Balance of tax	**79,976.000**
2013 2nd,3rd and 4th instalment taxes	**92,496.00**
Balance of VAT refund	**(78,339,222)**

Kindly expedite to ensure timely settlement of the above tax obligations."

The letter clearly shows that the Applicant was claiming a VAT refund of Kshs.78,339,222.

The Respondent's reply to this issue is found at paragraph 34 of the replying affidavit as follows:

"THAT I am unable to comment on the VAT refund claims that the Applicant alleges is owed to them and an officer from the refunds department will swear an affidavit on that. At Annexture SG-8 of the affidavit of Shilen Gadhia sworn on 10th September 2013, is a letter dated 27th March 2013 from the Applicants tax adviser. It demonstrates that the Applicant is seeking to off-set taxes they admit to owe for 2012 amounting to Kshs. 79,976,000 and instament tax amounting to Kshs. 92,496,000. This is more than their alleged VAT refund claim."

In the first place it is noted that there was no affidavit sworn by an officer from the Respondent's refunds department. Secondly, the averment by Caroline Nyagenchi misconstrued the clear contents of PKF Taxation Services Ltd's letter dated 27th March, 2013. From that letter it is clear that the Respondent owed the Applicant Kshs.78,339,222 in VAT refunds. The Respondent's VAT claim was for Kshs.48, 631,169. What was the basis for blocking the Applicant from the Simba System? The VAT claimed from the Applicant could have easily been offset against what the Respondent allegedly owed the Applicant in VAT refunds.

The Court notes that the Applicant was never informed that it would be denied access to the Simba System. The Applicant's was anchored on import and export of goods and locking it out of the Simba System meant it could not operate effectively. It is also important to note that no reason was given to the Applicant before it was blocked from accessing the Simba System. The Applicant was entitled to know why it was being blocked from accessing the Simba System.

In my view, the decision by the Respondent to block the Applicant from the Simba System was unreasonable. It also did not comply with the rules of natural justice since the Applicant was never heard before the drastic action was taken. There is no evidence that the Applicant was in the process of winding up so as to make it impossible for the Respondent to recover the taxes allegedly owed to it by the Applicant. The taxman should not behave like an undertaker whose main agenda is to inter one body and move to the next one. The undertaker never seeks to profit more than once from one's demise. The taxman should be like a farmer who takes good care of his crops and animals with a view to profiting from the same crops and animals again and again. Taxpayers are the reason behind the Respondent's existence and the Respondent and its officers should internalize this fact.

Considering my finding that the Respondent's decision to exclude the Applicant from the Simba System was unlawful and against the rules of natural justice, I issue orders as follows:

1. An order of certiorari is issued to quash the Respondent's decision to suspend customs declaration or clearance of the Applicant's goods. The Respondent's decision to block the Applicant's access to the Simba System is therefore quashed.

2. Having quashed the Respondent's decision, issuance of an order of mandamus will be superfluous. I therefore decline to issue the said order.

3. Award of damages is not available in judicial review. The prayer for an award of damages for the losses incurred by the Applicant as a result of the Respondent's action is therefore dismissed.

4. As the Applicant's case has partially succeeded, the appropriate order is to direct each party to meet their own costs and it is so order.

For avoidance of doubt, this decision does not in any way affect the Respondent's claim of VAT of Kshs.48,631,169 from the Applicant and neither does it affect the Applicant's claim for a VAT refund of Kshs.78,339,222 from the Respondent.

Dated, signed and delivered at Nairobi 25th day of February, 2015

W. KORIR,

JUDGE OF THE HIGH COURT