



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC CIVIL APPLICATION (JR) NO. 48 OF 2013

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF: COMMISSIONER OF CUSTOMS & EXCISE

AND

IN THE MATTER OF: WRONGFUL SEIZURE AND DETENTION OF THE MOTOR VEHICLE REGISTRATION NO. KBL 377A – ZD 3363

AND

IN THE MATTER OF: THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT, 2004, THE LAW REFORM ACT AND THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC APPLICANT

AND

THE COMMISSIONER OF CUSTOMS & EXCISE RESPONDENT

EX-PARTE: ABDI GULET OLUS

JUDGMENT

1. This is a judicial review application for orders of Certiorari, Prohibition and Mandamus in relation to a motor vehicle registration number KBL 377A – ZD 3363 (hereinafter the motor vehicle) which has been detained by the respondent for the reason of having been involved in the customs offence of diverting into the local market un-customed sugar on transit to Uganda and therefore liable to forfeiture under the East African Community Customs Management Act, 2004.

2. The brief facts of the case are that the ex parte applicant's vehicle driven by his driver was one of four trucks allegedly hired by agents for the transportation from the Port of Mombasa of containers of sugar destined for Uganda and which on information that they were involved in the diversion of the sugar into

the local market was deposited along with two others on the 31st May 2013 at Changamwe Municipal Parking Services from where the truck, together with another, under unexplained circumstances disappeared only to be traced days later on the 6th June 2013 at Mariakani, Mombasa with its cargo of sugar having been offloaded whereupon the truck was seized and deposited at Kilindini Port, Mombasa for the customs offence of diverting un-customed sugar into the local market. The ex parte applicant as the owner of the motor vehicle seeks its unconditional release and contends that the diversion of the sugar must have been done by or with connivance of the respondent's officers and police officers charged with the escort of the sugar to its destination in Uganda.

3. By a Notice of Motion dated the 7th August 2013 upon leave to file judicial review proceedings granted by the court on 6th August 2013, the ex parte applicant seeks the following specific orders:

1. ***THAT*** an Order of Prohibition to issue directed to the Commissioner of Customs & Excise and/or officers under him prohibiting the Commissioner and/or officers under the Customs & Excise Department from preferring any offence against the Applicant and/or from summoning the Applicant for the compoundment of any offence under the East African Community Customs Management Act, 2004 or any other relevant statute or customs regulations in relation to the Notices of Goods deposited in Customs Warehouse Nos.196514 and 196516 dated the 31st day of May, 2013 and the 6th June day of 2013, respectively.
2. ***THAT*** an Order of Certiorari to issue to bring to this Honourable Court the Notices of Goods Deposited in customs Warehouse Nos. 196514 and 196516 dated the 31st day of May, 2013 and the 6th day of June, 2013 respectively, for the purposes of quashing thereof.
3. ***THAT*** an Order of mandamus to issue directed to the Commissioner of Customs & Excise and/or officers under the Customs & Excise Department to compel the unconditional release of the Motor vehicle registration Number KBL 377A – ZD 3363 to the Ex-parte Applicant.
4. ***THAT*** the costs of this application be provided for.

4. The Notice of Motion was supported by the verifying affidavit sworn on 5th August 2013 filed in support of the application for leave and a further affidavit of 2nd October 2013 by the applicant sworn in response to the replying affidavit for the Respondent. The ex parte applicant's case is set out in the Statement supporting the application for leave as follows:

- a. *That the consignment in the container Nos. PCIU3118620 and PCIU3174367 being transit cargo was under the escort of officers from both the Customs & Excise Department and the Kenya Police whose mandate is to ensure the proper clearance and transportation of the transit cargo from the Kilindini Port to the exit border point into Uganda.*
- b. *That the transit containers on board the Applicant's said Motor Vehicle Registration Number KBL 377A ZD 3363 were fitted with an e-seal that makes it possible for the Customs & excise officers to completely and easily monitor and track the Motor Vehicle whilst under transit to Uganda.*
- c. *That the Customs & Excise officers and police officers who were in charge of the escort of, inter alia, the Applicant's Motor Vehicle Registration Number KBL 377A – ZD 3363 whilst transporting the transit cargo are exclusively culpable for any loss of the transit cargo through the suspected pilferage from the containers on board the Applicant's said Motor Vehicle and for any loss in the local or related duties on the transit sugar allegedly diverted in the local market.*
- d. *That no criminal charges whatsoever have since been preferred against the said officers in charge of the escort of the transit cargo on board the Applicant's Motor Vehicle Registration Number KBL 377A – ZD 3363 and no arrest or criminal charges were preferred against the Applicant's driver at the instance of or subsequent to the seizure of the Applicant's said Motor Vehicle Registration Number KBL 377A – ZD 3363.*
- e. *That the Customs & Excise officers remain culpable for the pilferage of the transit cargo from the containers on board of the Applicant's Motor Vehicle Registration Number KBL 377A – ZD 3363 following the temporary seizure and unexplained release of the said Motor Vehicle from the Customs Warehouse at Changamwe that it had been, inter alia, deposited on the 31st day of May 2013.*

- f. *That no offence has for the past close to 2 months been compounded against the Applicant under the East African Community Customs Management Act, 2004 in regard to the transit cargo allegedly pilfered from the containers on board the Motor Vehicle registration Number KBL 377A – ZD 3363.*
- g. *That the Applicant has been treated indiscriminately by the senior Assistant Commissioner, Investigation & Enforcement Department whom has severally released without proper explanation to the Applicant other Motor Vehicles that had been seized and deposited in the Customs Warehouse and/or were in the convey under escort with the Applicant's Motor Vehicle Registration Number KBL 377A – ZD 3363 during the alleged pilferage of the transit cargo.*
- h. *That the alleged pilferage from the containers on board the Applicant's Motor Vehicle registration Number KBL 377A – ZD 3363 and diversion of the transit sugar into the local market was made possible by the calculated and deliberate actions on the part of officers from the Customs & Excise department and/or was made possible through culpable gross negligence on the part of such officers.*
- i. *That the seizure and continued detention of the Applicant's said Motor Vehicle Registration Number KBL 377A – ZD 3363 is wrongful and completely unjustifiable and the Applicant has been exposed to irreparable loss and damaged in his transport business for culpable criminal acts committed without his absolute knowledge or any abatement whatsoever on his part.*
- j. *That the Applicant has not under any reasonable circumstances deliberately or otherwise committed any offence punishable under the provisions of the East African Community Customs Management Act, 2004 or any other relevant statute or customs regulations.*

5. The respondent filed a replying affidavit and a further affidavit sworn respectively on 16th September 2013 and 23rd October 2013 to respond to the ex parte applicant's verifying affidavit and further affidavit. The substance of the respondent's response is that the respondent properly deposited the applicant's motor vehicle in accordance with statutory provisions of the East African Community Customs Management Act (EACCMA) for having been reasonably suspected of commission of a customs offence of diverting uncustomed sugar on transit into the local market, which deposit was notified to the ex parte applicant using the forms of notices then applicable in view of the saving by EACCMA of the regulations and forms applicable under the national law, the Customs and Excise Act cap. 472, prior to the formulation of regulations under the Act.

6. The parties filed their respective written submissions which their Counsel – Mrs. Nyange for the ex parte applicant and Ms. Mwaniki for the respondent – highlighted by oral submissions at the hearing and judgment was reserved. The verbatim record of the counsel's oral submissions are set out below:

“Mrs. Nyange for the applicant

Notice of Motion dated 7.8.2013, statement dated 5.8.2013 and verifying affidavit. We also rely on the further affidavit of the applicant of 2.10.2013. Applicant's written submissions dated 13.11.2013.

Motion seeks to quash notices served upon ex-parte applicant attached as AGO4 and AGO3 in the verifying affidavit. The notices were improper and unprocedurally given.

AGO4 at p. 17. the notice was lacking information. Pertinent information such as the Aircraft/vessel and the place of origin is not indicated. This applies to both notices AGO4 and AGO3.

Section 2 (1) of the Customs & Excise Act Cap 472. the said notices should be limited to a vessel or an Aircraft. Goods transported via vehicles cannot be detained under the section. The definition of a vehicle in Cap 472 does not include aircraft or vessel. The respondent was aware that goods are also transported via vehicles. The use of the notice to detain the goods was improper.

The truck or vehicle that was detained does not qualify as goods. The notice in AGO3 states that truck was deposited at Changamwe Municipal parking. Cap. 472 requires that goods be deposited in the customs warehouse which is defined at Cap. 472. The station at which the notice sought to detain the truck was improper.

The Respondent cited that the Ex-parte applicant committed an offence under section 200 and 203 of the E.A. Community Custom Management Act. A person is liable of an offence if found off-loading any unrestricted goods. The respondent should prove that the ex-parte applicant was found off-loading goods. There is no evidence to prove that the ex-parte was capable of the offence to warrant the detention of the vehicle.

The Commissioner had a duty under section 17 of the E.A. Community Customs Management Act. If anything happened to the goods, then such a loss or damage falls on the commissioner. The allegation that the vehicle was used to divert sugar into the local market is in bad faith.

The respondent claimed to have information of sugar being diverted on 30th and the vehicle was detained on 31.5.2013. see paragraph 11 of the replying affidavit.

The truck could be tracked at any time as the trucks were installed with electronic cargo tracking system. P. 4 of the submissions. The names of the custom officers who escorted the trucks are supplied in the further affidavit of the application dated the 2.10.2013.

The decisions in Petition No. 322 of 2011 at p. 10 of the respondent's submission. The authority was a constitutional petition challenging the imported goods impounded. This has no nexus to the present case. The present case relates to notices issued.

Misc. Application No. 1756 of 2005 at p 10 of the respondent's submissions. It related to a prohibition order against the demand of duty. The present case is about detention notice.

Civil Appeal No. 154 of 2007 relates to right to tax and the statute involved is cap. 470. It has no nexus with the present case.

Civil application 808 of 2004. The case dealt with court and failure by Commissioner of Lands to register some titles. It has no application to this case.

I pray that the Notice of Motion of 17.8.2013 be allowed.

Miss Mwaniki for the Respondent

The respondent opposes the Notice of Motion. Replying affidavit of Joseph Ngugi of 16.9.2013 and further affidavit of 23.10.2013.

Applicant's case challenges the action of the Commissioner in depositing the vehicle and not the form of the notices.

Order 53 Civil Procedure Rules a party cannot rely on any ground other than those set out in the statement of facts. The issues raised on the form had not been set out in the statement, nor is the issue of liability of the Commissioner under section 17 of the Cap. 472 and also section 106, 107 and 109 on redemption of the bonds was not set out in the statement of facts. I submit that those grounds which are introduced in the submissions should be disregarded.

The sugar was entered by JN1 on 16.9.2013. JN2 shows that the same was verified and released on 28.5.2013. On 30.5.2013, the respondent received information that there was sugar diverted into the market. The consignment had left and the respondent's officials moved immediately to trace the trucks. There were 4 trucks. The respondents to avoid the dumping of the sugar deposited the sugar at Changamwe by notices sought to be quashed. The deposit was done pending investigations.

Changamwe Municipal Parking. A customs area is anywhere the commissioner appoints and a commissioner can deposit in situ. I refer to section 2 of the definition of a customs warehouse as any place appointed by the commissioner.

On the night of 31.5.2013 when the trucks were deposited 2 trucks left the municipal parking and one of the trucks was KBL 377A/ZD 3363 which is the applicant's truck. The officers moved to trace the trucks and the applicant's truck on 6.6.2013 found on its way trying to leave Mombasa just before Mariakani area and it had emptied the sugar. The sugar had already been diverted in accordance with the intelligence reports that we had received. Again the officers deposited the vehicle by notice 196516 at Kilindini Port.

Respondent is a statutory body established under the KRA Act Cap. 469 as the sole agent of the government for the collection of all revenue. KRA enforces the provisions of the E.A. Community Customs Management Act, an Act of the community for the management and administration of customs. The commissioner of customs is appointed under the Act for purposes of dealing with all customs matters in Kenya.

Sugar was entered for transit and not for local use. It originated from Bangkok in Thailand and was destined for Uganda through Kenya. The Act allows such transit and duty is paid at the final port of destination. The sugar is then released into the market without payment of duty. Their act of dumping goods which customs has not been paid renders the goods un-customed goods. Section 2 of the E.A. Community Act includes such goods as dutiable. Both limbs of un-customed goods are satisfied. The act became an offence under the Act – sections 200 and 203 (f) of EACMA and Regulation 104 paragraph 22 and 23 of the E.A. Community Management Act Regulations.

The respondents detaining the vehicles were guided by section 189 of EACMA, section 211 and section 213 (1). These provisions provide for a deposit of a vehicle that is used for a customs offence as liable to forfeiture.

Notice of deposit. The Notice used only makes provision for aircraft and vessel. The forms were in use under customs and Excise Act Cap. 472. since coming into effect of EACMA in January 2005, there is a saving clause under section 252 (5) which provides that subsidiary legislation by parties states to remain in force until new legislation is made. The form used is the one in force until a new form is formulated for that purpose.

I rely on authority

- MSA HC Petition 26 of 2013; it involved one of the 4 trucks involved in this case per Maureen Odero, J.
- Nakuru H.C. Petition No. 5 of 2012 trucks seized for attempting to divert goods – revenue provision to be strictly cautioned.
- H.C. Petition 322 of 2011, Nairobi – commissioner of customs had power to seize at paragraph 31, 32, 22, 34 and 35 of the judgment.

Applicants at paragraph 12-14 of the affidavit suggest that the respondents are responsible for loss of the cargo. It has not been shown how the respondent were culpable. On the night that the goods disappeared they had been deposited in the yard and they were out under escort. The tracking cargo system only shows that the goods keep the transit route. If the goods are diverted on transit route, there is no way that the respondents' officer can know that.

Paragraph 19 of the replying affidavit. The respondent is conducting investigations to establish whether the respondents' officers and police officers were involved. If they are found to be involved, it does not take away the technicality under the EACCMA. It would be another process altogether. I refer **R v. Commissioner of Lands, ex p. Somken Petroleum Co. Ltd** (2005) eKLR fraudulent transaction relating to stamping documents at commissioner of lands. Even if there was evidence that officials were involved, the revenue must be collected, the officials could be prosecuted in the criminal process. The revenue must be collected.

Judicial Review is involved in the process rather than the decision's merit. H.C. Misc. 1756 of 2005, **Coastal Bottlers Ltd v The Commissioner of Domestic Taxes; Pili Management Consultants Ltd v.**

Commissioner of Income Tax, Civil Appeal No. 154 of 2007.

The seizure is wrongful and not justifiable is the only ground cited by the applicant. The court shall not adjudicate the merit of the decision. The respondents' actions were intra vires.

The reply to submissions by counsel

- 1. The issue of the forms of notice are an afterthought. There was no need to give notice as the vessel was seized in the presence of the owner – I rely on section 214 of the EACMA. Annexure JNO4 an acknowledgment by the applicant that he received the original notice of deposit. This took away the need to issue a notice of deposit.*
- 2. The name of the vessel is clearly indicated by the number plate of the motor vehicle as set out in the notice.*
- 3. Commissioner of customs could have offset the rates using the bonds by agents in the matter the powers of realizing the bonds and the deposit of the trucks can be exercised together or separately in the discretion of the commissioner. The bonds may not be sufficient to cover the debts and the forfeiture of the vehicle is punitive but the commissioner may also auction it to recover the debts. The case of Emanuel Hatangi Mbabazi v. Commissioner of Customs and Excise Mombasa HC Misc Case No. 138 of 2003 is distinguishable, the applicant demonstrated that the goods left Kenya. In this case there has been no attempt to challenge the forfeiture. All the applicant states is that they were not involved.*

We pray for the dismissal of the Notice of Motion with costs as it intended to delay the respondents in exercising its powers.

Mrs. Nyange in reply

- 1. Bonds*

Section 109 – the commissioner has a duty to request for the payment for the payment of the tax in respect to the uncustomed goods. The fact that the bond could have been issued by the agents to secure many transactions does not excuse the respondent. The respondents should have called for the bonds.

- 2. Notice to be quashed. The notice under Cap. 472 did not have provision for the vehicle. The notice could not have been used for detention of the vehicle.*
- 3. The lapse by customs officer ought not to be visited upon the applicant. They should have escorted the vehicle throughout until the vehicle left the country.*
- 4. JN2 gives the names of the officers escorting the vehicle.*
- 5. Powers of Commissioner to declare any place a warehouse. The respondents have not pointed to a law giving the commissioner power to declare any place a customs warehouse. The Changamwe Municipal Parking could not have qualified as a customs warehouse.*
- 6. I reiterate the written submissions.*
- 7. H.C. 36 of 2013 Mombasa, **Kipyeko v. KRA** was a preliminary ruling on whether mandatory injunction could issue against the commissioner on detained trucks.*
- 8. A lapse by the commissioner or her officers cannot be visited on the applicant.”*

7. The ex parte applicant set out the following issues for determination:

- 1. Whether or not Notices of Goods Deposited in Warehouse Nos. 196514 and 196516 issued on the 31st day of May 2013 and 6th June 2013, respectively, were properly and procedurally issued?*
- 2. Whether or not the Commissioner's decision to seize and retain Motor Vehicle Registration Number KBL 377A – ZD 3363 at the Kilindini Custom Warehouse was arbitrary and in bad faith?*
- 3. Whether or not orders prayed for in the said application can issue in the circumstance of the case?*

The applicant pleaded in his Statement under the grounds upon which the relief is sought that the seizure

of the motor vehicle was discriminatory, wrongful and unjustifiable. With respect, the primary issue for determination is whether the action of the respondent in seizing the motor vehicle the subject of these proceedings was ultra vires, unreasonable or arbitrary and in bad faith, and therefore liable to be remedied by the judicial review orders sought. Whether to grant or decline the orders sought is consequential to the determination of this issue.

8. With respect, the issue of the form and procedure of the notices of deposit was not pleaded in the Statement and, in accordance with Order 53 rule 4 of the civil procedure rules cannot be raised without leave of court. In any event there was a short answer to the objection that the notices were defective that the said notices had sufficient information on the motor vehicle deposited and the reasons for the deposit of the motor vehicle on the two occasions, respectively, for ‘*pending investigations*’ and ‘*Diversion of transit sugar into the local market*’, the first notice being received by the applicant’s driver and second one being served on the applicant himself.

In accordance with section 214 of EACCMA notice of seizure is not necessary where the seizure is done in the presence of the owner of the vessel. More importantly, the notice is prescribed to “**give notice in writing of the seizure and of the reasons...**”

*“214. (1) Where any thing has been seized under this Act, then, unless such thing was seized in the presence of the owner of the thing, or, in the case of any aircraft or vessel, of Procedure on seizure the master thereof, the officer effecting the seizure shall, within one month of the seizure, **give notice in writing of the seizure and of the reasons to the owner or, in the case of any aircraft or vessel, to the master:**”*

Looking at the notices the subject of these proceedings, the object of section 214 of the Act was clearly fulfilled and there is no merit in the submission that the notices were defective.

10. There is statutory authority to seize a vehicle liable to forfeiture because of its use in the transportation of goods which are liable to forfeiture under the Act or reasonably believed to be liable to forfeiture. Section 213 of the Act provides for seizure in the following terms:

*“213. (1) An officer or a police officer or an authorised public officer may **seize and detain** any aircraft, vessel, **vehicle**, goods, animal or other thing **liable to forfeiture under this Act** or which he or she has **reasonable ground to believe is liable to forfeiture**; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.”*

It is clear that the standard for test for seizure is pegged at the lower ‘reasonable ground to believe’ not the certainty of **liability** to forfeiture. The question in this case therefore is whether the vehicle the subject of these proceedings was liable to forfeiture or, alternatively, whether the respondent’s officer had reasonable grounds for believing the vehicle was liable to forfeiture.

11. If the vehicle was used in the transport of goods liable to forfeiture, the vehicle would itself be liable to forfeiture, and the respondent’s officers need not demonstrate reasonable grounds for believing the vehicle to be liable. Section 211. (1) of EACCMA provides that –

*A vessel of less than two hundred and fifty tons register, and **any vehicle**, animal, or other thing, **made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall itself be liable to forfeiture.***

12. Was the motor vehicle ‘**made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act**’ so as to make it liable to forfeiture? Section 210 of the Act provides for the goods liable to forfeiture to include uncustomed goods. It is common ground that the motor vehicle was loaded with transit sugar destined for Uganda; that the sugar was off-loaded into the local market in unclear circumstances which the applicant refers to as ‘pilferage by the respondent’s officers and police officer’ and the respondent ‘diversion of transit sugar

into the local market'. The applicant's pilferage theory is unpalatable in view of lack of any evidence that the owner of the consignment destined to Uganda has claimed his sugar or sought to recover its value from the applicant or the respondent. Be that as it may, there is a clear case of 'restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise' under section 210 (b) and 'uncustomed goods' under section 210 (c) of EACCMA both which are liable to forfeiture.

13. Pursuant to section 211 of the Act, any vehicle that transports goods liable to forfeiture is itself liable to forfeiture. Without prejudging the merits of the case, there is a *prima facie* case of transportation of uncustomed goods, and the vehicle which was used in the transport is accordingly liable to forfeiture. But that is a decision for the criminal court which deals with the trial of any person related to the restricted goods or uncustomed goods or the civil court which deals with the commissioner's application for condemnation of the vehicle liable to forfeiture. It is clear that in the circumstances of the case, the respondent's officers were entitled to seize the vehicle as a thing liable to forfeiture having been used to transport restricted goods or uncustomed goods, and, most definitely, the officers also had reasonable grounds for believing that the vehicle, having transported uncustomed sugar in transit which was offloaded into the local market, was liable to forfeiture. I do not accept the contention by the applicant that there were no reasonable grounds for believing that an offence had been committed.

14. That the vehicle had disappeared from its legal deposit site at the Changamwe Municipal Parking on the night of the 31st May 2013 only to be traced five days later in Mombasa without the transit would provoke reasonable grounds for believing that the vehicle had off-loaded the sugar in the local market rather than as suggested by the applicant that it had delivered the sugar to its destination in Kampala, Uganda. The fact that the vehicle was fitted with the Electronic Cargo Tracking System (ECTS), which the respondent concedes but states that it only tracked deviation from the transit route and could not track the off-loading, does not mitigate against the status of the offloaded sugar as uncustomed goods therefore liable to forfeiture, and the transporting vehicle with it. It may point to the negligence or involvement of the respondent's officers and police officers escorting the cargo in the diversion of the transit sugar, but it does not take away the liability of the applicant's vehicle.

15. On the allegations of involvement of the officers of the respondent and police officers in the alleged diversion of sugar, the matter was the subject of investigations by the respondent and criminal charges may be preferred against the culpable officers. However, that is a matter for the criminal trial court to deal with at the appropriate time. I agree with the principle enunciated by Lindley, L. J. in **Scott v. Brown, Doering, McNab and Co.**, (1892) 2 QB 724, quoted in (*R v. The Commissioner for Lands ex p. Somken Petroleum Company Ltd.* Nairobi HC Misc. Appl. 807 of 2004) that:

"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 duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the, evidence adduced by the plaintiff proves the illegality, the Court will not assist him."

16. The ex parte applicant has, however, not been proved to have been involved in any customs offence, and his driver and or other persons involved have similarly not been charged and convicted of any customs offence, although it was submitted that the action of diverting uncustomed goods into the customs territory amounted to an offence under section 200 and 203 of the EACCMA and regulations 104 (22) and (23) of the EACCMA Regulations. However, as shown below, the liability to forfeiture does not depend on the knowledge or involvement of the owner of a motor vehicle in the customs offence. Liability to forfeiture depends on the use of the motor vehicle in a customs offence, not on the knowledge or involvement of the owner of the vehicle in the customs offence.

17. The Commissioner has power under section 219 of EACCMA to compound an offence but this can only be done with the person involved admitting the offence. There is legal possibility that the compounding of the offence may be done by the Commissioner without agreement of the ex parte applicant and therefore the limb of the Prayer No. 1 for prohibition against the Commissioner to prohibit

his compounding of offences against the applicant has no merit. Section 219 (1) and (2) provides for this method of settlement of cases by the Commissioner as follows:

“219. (1) The Commissioner may, where he or she is satisfied that any person has committed an offence under this Act in respect of which a fine is provided or in respect of which any thing is liable to forfeiture, compound the offence and may order such person to pay a sum of money, not exceeding the amount of the fine to which the person would have been liable if he or she had been prosecuted and convicted for the offence, as the Commissioner may deem fit; and the Commissioner may order any thing liable to forfeiture in connection with the offence to be condemned.

(2) The Commissioner shall not exercise his or her powers under subsection (1) unless the person admits in a prescribed form that he or she has committed the offence and requests the Commissioner to deal with such offence under this section.”

18. Moreover, that the respondent had power under section 109 of EACCMA to call in or realise the security bond for loss of revenue on transit goods should they be diverted does not take away the liability to forfeiture which is also a punitive measure under the Act. As the remedy of forfeiture is available under the statute, the respondent cannot be restrained from exercising the forfeiture option or both forfeiture and bond recovery where the amount of tax due may outstrip the value of the bond or the forfeited goods or vessel.

19. The allegation of discrimination has not been proved. There was evidence that three of the four trucks which were hired to transport the transit sugar were deposited pending investigations into information about diversion of sugar into the local market on the 31st May 2013. Two of those left the site of deposit and the applicant’s truck was traced at Mariakani on the 6th June 2013 with its sugar off-loaded. One other truck was seized and was the subject of court proceedings in Mombasa HC Petition No. 36 of 2013. I do not find that there is evidence of discriminatory treatment of the applicant when he does not produce evidence as to what became of the other two trucks, if they were ever seized at all.

20. It is trite law that Judicial Review is concerned with the process of decision making and not with the merits of the decision itself. There is an elaborate procedure for the processing of claims on seized property under section 216 of the EACCMA and it is trite that where a statute has made provisions for dealing with disputes, that procedure should be strictly followed. See the case of ***Speaker of National Assembly v. James Njenga Karume(2008) 1KLR EP 425*** . Section 216 (4) of the Act provides significantly as follows:

4. Where any proceedings have been instituted in accordance with this section, then—

(a) if the court is satisfied that a thing was liable to forfeiture under this Act, the thing shall be condemned;

(b) if the court is not so satisfied, the thing shall be released to the claimant:

Provided that the court shall not release the thing to the claimant unless it is satisfied that the claimant is the owner or, by reason of any interest in the thing, is entitled to the possession thereof and if the court is not so satisfied, the thing shall be condemned as if no claim had been made.

21. The ex parte applicant and the respondent are respectively entitled under section 216 of the EACCMA to institute proceedings for recovery and the condemnation of the seized thing. It is no defence as pleaded in the Statement that the applicant as the owner of the vehicle was not involved in any criminal offence under the relevant Acts and regulations and therefore his motor vehicle should not be liable to seizure and forfeiture. Section 217 of EACCMA expressly provides on this plea as follows:

*“217. (1) Where anything has been seized under this Act, as being liable to forfeiture, then the condemnation of the thing shall in no way be affected by the fact that **any owner of the thing was in no way concerned with the act which rendered the thing liable to forfeiture.**”*

22. Moreover, although the issue was not taken up before me, I have noted the decision of **Crywan Enterprises Ltd v. KRA**. Nairobi HC Petition No. 322 of 2011 (Majanja, J), with whom I agree, confirming the constitutionality of sections 210 and 211 on respectively the type of goods and vessels liable to forfeiture. In addition, as shown in section 215 of the Act, forfeiture is by order of the court upon conviction of **any person - not necessarily the owner of the thing** - for an offence under the Act for which the thing is liable to forfeiture or by condemnation by a civil court under section 216 of the Act. Section 215. (1) provides that - *‘Where any person is prosecuted for an offence under this Act and any thing is liable to forfeiture by reason of the commission of the offence, then the conviction of the person of the offence shall, without further order, have effect as the condemnation of the thing.*

23. As demonstrated above, the action to seize the motor vehicle and the notices issued for that purpose which are impugned by these proceedings were not successfully challenged under the tests of judicial review including illegality, procedural unfairness, unreasonableness and legitimate expectation. See **R. v. Attorney General and Anor**. (2006) 2 EA 265. In the words of the judges (Nyamu & Wendo, JJ.) in **Coastal Bottlers Ltd v. The Commissioner of Domestic Taxes**, Nairobi HC Misc. Application No. 1765 of 2005, I find that –

“there is no public duty or statutory power which the Respondent has failed to exercise in respect of the prayers for prohibition and mandamus. In respect of certiorari, there is no evidence of unreasonableness, bad faith, malice or illegality established as against the Respondent. The Notice of Motion failed to satisfy the requirements of Order 53 Civil Procedure Rules.”

24. Having found that the respondent acted reasonably within its statutory authority, without arbitrariness, bad faith, bias or discrimination, there is no occasion for the grant of the judicial review orders sought. It must be accepted that where a statute grants a power to a body, the court will not interfere with its exercise unless it is exercised without the necessary statutory basis or it is being exercised oppressively.

25. While the *intra vires* or the statutory basis for the exercise of the respondent’s power to seize the applicant’s motor vehicle has amply been demonstrated, the execution of this power is likely to occasion loss and damage that may be irrecoverable should the applicant eventually in his claim for return of the vehicle under section 216 of the Act or if the applicant or other persons involved are acquitted of any customs offence which make the vehicle liable to forfeiture.

26. In his further affidavit, the applicant has alleged that the motor vehicle had been vandalised as the respondents’ officers removed the electronic gadget for tracking the movement of the vehicle, the Electronic Cargo Tracking System (ECTS). In his further affidavit, the respondent’s officer has denied that the gadget had been removed and asserted that it was intact and in working order. While this is a matter for trial court dealing with the question of commission of offence and liability to forfeiture, it demonstrates the risk that the vehicle faces during the continued detention while awaiting a determination thereon in accordance with the Act. Section 222 provides that proceedings for such determination may be filed any time within 5 years after the alleged offence, as follows:

“222. Proceedings for an offence under this Act may be commenced, and anything liable to forfeiture under this Act may be seized, within five years of the date of the offence.”

The respondent has not as at the time of these proceedings filed any criminal charges against the ex parte applicant, his driver or its officers who the ex parte applicant claims were involved. Nor has any proceedings for the condemnation of the vehicle by the Respondent under section 216 of the Act been instituted. It may be because of the stay orders of this court made upon the grant of leave to file for judicial review proceedings on the 6th August 2013.

27. In these circumstances, it must be the reasonable fear of all the parties concerned that with the continued detention of the vehicle with the attendant risk of damage by human intervention and the elements, it may so deteriorate in condition as to be of little value both to the respondent in meeting the customs when the vehicle is finally forfeited and to ex parte applicant in the state that it shall be at the

time it is eventually cleared of the threat of forfeiture, depending on the eventual outcome of the trial on forfeiture liability. The court considers that the forfeiture of the vehicle is mainly a punitive prescription although it may well be supplemental to the bond given under the Act for shortfall on the customs due for the diverted goods. A court of justice must in these circumstances aim to restore the vehicle to the owner to avoid its wastage, subject to its availability to the respondent should it be declared forfeited through the procedure prescribed under the EACCMA. It would be oppressive to the ex parte applicant if he were to eventually succeed in his claim only to lose the whole value of his motor vehicle on account of its long detention and attendant deterioration.

28. Accordingly, for the reasons set out above, I consider that the justice of the case requires, and the court has inherent jurisdiction in the interests of justice to make, the following orders on the ex parte applicant's Notice of Motion dated 7th August 2013:

- a. **The judicial review orders of certiorari, prohibition and mandamus sought in the notice of motion dated 7th August 2013 are declined.**
- b. **Subject to the ex parte applicant depositing the registration and ownership documents for the motor vehicle the subject of these proceedings, and subject to the taking of photographs of the motor vehicle by the scene of crime personnel for purposes of their use under section 78 of the Evidence Act in any criminal proceedings that may be brought in relation to any customs offence involving the motor vehicle, the respondent will release the said motor vehicle to the ex parte applicant.**
- c. **The respondent will within the time permitted by the EACCMA Act file proceedings for condemnation of the motor vehicle and or prosecute the ex parte applicant and or his driver employee and or other persons involved for a determination of criminal liability for an offence under the Act and therefore forfeiture of the motor vehicle. In default, the seizure of the vehicle will be lifted and the registration and ownership documents aforesaid restored to the ex parte applicant.**
- d. **The applicant may also file proceedings under EACCMA for recovery of the motor vehicle.**
- e. **There shall be liberty to apply.**
- f. **The ex parte applicant will pay to the respondent the costs of this suit.**

Dated, signed and delivered this 18th day of July, 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

No appearance for the Ex parte Applicant

Mr. Kagucia for Miss Mwaniki for the Respondent

Ms Linda - Court Assistant