



## REPUBLIC OF KENYA

### High Court at Nairobi (Nairobi Law Courts)

#### Petition 322 of 2011

CRYWAN ENTERPRISES LIMITED .....PETITIONER

AND

KENYA REVENUE AUTHORITY..... RESPONDENT

#### JUDGMENT

##### Introduction

1.The issue for determination in this petition is whether the respondent's action of impounding and detaining the petitioner's imported goods pending confirmation of payment of customs duty infringes on the petitioner's right to property secured by **Article 40** and whether the provisions of the ***East Africa Customs Management Act ("EACCMA")*** are unconstitutional to the extent that they permit such seizure.

2.The petitioner is a limited liability company incorporated in Kenya under the provisions of the ***Companies Act (Chapter 486 of the Laws of Kenya)*** engaged in the business of manufacture and distribution of wines and spirits.

3.The respondent, the Kenya Revenue Authority ("KRA") is incorporated under the provisions of **section 3** of the ***Kenya Revenue Authority Act (Chapter 469 of the Laws of Kenya)*** and is responsible for the collection of taxes in the country. The Commissioner of Customs, who is responsible for the collection of customs duty under the ***East African Community Customs Management Act ("EACCMA")*** is an officer of KRA and act's on its behalf pursuant to the said Act.

##### Background

4.This matter stems from events taking place in April of 2011 when the petitioner imported 160 drums of neutral alcohol (hereafter referred as "the consignment") from India for its use in the ordinary course of business. The drums were packed in two containers. After the clearing processes from the Port of Mombasa on 30<sup>th</sup> May 2011, the petitioner's avers that the cargo was then transported by road to a rented go-down located at Mlolongo along the Nairobi/Mombasa road where the drums were offloaded for safe keeping.

5.In September 2011, the petitioner hired a truck from a transporter, *Toror Pharmacy*, to transport the consignment from the go-down to the petitioner's factory situated in Embakasi. On 18<sup>th</sup> September 2011, the consignment was impounded by police officers on claims of failure to produce import documents for the consignment. The consignment was released by police officers but in a surprise turn of events the respondent's officers arrived and sealed the consignment.

6. On 21<sup>st</sup> September 2011 addressed to the petitioner's director, the Kenya Revenue Authority ("KRA") officers issued a '**Notice of Goods Deposited in Customs Warehouse**' indicating the reason for arrest and deposit at the customs warehouse as '**pending confirmation of payment of taxes.**'

7. The notice was followed by another letter dated 12<sup>th</sup> October 2011 demanding tax amounting to Kshs. 8,974,875.00. This claim was resisted by the petitioner through its advocate's letter dated 3<sup>rd</sup> November 2011 in which it denied that the ethanol was smuggled and stated that the seizure and detention of the consignment was unjustified, unlawful and in breach of the petitioner's rights.

8. The respondent duly replied to the petitioner's advocate by the letter dated 15<sup>th</sup> November 2011. In the letter, KRA stated that it had conducted investigation and established the following;

*1. 1\*40 container number 403976/US 4310 on board truck number KBH019Z/ZD1076 was ferrying 160 drums of 250 litres STC ethanol. Further investigations discovered 22 more drums with similar marks and numbers as those impounded at the premises leased by your client this bring(ing) the total number of drum to 182.*

*2. Customs entry number 2011MSA2853356 was availed by the imported as proof of importation of the said consignment. The entry dated 20<sup>th</sup> May 2011 was used to clear 2\*20 containers of ethanol. The marks and numbers on the drums found in the factory and those detained at the customs warehouse.*

*From the foregoing and given the period the good were kept at the alleged godown, we arrived at the finding that the consignment is not the same since there is no sufficient proof*

- On the acquisition, procurement or purchase of detained ethanol*
- Of any duty and taxes paid for the said consignment*

9. The petitioner avers that the aforesaid reasons are unreasonable and cannot provide a lawful excuse for condemning the consignment as smuggled goods.

#### **Petitioner's Case**

10. The petitioner's case rests on the amended petition filed on 24<sup>th</sup> May 2012 and the supporting affidavit of Dr Mbutia and his supplementary and further affidavit sworn on 15<sup>th</sup> October 2012 and 19<sup>th</sup> December 2012 respectively. The petitioner has also filed skeleton submissions dated 19<sup>th</sup> December 2012.

11. The petitioner asserts that the action by KRA's officials to detain its property is an infringement on its right to property secured under **Article 40** and that the seizure and confiscation of the petitioner's property merely on suspicion that either the property is smuggled or that import duty or any form of tax has yet to be paid to the respondent is unreasonable, draconian, capricious and unjust.

12. The petitioner submits that KRA failed to abide by the laid down statutory mechanisms of seizure of goods under **section 214** of **EACCMA** and in particular, that the respondent failed to give notice of seizure and reasons for the seizure as required by the Act.

13. Mr Kabugu, learned counsel for the petitioner, submitted that the petitioner was unfairly treated contrary to **Article 47** as it supplied documentation confirming that it had paid duty and instead of the respondent dealing with the veracity of the documentation, it instead raised the issue of discrepancy of numbers reflected in the documentation and those of the consignment stating that these did not match universal classification marks. It is the petitioner's case that consignment bore the correct marks.

14. The petitioner claims that the reasons given for the seizure and detention of the consignment are unreasonable and as a result of the KRA's action, it has incurred tremendous losses and demands damages for the direct financial loss occasioned by the loss of the consignment whilst in its custody. The

petitioner also claims compensation for further loss of money in expected profits from eventual sale of the consignment.

15. The petitioner seeks the following reliefs in the amended petition;

*a) The court be pleased to declare that seizure and detention of the petitioners property (160 drums “250 litres of neutral alcohol) deposited at customs warehouse number 209008 by the respondent is unlawful and ultra vires Article 40 of the Constitution.*

*b) The court be pleased to declare that sections 210 and 211 of the East African Community Customs Management Act are ultra vires Article 40(2) of the Constitution of Kenya to the extent that they permit seizure and forfeiture of private property outside the parameters prescribed under article 40(6) of the Constitution of the Republic of Kenya and are therefore null and void to the extent of such inconsistency.*

*c) The Court be pleased to declare that sections 196, 197, 198 and 200 of the Customs and Excise Act (Cap 272 of the Laws of Kenya) are ultravires Article 40(2) of the constitution of Kenya to the extent that they permit seizure and forfeiture of private property outside the parameters prescribed under Article 40(6) of the Constitution of the Republic of Kenya and are therefore null and void to the extent of such inconsistency.*

16. The petitioner also decries the fact that despite the court orders of 23<sup>rd</sup> December 2011 in which the court directed the release of the consignment, the respondent failed to honour the court order despite it furnishing the required security and paying for the warehouse storage charges on claims that the consignment had been lost or stolen.

### **Respondent's case**

17. The respondent opposed the petition on the basis of the affidavits sworn by its officers; Two affidavits of Josephine Manyasi sworn on the 2<sup>nd</sup> February 2011 and 9<sup>th</sup> February 2011, further supplementary affidavit sworn by Joseph Kaguru, on 9<sup>th</sup> July 2012 and 12<sup>th</sup> October 2012 and an affidavit sworn by Inspector Mumanyi on 12<sup>th</sup> November 2012. The respondent relies on written submissions dated 15<sup>th</sup> October 2012.

18. KRA's case is that its actions were anchored in the relevant provisions of **EACCMA**. It contends that the consignment was seized upon reasonable suspicion of smuggling and that the goods were detained pending confirmation that all duties in respect of the subject consignment had been paid. The respondent denies that it breached the provisions of **EACCMA** or that the provisions of the Act are unconstitutional.

19. KRA further contends that the petitioner failed to give satisfactory explanations on why the consignment appeared to be coming from a location beyond their go-down at the time it was intercepted and the discrepancies identified in the Customs entry number. It also avers that seizure was triggered by a tip-off from police officers who informed it that they had intercepted a truck carrying a consignment of uncustomed goods. That even though documentation was produced by the petitioner to support payment of duties, there was discrepancies between the numbers in the stickers attached to the entry and consignment whereupon it raised a tax demand with the petitioner. Josephine Manyasi also deponed that a laboratory analysis revealed that the consignment contained a higher volume of ethanol which attracted high import duty.

20. KRA states that there was no need to issue the notice under **section 214** of **EACCMA** as the act of verification and deposit of the company's consignment was done in the presence of its directors. The section is one that provides for procedure on seizure and stipulates that within one month of the seizure a notice in writing of the seizure be given to the owner of the goods containing reasons for the seizure where the seizure and verification is done in the absence of the owner.

21. Ms Mwaniki, learned counsel for the respondent, pointed out that in any case the onus to prove that

duty has been paid lay with the petitioner and the petitioner having failed to discharge this burden, the respondent duly demanded in accordance with the provisions of **EACCMA** which entitle it to recover the tax due.

### **Determination**

22.I will confine my determination to matters necessary for the settlement of the constitutional issues set out in the prayers sought by the petitioner as follows;

(a) Whether **sections 210** and **211** of the **EACCMA** are *ultra vires* **Article 40(2)** and **40(6)** of the Constitution.

(b) Whether the seizure and detention of the petitioner's consignment was unlawful and unreasonable.

### **Constitutionality of provisions of EACCMA**

23.I would like to point out that the provisions of the **Customs and Excise Act (Chapter 472 of the laws of Kenya)** do not apply to or take precedence over matters dealt with by **EACMMA** since it came into force in January 2005 by virtue of **section 253** of **EACMMA**. **Section 253** provides that, "**This Act shall take precedence over the Partner States' laws with respect to any matter to which it provisions relate.**" I shall therefore limit my findings to the provisions of the **EACCMA**.

24.Before I proceed with the analysis and determination I shall set out the pertinent constitutional and legal provisions under review. **Article 40** provides as follows;

*Protection of right to property.*

**40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—**

*(a) of any description; and*

*(b) in any part of Kenya.*

**(2) Parliament shall not enact a law that permits the State or any person—**

**(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**

**(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).**

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired. [Emphasis mine]

25. The provisions of *EACCMA* impugned by the petitioner provide as follows;

**Goods liable to forfeiture.**

210. In addition to any other circumstances in which goods are liable to forfeiture under this Act, the following goods shall

be liable to forfeiture—

a) any prohibited goods;

b) any restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise;

c) any uncustomed goods;

d) any goods which are imported, exported or transferred, concealed in any manner, or packed in any package, whether with or without other goods in a manner appearing to be intended to deceive any officer;

e) any goods which are imported, exported or transferred contained in any package of which the entry, application for shipment, or application to unload does not correspond with such goods;

f) any goods subject to Customs control which are moved, altered, or in any way interfered with, except with the authority of any officer;

g) any goods in respect of which, in any matter relating to the Customs, any entry, declaration, certificate, application or other document, answer, statement or representation, which is knowingly false or knowingly incorrect in any particular has been delivered, made or produced; and

h) any goods in respect of which any drawback, rebate, remission or refund of duty has been unlawfully obtained.

**Section 211** goes on to state as follows;

**Vessels, etc., liable to forfeiture.**

211. (1) 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.

(2) An aircraft or any vessel of two hundred and fifty tons register or more made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall not itself be liable to forfeiture but the master of any such aircraft or vessel commits an offence and shall be liable to a fine not exceeding ten thousand dollars; and such aircraft or vessel may be seized and detained until the fine is paid or security given.

(3) Where any vessel, vehicle, animal, or other thing, is liable to forfeiture under this Act, then the tackle,

apparel, furniture, and all other gear, used in connection therewith shall also be liable to forfeiture.

26. It is necessary at this stage to set out briefly the principles applicable when the court is called upon to declare statutory provisions unconstitutional. It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner. In considering whether an enactment is unconstitutional the court must look at the character of the legislation as a whole, its purpose and objects and effect of its provisions (see *Ndyanabo v Attorney General of Tanzania (2001) 2 EA 485*, *Joseph Kimani and Others v Attorney General and Others Mombasa Petition No. 669 of 2009 [2010] eKLR*, *Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)*), *Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)*).

27. The petitioner has challenged the constitutionality of **sections 210 and 211** of *EACCMA* on the basis that they permit arbitrary seizure of private property contrary to **Article 40(2)**. Mr Kabugu, contended that there must be a finding, even on an interim basis that the property was unlawfully acquired before it can be taken away.

28. The question for consideration is whether *EACCMA* contains the kind of provisions that are prohibited by **Article 40(2)(a)** in the sense that they constitute or permit arbitrary taking of property. **Article 40(2)** guards against 'arbitrary' deprivation of property. Counsel for the petitioner submitted that arbitrary deprivation of property involves random deprivation without lawful justification. According to the *Black's Law Dictionary, 9<sup>th</sup> edition*, at page 119, the term 'arbitrary' is described as **"1. Depending on individual discretion; determined by a judge rather than by fixed rules, procedures, or law. 2. (Of a judicial decision) founded on prejudice or preference rather than on reason or fact."** While the *Concise Oxford English Dictionary, 12<sup>th</sup> edition, 2011* defines the same term as **"based on random choice or personal whim."** In simple terms where the basis of deprivation is not founded on law or predetermined objective criteria or is done without procedural propriety it is ipso facto arbitrary.

29. In the case of *First National Bank of SA Ltd v Commissioner for South Africa Revenue Services and Another CCT 19/01 [2002] ZACC 5*, the South Africa Constitutional Court considered the meaning of **arbitrary** in the property clause in the Constitution. Ackermann J., concluded that a deprivation of property is arbitrary if the law in issue either fails to provide a sufficient reason for the deprivation or is procedurally unfair. The Court held that to determine whether there is sufficient reason for a permitted deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law. If the purpose of the law bears no relation to the property and its owner, the provision is therefore arbitrary.

30. In order to determine whether **sections 210 and 211 of EACCMA** amount to unconstitutional deprivation of property, the provisions must be considered in light of the entire Act. The impugned sections do not exist in isolation, they deal with goods liable to forfeiture and are part of a statute enacted to, **"make provisions for the management and administration of Customs and for related matters."** The collection of taxes is an important component of the modern state and the Constitution of Kenya recognizes this fact by making provision for charging and collection of taxes in **Chapter Twelve** of the Constitution. The statutes governing the collection of taxes must of course be consistent with the letter and spirit of the Constitution and must be applied accordingly (see *Samura Engineering Limited and Others v Kenya Revenue Authority, Nairobi Petition No. 54 of 2011 [2012] eKLR*).

31. *EACCMA* deals with the imposition and collection of duty on goods imported into the country. It contains various provisions aimed at controlling the movement of imported goods until duty has been paid. In order for KRA to collect the duty payable, it may be necessary to examine and verify the goods. The duty is assessed on the basis of the value, character and quantity of the goods and once the goods are beyond KRA's reach it may be difficult to collect the duty. Therefore an essential feature of the Act is to keep the goods within a controlled environment until duty is paid. This includes controlling the manner in which the goods are stored and transported within the country and ensuring that goods do not enter the country without payment of duty. Thus the Act is replete with provisions that govern the storage and

movement of goods until duty is paid. The Act also contains provisions that are aimed at preventing smuggling and evasion of customs duty.

32. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another* (supra at para 14), the Court observed that the *Customs Act* was ‘premiered on a system of self-accounting and self-assessment’ and that there was no viable method by which the Commissioner could keep track of all imported dutiable goods and automatically collect the duty: ‘The Commissioner therefore verifies compliance through routine examinations and inspections and through action precipitated by suspected evasion.’ This feature of customs legislation is not uncommon world over. In *R v Lyon* [1906] HCA 17 O’Connor J., stated, in relation to the *Australian Customs Act of 1901* that, ‘[T]he whole policy of the Customs Act, as indicated by a number of sections, is that, from the time of importation until the time of paying duty, the customs shall not lose control of the articles imported. This is indicated directly in sec. 30, which provides that imported goods shall be subject to the control of the customs from the time of importation until delivery for home consumption or exportation. The object of that provision, if it were necessary to give any reasons for its enactment, is obvious; if once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them. The only security the customs authorities could have in such a case for the payment of duty would be in most cases the personal security of the importer. Therefore it is, if the Act is to be effective, that all through the dealings with the goods, from the time they are first imported until duty is paid, they must be kept under customs control.’ (See also *Gaertner and Other v Minister of Finance and Others* [2013] ZAWCHC.)

33. While a *prima facie* reading of the impugned provisions would seem to support the petitioner’s contention, these provisions are part of a statutory scheme aimed at efficient and effective collection of customs duty. Sections 210 and 211 form part of Part XVII of the Act titled, “*Offences, Penalties, Forfeitures and Seizures.*” Section 210 of EACCMA only sets out the kind of goods liable to forfeiture, it is not the section that empowers the respondent to arbitrarily take a person’s property nor does it deal with administration and enforcement of customs duty. Likewise, section 211 only sets out vessels which may be forfeited. Both sections deal with liability for forfeiture which implies that there must be a process for establishing liability hence one must look elsewhere in the statute to establish under what circumstances the goods and vessels are liable to forfeiture.

34. As part of the control measures to protect revenue and prevent smuggling Part XII of the EACMMA titled, “*Prevention of Smuggling*” sets out a raft of powers granted to police and customs officers to, inter alia, stop, search, detain and seize vehicle and other vessels conveying goods suspected of ferrying smuggled goods. Section 153 of Act permits officers to stop and search any vehicle upon ‘reasonable grounds’ and its states that, “An officer may, if he or she has reasonable grounds to believe that any vehicle is conveying any uncustomed goods whether or not in transit, or being transferred from one Partner State to another, stop and search any such vehicle; and for the purpose of that search, that officer may require any goods in that vehicle to be unloaded at the expense of the owner of the vehicle.” [Emphasis mine]

35. Section 213(1) goes further to state that, “An officer or a police officer or an authorized 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 has been, or is about to be instituted.”

36. The ability to seize and detain goods upon reasonable grounds is one of the powers conferred on police officers or public officials to seize goods liable for forfeiture. Without such a power, it becomes easy to evade payment of duties through smuggling. It is a power that falls within the scheme of the Act and without this power the purposes of the Act are diminished. I find and hold that power to seize goods on the basis of reasonable grounds provided in the Act is rationally connected to the purpose of the Act to secure and collect taxes. For without such a power, “once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them” and also collect taxes.

37. Section 214 of EACMMA sets out the procedure to be followed upon seizure. It provides that unless the seizure takes place in presence of the owner of the goods, the officer effecting the seizure shall within

one month of seizure give written notice of the seizure and reasons thereof to owner. Notice of seizure need not be given if the person is being prosecuted in relation to the seizure or the offence has been compounded. Under **section 215(4)** of *EACCMA*, the owner is also entitled to notify the Commissioner to claim the thing seized. Where a notice of claim has been given to the Commissioner, he may require the claimant to institute recovery proceedings.

38. What these provisions demonstrate is that forfeiture is not arbitrary but is subject to reasonable grounds taking the provisions of impugned sections within the context of the entire Act. Moreover, there is a procedure for determining the rights of a party whose property has been seized on account of suspicion of breach of the Act and for the Commissioner to secure the collection of taxes. This is consistent with the tenets of procedural fairness.

39. I therefore disagree with the petitioner's argument that suggests the impugned provisions give a *carte blanche* to the respondent's officers to arbitrarily seize private property. I do not find that **sections 210** and **211** of *EACCMA* unconstitutional or in violation of **Article 40(2)** in the manner suggested by the petitioner. In view of my findings, I do not think it is necessary to address the meaning of **Article 40(6)** of the Constitution.

### **Whether the seizure and detention was unlawful and unreasonable**

40. As I have found the provisions of the *EACCMA* are not unconstitutional, the next level of inquiry is to measure the conduct of the respondent against the statutory provisions to determine whether it is unlawful or unreasonable.

41. The petitioner has condemned KRA's actions as being high handed, arbitrary and unreasonable in so far as it was carried out pending investigation of payment of taxes or otherwise '*before ascertainment of wrong doing.*' To support this proposition, the petitioner relied on the case of *Mada Holdings Limited t/a Fig Tree v County of Narok, Nakuru JR No. 122 of 2011 [2012]eKLR*.

42. The respondent on the other hand has explained that although the petitioner had provided the customs entry number to support payment of duties in respect of the consignment, closer examination by its officials revealed discrepancies between the customs entry number and those submitted by the petitioner.

43. I am not concerned with the merits of the decision to subject the petitioner's consignment to forfeiture proceedings. What I am required to be satisfied is that the Commissioner's action of seizing the petitioner's consignment was reasonable in the circumstances. As I noted, **section 153** of *EACCMA* permits the respondent to stop and search any vehicle upon 'reasonable grounds.' **Section 213(1)** permits "*An officer or a police officer or an authorized 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 has been, or is about to be instituted.*"

44. **Rudd, J** in *Kagane and Others v Attorney-General and Another* [1969] 1 EA 643 explained what was meant by reasonable and probable cause in a case of malicious prosecution. The learned judge observed that, "*Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed... If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true ...*" (See also *Jacob Juma & Another v Commissioner of Police and Another*, Nairobi HCCC No. 661 of 2007 as per G.V. Odunga J.)

45. The assessment as to whether there was a reasonable basis for seizing the vehicle must be on the basis of the facts available on 18<sup>th</sup> September 2011. The basis for suspicion is set out in the deposition by Joseph Kaguru and the annexed statement by Sgt. Phillip Sang in which he states that the lorry carrying the petitioner's consignment KBH 091Z/ZD 1076 was intercepted along Mombasa Road following a tip-

off from an informer that it was carrying smuggled goods from neighbouring Tanzania. When the vehicle was impounded, the driver only had delivery notes and not import documents hence the necessity to impound and verify not only the contents of consignment but also the documentation.

46. It must be recalled that the systems of customs duty collection is ‘*premised on a system of self-accounting and self-assessment*’ and as provided by **section 232(a)** of *EACCMA* the onus of proving the place of origin of the goods or that proper duties have been paid is on the person claiming the seized goods. It is therefore not unreasonable to expect that the documents provided by the petitioner would at any rate have to be verified. It is for this reason that the Act provides for a period of one month in which time the Commissioner should give notice of seizure. **Section 214** of *EACCMA* allows the detention of a vehicle for a specific period.

47. I do not see anything unreasonable about the respondent acting on information from credible source and proceeding to detain the goods pending payment or proof of payment of duty. The Commissioner cannot be faulted for carrying out its mandate and absent any evidence of illegality or unfair administrative action or unreasonableness, the respondent was entitled to act as it did in the circumstances. I am satisfied that the respondent’s actions were reasonable and in accordance with the provisions of the law and do not amount to unfair administrative action within the purview of **Article 47** of the Constitution which provides that, “*Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*”

48. Regarding the failure to give the one month’s notice required by **section 214** of *EACCMA*, the receipt of the deposit for the consignment in the warehouse dated 21<sup>st</sup> September 2011 shows the address of the depositor as, “*AGNES MATU FOR CRYWAN ENT. LTD .....*” *prima facie* show that the consignment was deposited in the presence of the petitioner’s representative. The statement by Sgt. Sang confirms that the verification of the contents of the vehicle was done in presence of the directors of the petitioners on 21<sup>st</sup> September 2011. According to the letter dated 3<sup>rd</sup> October 2011 written by petitioner’s directors to the respondent, one of the directors, Agnes Matu, confirms that when she was called by her employees after the vehicle was impounded, she immediately went to the scene and thereafter proceeded with the officer following the truck to Nairobi Area Police Station where she recorded a statement. On the basis of these facts I conclude that the petitioner’s officers were present at the time of seizure therefore ousting the requirement of notice under **section 214** set out above.

### **Conclusion and disposition**

49. In summary I make the following findings;

(a) **Sections 210** and **211** of *EACCMA* which provide for forfeiture of goods and vessels are not *ultravires* **Article 40(2)** of the Constitution.

(b) The respondent’s action in seizing the petitioner’s goods was based on reasonable grounds and the manner of seizure did not contravene the provisions of *EACCMA*. In the circumstances I do not find any violations of the petitioner’s right to fair administrative action protected under **Article 47**.

50. The parties admit that the consignment was stolen from the respondent’s warehouse. As a result of this loss, I consequently discharged the guarantee issued to secure consignment as a conservatory measure pending the hearing and determination of the petition. The petitioner now claims damages as a result of the loss of the consignment. I have however consciously refrained from addressing this issue alongside issues of the tax amounts as these are not matters which are incidental to the enforcement of fundamental rights and freedoms under **Article 22**. The determination of liability for loss of goods and the damage occasioned to the petitioner by the said loss lies elsewhere.

51. This case was limited to determining whether the provisions of *EACMMA* were consistent with the Constitution. As to whether the basis for demanding taxes for the reasons set out in the Commissioner’s letter dated 15<sup>th</sup> November 2011 was correct, I would also draw the petitioner’s attention to the provisions of **section 127E (1)** of the *Customs and Excise Act* which establishes an Appeals Tribunal for

the purposes of hearing appeals on disputes arising from the decisions of the Commissioner or a person authorised by him, or the proper officer. In the event the petitioner is aggrieved by the Tribunal's decision it is entitled under **section 127E(5)** of the Act to appeal to the High Court.

52. In view of the conclusions I have reached above, I dismiss the Amended Petition dated 24<sup>th</sup> May 2012.

53. Each party shall bear its own costs.

**DATED** and **DELIVERED** at **NAIROBI** this 15<sup>th</sup> day of April 2013.

**D.S. MAJANJA**  
**JUDGE**

Mr Kabugu instructed by Alex Karanja & Company Advocates for the petitioner.

Ms Mwaniki, Advocate, instructed by Kenya Revenue Authority, the 1<sup>st</sup> respondent.