Republic v Kenya Revenue Authority; Kenfreight (EA) Limited (Exparte Applicant) (Miscellaneous Application 64, 70 & 71 of 2016 (Consolidated)) [2025] KEHC 3624 (KLR) (3 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3624 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

MISCELLANEOUS APPLICATION 64, 70 & 71 OF 2016 (CONSOLIDATED)

OA SEWE, J

MARCH 3, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

KENYA REVENUE AUTHORITY ..... RESPONDENT

AND

KENFREIGHT (EA) LIMITED ..... EXPARTE APPLICANT

JUDGMENT

1. Upon being granted leave to file a substantive Judicial Review application, the *ex parte* applicant, Kenfreight (E.A.) Limited, (hereinafter, "the applicant") filed the Notice of Motion dated 7th September 2016. The application was brought pursuant to Order 53Rules 1 and 2 of the Civil Procedure Rules. It seeks that:

   (a) An order of Certiorari be issued to remove into this court for purposes of quashing the decision of the Kenya Revenue Authority to demand and collect Kshs. 18,484,177/= in respect of custom duties allegedly payable by the applicant and referred to in the three Notices dated 14th July 2016 addressed to the applicant's bankers, NIC Bank Limited.

   (b) An order of Prohibition be issued to prohibit the Kenya Revenue Authority from continuing to wrongfully demand from the applicant and its bankers, NIC Bank Limited, the sum of Kshs. 18,484,177/= on account of the custom duties allegedly payable by the applicant for non-cancellation of transit bonds.

   (c) That the costs of and occasioned by this Motion be taxed and paid by the respondent to the applicant.

2. The application was premised on the grounds that the Kenya Revenue Authority ("KRA") had wrongfully demanded from the applicant payment of 18,484,177/= on account of customs duties pursuant to the three Notices dated 14th July 2016 addressed to the applicant's bankers, NIC Bank Limited, without any legal or justifiable basis whatsoever. The applicant further averred that KRA was acting with lack of candour and *malafides* in making that demand when it very well knew that the amount was not due or owing to it. According to the applicant, it had always diligently and faithfully accounted for and paid all its taxes and duties as and when due.

3. The applicant further complained that KRA failed to take into account and give due regard to the documentation produced by it; and therefore that the cancellation of its bond by KRA is not only unfair and oppressive but also a contravention of Article 47 of *the Constitution* which guarantees the applicant's right to fair administrative action.

4. The grounds aforestated were explicated in the applicant's Supporting Affidavit sworn on its behalf by Mr. Francis Nganga on 23rd August 2016. The applicant deposed therein that it is one of the largest clearing and forwarding and logistics companies in East Africa; and that it has its principal place of business at Mombasa. It further stated that oil marketing companies in Kenya had contracted it to provide clearing services for their customers in DRC Congo and South Sudan, in respect of fuel from Nakuru to Malaba.

5. In connection with those instructions the applicant received letters dated 15th June 2016 from the respondent demanding transit documentation for cancelled bond entries. The applicant averred that it responded appropriately to the demand letters and attached customs entry, exit documents and Certificates of Export as well as evidence of Bond Cancellation from the respondent to support its stance that no such duty was due to the respondent.

6. The applicant further deposed that, on the 24th June 2016, the respondent demanded to be shown Customs T1 entries issued in Uganda to confirm that the cargo in issue reached Uganda. To that affidavit, the applicant annexed several documents to buttress its assertions that the transactions in question were above board and had been duly certified by the respondent and the bonds in respect thereof retired.

7. The applicant's complaint was that, notwithstanding its explanation, and without further reference to it, the respondent issued three notices dated 14th July 2016 to its bankers, NIC Bank Ltd, demanding payment of Kshs. 18,484,177/= within 14 days on the basis of the Guarantee provided by NIC; and that in spite of explanations given thereafter in various correspondence and in tripartite meeting held on 16th August 2016, the respondent insisted on its demand. It was therefore constrained to file this suit for the Court's intervention.

8. The respondent opposed the application. It relied on the averments set out in the Replying Affidavit sworn on 5th April 2017 by one of its officers, Ms. Fridah Gakii Mwongera. She explained the mandate of KRA as set out in the *Kenya Revenue Authority Act* and averred that during the period 2015/2016, the applicant, in the course of its business made a number of custom transit entries (T1812) in respect of fuel; which entries were covered by two general transit bonds executed by the applicant and guaranteed by its bank, NIC Bank Ltd, in compliance with Section 107 of the East African Community Customs Management Act, 2004 (EACCMA).

9. The respondent further averred that, during the transit and monitoring exercise conducted by its officers on 30th May 2016 and 1st June 2016 on the transit fuel handled by the applicant, among others, it was discovered that some declared transit fuel handled by the applicant did not cross over to Uganda, contrary to the declarations. It was upon that discovery that the respondent, vide its letter

dated 15th June 2016, notified the applicant of the anomalies and demanded payment of taxes in accordance with the provisions of Regulation 104(13) of the EACCMA. Copies of the letters were annexed to the respondent's Replying Affidavit and marked Annexure "FG 1".

10. The respondent further averred that the applicant was given an opportunity to prove that the goods exited the country; and upon failing to do so, it called for the two guarantees from the NIC Bank Ltd under Section 109 of EACCMA vide its letters dated 14th July 2016. It also deposed that thereafter, the parties engaged in negotiations with a view of an amicable settlement; and that by 23rd August 2016 no settlement had been reached as the applicant was unable to produce a Certificate of Landing as provided for under Section 78(3) of the EACCMA. At that juncture, the respondent went ahead and issued a Notice under Section 109 of EACCMA to the NIC Bank Ltd for the payment of the taxes covered by the guarantees to the tune of Kshs. 49,757,510.87. The respondent confirmed that NIC Bank Ltd complied and remitted a sum of Kshs. 18,484,168/= to it, leaving a balance of Kshs. 31,273,332.56 outstanding.

11. It was, therefore, the contention of the respondent that, having established that the applicant was involved in tax evasion, it was within its mandate to invite, and did invite the applicant in line with the provisions of Section 219 of EACCMA for purposes of compounding the case, but the applicant failed to appear and instead instituted these proceedings. The respondent therefore posited that the Notice of Motion dated 7th September 2016 is not only premature but also discloses no reasonable cause of action. Accordingly, the respondent prayed that the application be dismissed with costs.

12. With the leave of the Court, the applicant filed a Further Affidavit, sworn on its behalf by Mr. Francis Nganga on 29th June 2017. The applicant explained that the general transit bonds executed by it were revolving bonds such that once the entry for a subject consignment was exported and a Certificate of Export issued therefor, the bond in respect of that particular entry would be retired and the amount released back into the revolving fund for utilization for other consignments, including those unrelated to the business of the exporter in the instant case. The applicant averred that the respondent was therefore less than candid in giving the impression that the general transit bonds were guaranteed by the NIC Bank Ltd; and could therefore be called upon at any time as a guarantee.

13. The applicant reiterated its stance that the primary liability for payment of the alleged taxes claimed by the respondent lay with Petrocam Kenya Limited and Piccalilly International Limited; yet no recovery action had been taken by the respondent as against those companies. The applicant deposed that the respondent was clearly acting unreasonably in the matter in requiring it to produce a Certificate of Landing from Uganda, when its mandate was limited to the export process which was properly done and certified in accordance with the law as is evident from the Certificates of Export issued by the respondent.

14. The applicant maintained its stance that the respondent's demands for alleged tax were made *ultra vires*; and that the demands to NIC Bank Ltd were not only irrational but were also made in abuse of the respondent's powers given that the bonds for the respective consignments were retired/cancelled, and the amounts in respect thereof released into the revolving guarantee fund for use for other transactions.

15. In particular, the applicant denied that:

    (a) It was involved in tax evasion as alleged by the respondent in its Replying Affidavit;

    (b) The suit is premature or that it failed to comply with mandatory statutory provisions;

    (c) It ought to have appealed to the Tax Appeals Tribunal as such appeals can only be preferred in instances where the decision of the Commissioner on the computation tendered is disputed

and not where complaints are raised about excesses and abuse of power, irrationality, illegality or procedural impropriety;

16. Accordingly, the applicant prayed that the application be allowed and the orders sought granted with costs.

17. The applicant filed identical applications in Mombasa High Court Judicial Review No. 70 and High Court Judicial Review No. 71 of 2016. In HCJR No. 70 of 2016, the applicant moved the Court for an order of Certiorari to quash the decision of KRA to demand and collect Kshs. 31,272,459/= from it for customs duty allegedly payable as stated in the 30 Notices issued by KRA dated 1st August 2016. The applicant also prayed for an order of Prohibition to prohibit KRA from continuing to wrongfully demand from it, and its bankers the said sum of kshs. 31,272,459/= for alleged non-cancellation of Transit Bonds.

18. In HCJR No. 71 of 2016, the applicant prayed for an order of Mandamus to compel KRA to immediately repay to it the sum of Kshs. 18,484,177/= which it wrongfully and unlawfully obtained from the applicant's bankers, NIC Bank Ltd on 24th August 2016 despite the Order made in HCMA No. 64 of 2016.

19. By an order of the Court (Hon. Ogola, J.) made on the 7th June 2017 in HCJR No. 71 of 2016, the three matters were consolidated for purposes of expeditious disposal. Thereafter, on the 23rd January 2019, further directions were given that the three files be consolidated with HCJR No. 62 of 2017. Subsequently, directions were given on 5th June 2024 that the consolidated applications be canvassed by way of written submissions which the parties had filed beforehand.

20. In its written submissions dated 29th June 2019, the applicant reiterated the facts relied on and addressed the Court regarding the applicable law. It proposed a single issue for determination, namely, whether the respondent had legally and rationally exercised its statutory powers in demanding for tax from it.

21. It was the submission of the applicant that the alleged claim for tax is predicated upon the provisions of Section 78(3) of EACCMA and the contention by the respondent that it failed to give evidence in the form of copies of the clearance documents issued by Uganda Revenue Authority (URA) to prove that the consignments in question reached Uganda. In sum, the respondent required the applicant to avail copies of the T812 (transit entries) endorsed by both KRA and URA confirming processing of the entries at the border. In the submission of the applicant, by applying the provisions of Section 78(3) to the consignment in question and requiring URA entries for clearance in Uganda, the respondent acted illegally and in abuse of its powers. The posturing taken by the applicant was that the aforementioned provision did not apply to the circumstances of this case because the transportation was carried out overland by tanker/truck.

22. It was further submitted by the applicant that, at no time did it have the physical possession of the goods in question; and that the respondent issued documents, and in particular, a Certificate of Export, confirming exit of the goods. Thus, the applicant urged the Court to find that, in the circumstances, the respondent acted capriciously in demanding for tax from it and for calling bonds that had already been retired.

23. The applicant also pointed out that, since 2009, the applicant had been conducting electronic monitoring of cargo from source to destination using the Electronic Cargo Tracking System (ECTS) to facilitate faster and efficient flow of legitimate trade. The applicant therefore posited that KRA ought to have detected any infractions of the nature suggested by it and acted in real time. The applicant urged the Court to note that no data from the ECTS was availed by the respondent.

24. Lastly, the applicant took issue with the fact that the respondent pursued it for tax payment instead of making a demand for the same from the disclosed principals, namely Petrocam Kenya Limited and Picalilly International Limited. The applicant submitted that any provision deeming as the owner an agent who had simply been appointed to handle customs documentation is unconstitutional.

25. The applicant relied on the following authorities, among others, to buttress its arguments herein:

    (a) The Commissioner of Domestic Taxes (Large Tax Payers) [2014] eKLR, in which it was held that the purpose of Article 47 of *the Constitution* is to uplift the standards of administrative action by providing constitutional standards and that the national values and principles of good governance such as integrity, transparency, accountability must be infused in administrative action.

    (b) Republic v Commissioner for Higher Education, Ex Parte Peter Soita Shitanda [2013] eKLR, in which the Court considered and determined issues relating to improper and unreasonable exercise of statutory functions and powers by an administrative authority.

26. The respondent relied on its written submissions dated 12th April 2017. It raised the following issues for determination:

    (a) Whether an alternative forum would be best placed to determine the dispute herein;

    (b) Whether in view of the provisions of Sections 78(3) of the EACCMA the respondent was entitled in law to require the applicant to produce evidence of landing of the subject goods in Uganda.

    (c) Whether in the circumstances, this is a matter for a Judicial Review Court; and if yes, whether the respondent's actions are amenable to judicial review.

27. In the submission of the respondent, the issues raised herein go to the merits of the decision taken by it pursuant to Section 78(3) of EACCMA and therefore the decision as to whether taxes were due ought to have been taken to the Tax Appeals Tribunal instead. The respondent relied on several authorities to buttress the argument that judicial review is concerned, not with the merits of the impugned decision but whether the respondent had jurisdiction to make the decision and whether the process employed in arriving at that decision was procedurally proper. The authorities include:

    a. Republic v Kenya Revenue Authority, Ex Parte Interactive Gaming & Lotteries Limited [2016] eKLR;

    b. Republic v Commissioner for Investigations & Enforcement, Ex Parte Wananchi Group Kenya Limited [2014] eKLR;

    c. Pili Management Consultants Ltd v Commissioner of Income Tax Kenya Revenue Authority (Civil Appeal No. 154 of 2007); and,

    d. Republic v Kenya Revenue Authority, Ex Parte Yaya Towers Limited [2008] eKLR.

28. The respondent also submitted that, since Judicial Review is a remedy of the last resort, the applicant ought to have explored the other options available to it before filing the suits which form the subject of this Judgment. In particular, the respondent posited that, if indeed the appellant was aggrieved by the tax demand, it ought to have filed an appeal to the Tax Appeals Tribunal pursuant to Section 12 of the *Tax Appeals Tribunal Act*, 2013; and therefore that Judicial Review is not the appropriate way of resolving the tax dispute. Reliance was placed on Republic v Kenya Revenue Authority, Ex Parte Interactive Gaming & Lotteries Limited (supra) and Speaker of the National Assembly vNjenga

Karume, Nairobi Civil Appeal No. 92 of 1992, among other decisions to shore up the respondent's arguments.

29. On the scope of judicial review proceedings, the respondent quoted from Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 and submitted that for a decision to be held to be unreasonable, it must be so outrageous in its defiance of logic or accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it. In the respondent's view, this cannot be said of the impugned decision. Hence, the respondent urged the Court to dismiss the applications with costs.

30. From the foregoing summary, there is no dispute that during the period 2015/2016, the applicant made transit entries in the respondent's system in respect of fuel to Uganda as follows:

    (a) RCTG14/12808KE which was executed on 1st December 2014 in the sum of Kshs. 50,000,000/=, and

    (b) RCTG15/03654 2015KE executed on 4th May 2015 in the sum of Kshs. 30,000,000/=.

31. It is common ground that the consignments in question were to be transported overland by tankers. The respondent conceded as much vide the bundle of documents marked Exhibit "FG 1" in which it set out the particulars of the tankers concerned. It is also not in dispute that an export entry was lodged for each of the consignments and a Certificate of Export issued by the respondent. The applicant assumed that all was well until the respondent purported to raise an issue claiming that the products never exited Kenya.

32. A dispute arose thereafter after the respondent raised a tax demand in connection with the consignments. The respondent contended that during the Transit Monitoring exercise conducted by its officers on 30th May 2016 and 1st June 2016 on the transit fuel handled by the applicant, among others, it was discovered that some of the fuel declared for transit by the applicant did not cross over to Uganda, contrary to the declarations. The parties thereafter exchanged a series of letters culminating in the three tax demands dated 14th July 2016, which the applicant now seeks to have quashed.

33. In the premises, the issues for consideration are:

    (a) Whether the suits were prematurely filed and whether an alternative forum would be best placed to determine the dispute herein;

    (b) Whether, in the circumstances, the respondent's actions are amenable to judicial review order; and,

    (c) Whether the applicant is entitled to the reliefs sought.

A. On Alternative Dispute Resolution:

34. There can be no doubt that alternative dispute resolution mechanisms play a critical role in the administration of justice and. indeed, have the pride of place in Article 159(2)(c) of the Constitution; which mandates that:

    In exercising judicial authority, the courts and tribunals shall be guided by the following principles... alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)."

35. This provision, far from being a complete ouster of jurisdiction of the Court, simply provides for a postponement of approach to the Court in favour of the expediency contemplated by pursuing the available alternative dispute resolution mechanisms in the first instance; hence the doctrines of

exhaustion and avoidance. Hence, in Speaker of National Assembly v Karume [1992] KLR 21 it was held that:

> "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

36. Likewise, in Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others [2015] eKLR, the Court of Appeal restated its position thus:

> "It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution."

37. The same position was taken in William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR in which it was held, at paragraph 52, that:

> "The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of *the Constitution*."

38. More importantly, Section 9 of the *Fair Administrative Action Act*, is explicit that:

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under subsection (1)."

39. In the instant matter, it is plain that the dispute is about a tax demand vide the letters dated 14th July 2016 in respect of which Section 12 of the *Tax Appeals Tribunal Act* provides:

> " A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner, appeal to the Tribunal."

40. In this instance, the impugned notices were issued pursuant to Section 109 of EACCMA, which states as follows in Subsection (1):

> (1) Where the conditions of any bond have not been complied with the Commissioner may by notice in writing require the person who has given security under it to pay to him or her the amount of the security within fourteen days of the notice; and on failure to comply with the notice, the Commissioner may enforce payment of the security as though it were duty due and unpaid."

41. Moreover, tax law, for purposes of Section 12 of the Tax Appeals TribunalAct, include EACCMA. Section 2 is explicit in this regard because it defines "tax law" thus:

tax law" means—

(a) the *Income Tax Act* (Cap. 470);

(b) the *Excise Duty Act* (Cap. 472); or

(c) the Value Added Tax (Cap. 476);

(d) the East African Community Customs Management Act, 2004;

(e) any other tax legislation administered by the Commissioner;

42. There can be no doubt therefore that this avenue was indeed available to the applicant and ought to have been pursued before approaching the Court for judicial review. It is trite that where an alternative dispute resolution mechanism is provided for, the same ought to be followed first; and that the court's jurisdiction should only be invoked as a last resort measure.

43. That is not to say that it is impermissible for a party to approach the Court directly, even where an alternative dispute resolution mechanism is available to a party, where that course of action is the most appropriate in the circumstances. Indeed, in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the Court of Appeal held that:

> " ...We also bear in mind that access to justice as enshrined in Article 48 of *the Constitution* is a fundamental right, that cannot be derogated from. Whereas Alternative Dispute Resolution (ADR), such as arbitration, is crucial in expeditious disposal of disputes, by its very nature ADR is inferior to the principle of access to justice."

44. Accordingly, in the case of Mohamed Ali Baadi and others v Attorney General & 11 others [2018] eKLR, the court held:

> " While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute (See The Speaker of National Assembly v James Njenga Karume [1992] KLR 21), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of Dawda K. Jawara Gambia it was held that:

"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."

45. The same position was articulated in Republic v Independent Electoral and Boundaries Commission (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR, thus:

46. What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

47. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake..."

48. In this instance, the applicant's main contention is that the respondent violated the provisions of Article 47 of *the Constitution*. Accordingly, I take the view that the four suits were justifiably filed before the Court. Indeed, in Edwin Harold Dayan Dande & 3 others v The Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated)) [2023] KESC 40 (KLR) (16 June 2023) (Judgment) the Supreme made the point as follows:

> " The entrenchment of judicial review under *the Constitution* of Kenya, 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*. Thus, article 47 of *the Constitution* provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair."

B.On whether, in the circumstances, the respondent's actions are amenable to judicial review order:

49. The judicial review jurisdiction of the Court was discussed in the Ugandan case of Pastoli v Kabale District Local Government Council & Others, [2008] 2 EA 300, in which it was held:

> " In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality... Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral

standards: Re An Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E". Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

50. Ordinarily, judicial review is concerned with the decision-making process as opposed to the merits of the decision. Accordingly, in Republic v Attorney General & others, Ex Parte Diamond Hasham Lalji & another (supra) it was held, at paragraph 91 as follows:

> "Judicial review applications do not deal with the merits of the case but only with the process. In other words, judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters."

It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of fact and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved.

51. This aspect was reiterated by the Supreme Court in Saisi & 7 others v Director of Public Prosecutions & 2 Others (supra) as follows:

> 76. Be that as it may, it is the court's firm view that the intention was never to transform judicial review into to full-fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the *Fair Administrative Action Act*. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1)(e) and (h) of the *Fair Administrative Action Act*. The merits of a case are best analyzed in a trial or on appeal after hearing testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.

52. The foregoing notwithstanding, it is now settled that some measure of merit review is acceptable to enable the Court properly adjudicate a judicial review matter. The Supreme Court acknowledged as much in the Saisi thus:

> "For the court to get through an extensive examination of section 7 of the FAAA, there had to be some measure of merit analysis. That was not to say that the court had to embark on merit review of all the evidence. For instance, how would a court determine whether a body exercising quasi-judicial authority acted reasonably and fairly in the circumstances of the case without examining those circumstances and measuring them against what was reasonable or fair, and arriving at the conclusion that the action taken was within or outside the range of reasonable responses. It was to be limited to the examination of uncontroverted evidence. The controverted evidence was best addressed by the person, body or authority in charge. There was nothing doctrinally or legally wrong about a judge adopting some measure of review, examination, or analysis of the merits in a judicial review case in order to arrive at the justice of the matter. Rather a failure to do so, out of a misconception that judicial review was limited to a dry or formalistic examination of the process only led to intolerable superficiality. That would be against article 259 of *the Constitution* which required the courts to interpret it in a manner that inter alia advanced the rule of law, permits the development of the law and contributes to good governance."

53. The foregoing position was reiterated by the Supreme Court in the Dande case as follows:

> "Judicial review was introduced to Kenya from England in 1956 through sections 8 and 9 of the *Law Reform Act*, Cap 26. The jurisdiction to hear and determine judicial review was then vested in the High Court. Under that system, the High Court could issue orders of *mandamus*, prohibition, and *certiorari*. The grounds for the issuance of such orders were borrowed from common law. Prior to the promulgation of *the Constitution* of Kenya, 2010, there were two legal foundations for the exercise of the judicial review jurisdiction by the Kenyan courts found in sections 8 and 9 which constituted the substantive basis for judicial review of administrative actions on the one hand, and, order 53 of the Civil Procedure Rules which was the procedural basis of judicial review of administrative actions, on the other hand.
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> The entrenchment of judicial review under *the Constitution* of Kenya, 2010 elevated it to a substantive and justiciable right under *the Constitution*. Accordingly, judicial review was no longer a strict administrative law remedy but also a constitutional fundamental right enshrined in *the Constitution*. Thus, article 47 of *the Constitution* provided that every person had a right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.
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> ...
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> When a party approached a court under the provisions of *the Constitution* then the court ought to carry out a merit review of the case. However, if a party filed a suit under the provisions of order 53 of the Civil Procedure Rules and did not claim any violation of rights or even violation of *the Constitution*, then the court could only limit itself to the process and manner in which the decision complained of was reached or action taken and not the merits of the decision *per se*."

54. The applicant approached the Court under Articles 47 of *the Constitution*. It has, in essence, challenged the decision by the respondent to demand custom duty allegedly payable as per the three Notices dated 14th July 2016 addressed to the applicant's bankers, NIC Bank Limited. The applicant also applied for an order of Prohibition to prohibit the Kenya Revenue Authority from continuing to wrongfully demand the sums in dispute from the applicant or its bankers, NIC Bank Limited.

55. The Court of Appeal had the following to say in respect of the order of Certiorari in Kenya National Examination Council v Republic, *Ex Parte* Geoffrey Gathenji Njoroge & 9 others [1997] eKLR:

...Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons..."

56. As for the order of Prohibition the Court of Appeal proceeded to say:

> " ...It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised... The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition."

57. The same position was reiterated by the Court of Appeal inJoram Mwenda Guantai v The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170, as follows:

> " It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has the inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."

58. Hence, the basic issue for consideration is whether the decision can be faulted on the grounds of illegality, irrationality or procedural impropriety. The respondent is a statutory body mandated to administer and enforce all provisions of the written laws set out in Part I and II of the First Schedule to the *Kenya Revenue Authority Act* for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. As pointed out herein above, the EACCMA is one of those provisions and arguments that the Act is unconstitutional would not fall within the ambit of the

instant proceedings. It is trite that the Court can only pronounce itself on the basis of such issues and reliefs as have been raised or sought in the parties' pleadings.

59. Hence, in Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others [2016] eKLR, the Court of Appeal, while discussing this point, cited with approval, the following excerpt from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems, at page174:

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

60. It is noteworthy however that the respondent purported to exercise the powers conferred by Section 78(3) of EACCMA in calling upon the applicant to make good the tax due. The said provision states:

> (3) The proper officer may require the owner of any bonded goods which have been put on board any aircraft or vessel for exportation to any place to produce, within such time as the proper officer may consider reasonable, a certificate from the customs authorities at the port of discharge of the due discharge thereat of the goods according to the export entry; and if owner fails to produce the certificate, or if the certificate does not show that the goods have been duly discharged thereat according to the export entry, and the owner fails to account for any such goods to the satisfaction of the proper officer, then the proper officer may refuse to allow the owner to enter for export and to export any other goods in respect of which security may be required under this section.

61. The applicant underscored the fact that it was not the owner of the goods in question and that the respondent ought to have endeavoured to contact the two consignees, Petrocam Kenya Limited and Piccalilly International Limited for purposes of payment of duty. There is no such indication. In any event the sanction provided for in that subsection is that the "...proper officer may refuse to allow the owner to enter for export and to export any other goods in respect of which security may be required under this section."

62. It is significant, however, that for purposes of the Act, "owner" includes an agent. Section 2 gives the following definition:

owner" in respect of—

(a) an aircraft, vessel, or vehicle, includes every person acting as agent for the owner, or who receives freight or other charges payable in respect of, or who is in possession or control of, the aircraft, vessel, or vehicle;

(b) goods, includes 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;

63. More importantly, the subject goods were bonded; and it is indubitable that the respondent did not go for the applicant as the owner of the goods, but instead called the bond. In this regard, Section 106 of the EACCMA is explicit that:

> " The Commissioner may require any person to give security for the due compliance by that person with this Act and generally for the protection of the Customs revenue; and, pending the giving of such security in relation to any goods subject to Customs control, the Commissioner may refuse to permit delivery or exportation of such goods or to pass any entry in relation thereto."

64. Section 108(1) of EACCMA recognizes that:

> " ...a surety shall, for all the purposes of any bond, be deemed to be the principal debtor and accordingly the surety shall not be discharged, nor his or her liability affected, by the giving of time for payment, or by the omission to enforce the bond for any breach of any conditions thereof, or by any other act or omission which would not have discharged the bond if he or she had been the principal debtor."

65. Further to the foregoing, Section 109 provides that:

(1) Where the conditions of any bond have not been complied with the Commissioner may by notice in writing require the person who has given security under it to pay to him or her the amount of the security within fourteen days of the notice; and on failure to comply with the notice, the Commissioner may enforce payment of the security as though it were duty due and unpaid.

(2) Nothing in this section shall, unless the Commissioner otherwise allows, discharge the person who has given security under section 108 from the obligations entered into by him or her under this Act or under any other law.

66. From the foregoing provisions, it is manifest that the impugned letters were written within the legal mandate of the respondent; and that the respondent complied with the applicable procedure. The merits of the respondent's action and whether the bond could be issued after Certificates of Export had been issued in respect of the consignment do not, in my considered view fall within the purview of judicial review. I find succor in the decision made in Republic v Kenya Revenue Authority, Ex Parte Interactive Gaming & Lotteries Limited (supra) that:

> ...the issue whether or not tax is due and payable ought to be left to the statutory bodies and Tribunals as opposed to a judicial review Court since such issues go to the merit of the decision rather than the process."

67. The Court of Appeal was of the same view in Pili Management Consultants Ltd v Commissioner of Income Tax Kenya Revenue Authority (supra). Here is what the Court had to say:

As the trial judge rightly pointed out, the jurisdiction of a court in judicial review is concerned primarily with the decision making process not with the merits of the decision. For the Judge to be able to conclude that no tax was due from Pili for the year 2004, the Judge would have to determine first whether the money in Pili's account at the Bank was or was not liable to tax. No material was placed before the Judge on that point..."

68. I therefore find it apt to reiterate the expressions of Lord Hailsham of St Marylebone in Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155 that:

> " The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorized by law to decide for itself, a conclusion which is correct in the eyes of the court."

69. In the result, I find no merit in any of the four applications filed in the consolidated suits, namely, High Court Miscellaneous Application No. 64 of 2016, High Court Judicial Review Application No. 70 of 2016, High Court Judicial Review Application No. 71 of 2016 or High Court Judicial Review Application No. 62 of 2017. It follows that the applicant is not entitled to any of the reliefs sought in the four suits. The applications are hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MARCH 2025

OLGA SEWE

JUDGE