Republic v Commissioner of Customs & Border Control; Burn Manufacturing Usa LLC (Ex parte Applicant) (Judicial Review Miscellaneous Application E137 of 2025) [2025] KEHC 13017 (KLR) (Judicial Review) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13017 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E137 OF 2025

RE ABURILI, J

SEPTEMBER 19, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

COMMISSIONER OF CUSTOMS & BORDER CONTROL ..... RESPONDENT

AND

BURN MANUFACTURING USA LLC ..... EX PARTE APPLICANT

JUDGMENT

1. Pursuant to leave of court issued by this court on 29th April 2025, the Applicant filed on 21st May 2025 its substantive notice of motion dated 21st May 2025. The notice of motion is predicated on Order 53 Rule 3 (1) of the Civil Procedure Rules and Sections 8 and 9 of the *Law Reform Act*.

2. The motion seeks the following orders;

    a. That an order of Certiorari to remove into this Court for quashing the decision made by the Respondent dated 24th February 2025 declining the extension of time to apply for review against offences compounded on 24th July 2024.

    b. That an order of Mandamus to compel the Respondent to consider the Ex parte Applicant's review of the offences compounded on 24th July 2024.

    c. That an order of Prohibition to forbid the Respondent from collecting any taxes from the impugned offences compounded on 24th July 2024.

    d. That the costs of this application be provided for.

3. The Notice of Motion is supported by a verifying affidavit of Peter Gordon Scott who introduces himself as the Director of the Ex parte Applicant sworn on 14th March 2025 and filed on 20th March 2025 and also supported by a statutory statement dated 14th March 2025, also filed on the even date.

4. The Ex parte Applicant's case is that it is a vertically-integrated entity which owns and operates a manufacturing facility for clean, affordable, energy-efficient, and eco-friendly cooking stoves that target the ordinary Mwananchi, including but not limited to both low- and middle-income households.

5. That the Applicant imported a consignment of stainless-steel rods size 4.5MMX2400M vide Import Entry numbers 24EMKIM400191410, 24EMKIM400229882 and 24EMKIM400217926 in March 2024.

6. The Respondent is said to have subjected the consignment to a tariff assessment upon which a ruling was issued by the Tariff Section on behalf of the Commissioner on 4th April 2024.

7. That unknown to the Applicant and without proper instructions, the Applicant's clearing agent and the Respondent entered into an offence settlement on 24th July 2024, admitting that the Applicant had committed a customs offence.

8. The Applicant's case is that the said offences were compounded and the Applicant only came to learn of the said settlement when the Respondent demanded the said tariffs as assessed, on 21st August 2024.

9. That the ex-parte Applicant commenced its own investigations concerning how the clearing agent had proceeded to settle the offences without its involvement. The said investigations are said to have involved engaging the clearing agent and reporting the matter to the police.

10. The Applicant claims that its company officers recorded statements with the police and the Applicant had crucial evidence that the settlement by the Respondent and their Clearing agent had been fraudulently done.

11. The Applicant takes issue with the said settlement for compounding offences and has sought to review the said settlement entered into by the Respondent and the clearing agent who allegedly had no instructions to enter into such arrangement.

12. That being outside the statutory timelines to file a review with the Respondent, the Applicant on the 20th February 2025 made an application for late review with the Respondent to review the said decision. However, that the Respondent on 24th February 2025 through a letter, informed the Applicant that it had declined its review of the compounded offences yet what the Applicant had made before the Respondent was an application to make a late review application.

13. According to the Applicant, the Respondent has the requisite powers to determine a review under Section 219(3)(e) of the East African Community Customs Management Act, 2004 and that therefore the same ought not to be confused with an appeal.

14. It is also asserted that the Respondent's assertions that Section 229 of the East African Community Customs Management Act 2004, does not apply to the Ex Parte Applicant is misconceived and that decisions arising from compounding of offences can only be final and not subject to an appeal if the same are not unchallenged.

15. The Applicant also filed a supplementary affidavit sworn by Peter Gordon Scotts on 19th June 2025. From the said affidavit, the Applicant's further case is that once a party to the settlement under Section 219 of the EACCMA challenges the process of how the compounding of offences was done, then the same cannot be said to be final and not subject to an appeal.

16. The Applicant asserts that Section 219(2) of the EACCMA provides that the Respondent shall not exercise the powers to compound unless the person admits in a prescribed form that they have committed an offence, and that where a party challenges that they have not admitted the offences settled/compounded by the Respondent, then such compounded offences and orders cannot be said to be final and not subject to appeal.

17. The Applicant reiterates that in fact, what it sought from the Respondent through the letter dated 20th February 2025 was a request for extension of time to lodge a review against the offences compounded but the Respondent in its decision dated 24th February 2025 indicated that it was not within the jurisdiction and powers of the Commissioner of Customs to entertain any appeal outside the time allowed.

18. That this assumption by the Respondent that it has no such powers was an abdication of the Respondent's role under Section 229(3) of the EACCMA which provides that a person directly affected by the decision or omission of the Commissioner may lodge a review albeit after the time specified.

19. The Applicant claims that the Respondent has only provided a port pass of Wilson Kahiro who appears nowhere near the signed documents in relation to the compounding offences. Further, that no evidence has been provided of Japheth Kilio the person alleged to have signed the offence mitigation forms. This according to the Applicant, is despite the fact that compounding of offences is criminal in nature and therefore the Respondent ought to have exercised some caution which they did not.

20. The Applicant also states that the Respondent did not consider the reasons for which it sought for extension of time to file a review out of time. It is also the Applicant's case that as much as it is bound by the actions of their agents pursuant to section 148 of the Act, the same does not extend to the agent binding it to criminal liability which is personal.

21. That the Respondent did not comply with the requirements of section 219 (2) of EACCMA as it failed to conduct due diligence upon the persons entering into settlement the compounding of the offences by accepting settlements signed by Japheth Kilio and relying on port pass by Wilson Kahiro.

22. The Applicant further states that the Respondent has proceeded to collect taxes and that it is not a bar and should the court quash the said decision dated 24th February 2025, then any amounts collected from the said decision ought to be refunded to the applicant.

23. The Applicant also filed written submissions dated 19th June 2025. It is submitted that the process leading to the compounded offences by the Respondent was flawed, and as such any action arising from the said process did not meet the requirements of Section 219 of the EACCMA thus the same was null and void. The Applicant also relies on Section 219 of the EACCMA on settlement of cases by the Commissioner.

24. The Applicant submits that the compounding of offences was not properly done by the Respondents, and that in fact, the Respondent has not provided any evidence of Japheth Kilio the person alleged to have signed the offence mitigation forms.

25. It is the Applicant's further submission that the Respondent does not exercise the powers to compound unless the person admits in a prescribed form that they have committed an offence. That once the Applicant challenges the propriety of the offences settled /compounded by the Respondent, then such compounded offences and orders cannot be said to be final and not subject to appeal.

26. The Applicant submits that the process leading to the compounding of offences by the Respondent having been flawed, any action arising from the said process did not meet the requirements of Section 219 of the EACCMA thus the same was null and void.

27. Reliance is placed on the case of MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC) at 1172] where the court is said to have held that if an act is void, it is automatically a nullity in law, incapable of being validated and any proceedings based on it are equally void and bound to collapse.

28. The Applicant submits that a criminal offence is so personal and that as such, the same cannot be left to an agent and an agent just like a lawyer cannot bind its clients in a criminal case.

29. The Applicant submits that the Respondent unreasonably denied it an opportunity to review the compounded offences when it made a decision that it is not within the jurisdiction and powers of the Commissioner of customs to entertain any appeal outside the time allowed.

30. The Applicant submits that the decision by the Respondent was grossly unreasonable/ outrageous and in defiance of logic or acceptable moral standards as was held in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation (1948) 1 K.B 223.The Applicant further places reliance on the case of OJSC Machines Ltd, Transcentury Limited and Civicon Limited (Consortium) vs Public Procurement Administrative Review Board of Kenya & 2 others (201) eKLR, where the Court is said to have observed that the object of judicial review is to safeguard citizens from harm by ensuring that statutory bodies neither abuse the powers entrusted to them nor act beyond the limits of their lawful mandate.

31. The Applicant submits that it is entitled to the judicial review writs of certiorari, mandamus and prohibition and to this end, the Applicant relies on the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & others Civil Appeal No 266 of 1996.

32. The Applicant submits that the decision arrived at on 24th February 2025 is an abdication of the Respondent's statutory power, and the Respondent considered matters it ought not to have considered. Further, that it failed to consider an issue it ought to have considered, and as such the same is fit for quashing vide certiorari.

33. With regard to mandamus, the Applicant submits that it is entitled to the said order as the Respondent is required under Section 229(3) of the EACCMA to make the said decision.

34. Additionally, that even though the Respondent has proceeded to enforce the same, once the Court finds that the decision was irregular and quash it, then any subsequent act by the Respondent will be a nullity and the Court can issue appropriate reliefs.

The Respondent's Response

35. In response to the Notice of Motion, the Respondent filed a replying affidavit on 5th June 2025. The affidavit is sworn on 4th June 2025 by Tabitha Shikanda who introduces herself as an officer of Kenya Revenue Authority.

36. The Respondent's case is that the Kenya Revenue Authority is established under Section 5(1) of the Kenya Revenue Authority (KRA) Act as an agency of the Government for the collection and receipt of all revenue.

37. That under Section 5(2) of KRA Act, the Respondent is required to administer and enforce all provisions of the written laws set out in Part I & II of the First Schedule to the KRA Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

That under Part I of the First Schedule to the KRA Act, the Respondent enforces the East African Community Customs Management Act, 2004.

38. According to the Respondent, in March 2024, the Applicant through their clearing agents Continental Logistics Networks Limited imported a consignment of stainless-steel rods size 4.5 MMX2400M vide Entry No. 24EMKIM400191410, 24EMKIM4000229882 and 24EMKIM400217926.

39. The Respondent states that upon importation, there arose a dispute concerning misclassification of goods imported by the Applicant under import Entry No. 24EMKIM400191410, 24EMKIM4000229882 and 24EMKIM400217926.

40. It is stated that the said consignments were subjected to a tariff assessment, and it was noted that identical goods from the same exporter which were being imported by different consignees were being classified differently. That the Respondent after subjecting the said consignments to analysis issued a tariff ruling on 4th April 2024.

41. The Respondent states that the Applicant appealed against this ruling but the appeal was denied and the previous ruling upheld on 17th May 2024.

42. That the Applicant re-appealed the said ruling vide a letter received on 12th July 2024 which the Respondent responded to on 10th August 2024 informing the Applicant that the indulgence was the final communication from the Respondent on the matter and that the Respondent considered the dispute resolved as per Section 229 of the EACCMA.

43. The Respondent's contention is that the Applicant through its Clearing Agent (Continental Logistics Network Limited) accepted the entry amendments as amended by applicants as a gesture that they indeed were in agreement with the proposed change in Tariff on the entry as communicated by the respondent through the Tariff rulings.

44. The Respondent states that on 24th July 2024 the Applicants clearing agent signed the request for settlement forms admitting that the importer had indeed committed an offence.

45. That the said mitigation of offences forms and request for settlement forms were properly presented by the Clearing agent representatives and was properly identified with their port pass identity card as a representative of the Clearing Agent.

46. The Respondent states that the offences were raised and compounded through case reference numbers F71/0004741/2024, F71/0004756/2024 and F71/0004740 /2024 respectively. That as a result, the Applicant generated the following Eslips for offences on 25th July 2024 as follows; 1020240000873001 for Kshs 1,385,442, 1020240000872982 for Kshs 1,375,747, 1020240000872984 for Kshs 401,373.

47. According to the Respondent, it has on several occasions requested the payment of unpaid duty from the applicant but that the applicant has refused/neglected to pay the said duty and as a result, the respondent detained the Applicant's consignment registered under Import Entry No. 24EMKIM400770589 to compel the applicant to pay the outstanding taxes pursuant to Section 130 of the East African Customs Management Act.

48. The Applicant is said to have gone to court on 25th October 2024 in Kiambu High Court Constitutional and Human Rights Petition No. E042 of 2024 to compel the Respondent to release the consignment detained under Import Entry number 24EMKIM400770589. However, that the Applicant withdrew Kiambu High Court Constitutional and Human Rights Petition No. E042 of 2024 on 7th April 2025.

49. The Respondent states that it released the consignment upon provision of security by way of a bank guarantee amounting to the taxes of Kshs 10,993,853 which were in dispute. The bank guarantee's validity was 6 months expiring on 7th May 2025.

50. That on 20th February 2025, the Applicant wrote to the Respondent requesting for extension of time to lodge a review against the offences compounded on 24th July 2024. The Respondent states that it considered the Applicant's application/request and rejected the said application on 24th February 2025 in view of Section 147 of the EACCMA 2004, which provides that a duly authorised agent performing any acts on behalf of the owner of the goods shall be deemed to be the owner of the goods.

51. The Respondent's decision, it is contended, was based on Section 219 of the EACCMA which is said to provide that the Respondents' orders on compounding of offences are final and not subject to appeal.

52. That the Applicant's bank guarantee's validity being for 6 months and expiring on 7th May 2025, the Respondent proceeded to liquidate the same on the 22nd April 2025 after informing the bank to liquidate the same.

53. The Respondent's case is that if the Applicant seeks to challenge the compounded offences, then the Applicant ought to make an application to set aside the said order, a remedy which is not provided for under the EACCMA and which cannot be challenged under Section 229 of the EACCMA.

54. The Respondent maintains that it was under no obligation to extend time for the Applicant's late review request since such discretion under Section 229(3) of the EACCMA is conditional and was not satisfied in this case. It argues that mandamus cannot compel it to act outside its legal powers and that under Sections 2(1) and 148 of the EACCMA, the Applicant is bound by the acts of its duly authorised clearing agent who properly executed the compounding forms after admitting the offences through the signing of settlements.

55. It is contended That any claim of fraud, lies against the applicant's agent in tort and not against the Respondent. Further, that having lawfully exercised its powers in compounding the offences and already liquidated the Applicant's bank guarantee to recover outstanding taxes, the Respondent asserts that prohibition is unavailable as the matter has been overtaken by events. Accordingly, it urges this Court to dismiss the application herein with costs while it continues to discharge its statutory mandate.

56. The Respondent also filed written submissions dated 23rd June 2025 on 24th June 2025. The Respondent argues that the Applicant was bound by the actions of its agent (Continental Logistics) when the agent compounded the offences pursuant to Section 219 of the EACCMA. The Respondent also places reliance on Section 148 of the EACCMA on liability of owner for acts of duly authorized agent.

57. Reliance is also placed in the cases of Republic v Kenya Revenue Authority Ex-parte African Boot Company Limited [2012] KEHC 4298 (KLR) and Republic vs. Kenya Revenue Authority Ex parte Alltex EPZ Limited Nairobi High Court Judicial Review Application No. 709 of 2008 where the court is said to have held that the importer remains responsible for the conduct of its agent in all circumstances.

58. The Respondent submits that that the Applicant has a remedy against their agents in tort and as such, should not be allowed to escape liability as a result of their agent's actions.

59. It is further submitted that the Respondent has no power under Section 229 of the EACCMA to review compounded offences under Section 219 of the EACCMA. The same is said to have been as a result of the instructive reading of Section 219(3)(e) of the EACCMA.

60. The Respondent also submits that it properly disallowed the Applicant's application and that the Applicant ought to have moved this Court in the first instance to challenge the said compounding, and that it was not the one to determine the application.

61. The respondent relied on the case of Commissioner General (TRA) Vs Mohamed Ali Salim & Anor Civil Appeal No.80 of 2018 where the Court is said to have held that a decision of a quasi-judicial body which is final and not appealable can be challenged by seeking judicial review before the High Court.

62. The Respondent submits that the Applicant is not entitled to the order of certiorari as the decision by the Respondent to decline extension of time was guided by Section 219 of the EACCMA. The Applicant, it is contended, has not proven that the decision was replete with any ground for the grant of judicial review orders as elucidated in the case of Republic V Kenya Revenue Authority Exparte Yaya Towers Limited [2008] eKLR.

63. The Respondent submits that the Applicant is not entitled to the order of mandamus as the Respondent has no powers to consider an application for extension of time on compounded offences where the Respondent has no such powers. To this end, the Respondent places reliance on the case of Jotham Mulati Welamondi v Chairman, Electoral Commission of Kenya [2002] KEHC 1123 (KLR).

64. On prohibition, the Respondent submits that the writ cannot issue as the same has already been overtaken by events, and thus this Court cannot issue an order in vain hence the application should be dismissed.

Analysis and Determination

65. From the notice of motion, affidavits in support and opposition thereto and submissions of the respective parties all summarized herein above, the following issues arise for determination:

    i. Whether a review under Section 229 of the East African Community Customs Management Act, 2004 (EACCMA) is available in respect of offences compounded under Section 219 of the same Act and therefore whether the Commissioner had power to extend the statutory period for lodging such a review, which was filed 20/2/2025 seeking to extend time to review the decision made on 24th July 2024.

    ii. Are there any jurisdictional issues in this matter and if so, what is their effect?

    iii. Whether, in light of the Applicant's conduct and the circumstances of the case, the Respondent acted unlawfully, irrationally, or in breach of procedure in declining to entertain the late review application.

    iv. What orders should the court make including the question of costs if any?

66. I shall address and determine the foregoing issues collectively and cumulatively. On the first issue, it is not in dispute that the respondent herein, The Commissioner of Customs Control (the Commissioner) as defined under section 2 of the EACCMA and appointed under section 5 of the same Act bears the statutory mandate of the management and control of the Customs including the collection of, and accounting for, Customs revenue in the respective Partner State.

67. Section 5(1) of the *Kenya Revenue Authority Act* (KRA) Act on the other hand establishes the Authority as the agency charged with this responsibility, while Section 5(2) obligates the Authority to administer and enforce the provisions of the written laws set out in the First Schedule, including the East African Community Customs Management Act, 2004 (EACCMA).

68. In the discharge of the statutory mandate, the Respondent is empowered to take enforcement action against non-compliance and the Act expressly criminalizes the failure to pay customs duties/tarriffs lawfully due. Section 203 of the EACCMA makes it an offence for any person to evade payment of duty or to in any way be knowingly concerned in the fraudulent evasion of such duty.

69. Against that background, the commencement point for analysis is Section 219 of the EACCMA, which empowers the Commissioner respondent herein to compound customs offences where a written admission is made, by imposing a monetary penalty.

70. Section 219 of the EACCMA provides as follows:

> " Settlement of Cases by the Commissioner
>
> 219.
>
> (1) The Commissioner may where he or she is satisfied that any person had 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.
>
> (3) Where the Commissioner makes any order under this section—
>
> (a) the order shall be put into writing and shall have attached to it the request of the person to the Commissioner to deal with the matter;
>
> (b) the order shall specify the offence which the person committed and the penalty imposed by the Commissioner;
>
> (c) a copy of the order shall be given to the person if he or she so requests;
>
> (d) the person shall not be liable to any further prosecution in respect of the offence; and if any prosecution is brought it shall be a good defence for the person to prove that the offence with which he or she is charged has been compounded under this section; and

(e) the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court.

71. On the other hand, Section 229 (1), (2) and (3) of the EACCMA provides as follows:

> "(1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.
>
> (2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.
>
> (3) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any other information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision".

72. Section 230 (1) and (2) of EACCMA provide for appeal mechanisms where a person is aggrieved by the decision of the Commissioner made under section 229 above and it provides as hereunder:

> "(1) A person dissatisfied with the decision of the commissioner under section 229 may Appeal to a tax Appeals tribunal established in accordance with section 231.
>
> (2) A person intending to lodge an Appeal under this section shall lodge the Appeal within Forty-five days after being served with the decision, and shall serve a copy of the Appeal on the Commissioner.

73. A reading of the above provisions of the EACCMA reveals that the said sections must be read together and not one in isolation of the other. The import of Section 229(1), (2) and (3) of EACCMA above is that the Applicant who was dissatisfied with the decision made by the Commissioner in the matter relating to customs (compounding of offences being one of them under the Act, was required, in the first instance to lodge an application in writing for review of the Respondent's decision, stating the grounds upon which the review is lodged. On receipt of the application for review of the decision, the Respondent is required to respond within thirty days of receipt of the application. In the event that the Respondent's decision is not in favour of the Applicant, then the latter has a right of Appeal to the Tribunal, as stipulated in section 230 of the EACCAMA. Where such review is not filed within 30 days stipulated, then the Commissioner may be moved to accept an application for review outside the 30 days.

74. it is further worth noting that Section 12 of the *Tax Appeals Tribunal Act* (TATA), provides for Appeals to the Tribunal over the Respondent's decisions on any tax dispute. The section provides as follows:

> 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. [emphasis added]

75. Section 2 of the TATA defines an Appeal as "an Appeal to the Tribunal against a decision of the Commissioner under any of the tax laws." This section read together with Section 12 of the same Act stated herein above in the judgement, clearly shows that the decision for the Respondent which is Appealed to the Tribunal is a decision made pursuant to Section 229 of EACCMA.

76. The tax laws are expounded in Section 2 of the TATA wherein EACCMA is included.

77. It is also important to note that Commissioner in the context of these proceedings is the head of Customs and Border Control and is one of the Commissioners appointed under section 13 of the *Kenya Revenue Authority Act* which provides:

> 13. Appointment of Commissioners and other officers
>
> (1) The Board shall appoint to the service of the Authority; such Commissioners as may be deemed necessary.

78. On the other hand, the *Tax Appeals Tribunal Act* defines Commissioner as:

> " Commissioner" means the Commissioner appointed under *Kenya Revenue Authority Act*;

79. Section 5 of the EACCMA mandates the appointment by each Partner State a Commissioner responsible for the management of Customs and other staff as may be necessary for the administration of the Act and the efficient working of the Customs.

80. According to the Respondent, after subjecting the applicant's consignments to analysis, issued a tariff ruling on 4th April 2024, the Applicant appealed against this ruling but the appeal was dismissed and the previous ruling upheld by Tariff on 17th May 2024. Further that the Applicant re-appealed the said ruling vide a letter received on 12th July 2024 which the Respondent responded to on 10th August 2024 informing the Applicant that the indulgence was the final communication from the Respondent on the matter and that the Respondent considered the dispute resolved as per Section 229 of the EACCMA.

81. In other words, according to the Respondent, the applicant after receiving the decision on tariffs, challenged the decision by way of an appeal but the appeal was dismissed and it reappealed without success.

82. However, although Part XX is headed appeals, section 229 which falls under Part XX of the Act is specifically dedicated to review of the decision or omission by the Commissioner within 30 days and extension of time for review where such time has lapsed. It follows that the applicant was right in its submission that the Commissioner had jurisdiction to review the decision relating to compounding of offences in as much as such decision would be final and not appealable under section 219 of the Act.

83. The Applicant in a letter dated 20th February 2025 sought to invoke Section 229(3) of the EACCMA after lapse of the thirty-days period, urging the Commissioner to admit a late review. The Applicant in its letter stated that the reason it sought for the extension was because there were investigations being conducted on how its clearing agent Continental Logistics Networks Limited had entered into an agreement for settlement without instructions from the Applicant/Principal.

84. The Applicant therefore requested the Respondent to extend the period for filing for review to allow the applicant the opportunity to address the settlement and further to assist the Commissioner to bring to book persons involved in the alleged fraud.

85. The Respondent rejected the application, citing section 229 of the East African Community Customs Management Act which according to the respondent, provides that any application for review should be made within the statutory timelines of 30 days from the date of the Commissioner's decision. The Respondent then informed the Applicant that it was not within the jurisdiction and powers of the Commissioner of customs to entertain any appeal outside the time allowed. In my view, the Commissioner was using the term 'appeal' loosely and not strictly as used in section 230 of the Act.

86. The Respondent is also stated to have communicated that section 229 of the Act did not apply to the Applicant as the compounding decision by the commissioner was not appealable as guided by section 219 (3) (e) of the Act. For the above reasons, the Respondent declined the Applicant's application.

87. At the risk of repeating the provisions of the relevant law for clarity purposes, Section 219 (3) of the EACCMA provides as follows:

> " (3) Where the Commissioner makes any order under this section—
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> (a) the order shall be put into writing and shall have attached to it the request of the person to the Commissioner to deal with the matter;
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> (b) the order shall specify the offence which the person committed and the penalty imposed by the Commissioner;
>
> (c) a copy of the order shall be given to the person if he or she so requests;
>
> (d) the person shall not be liable to any further prosecution in respect of the offence; and if any prosecution is brought it shall be a good defence for the person to prove that the offence with which he or she is charged has been compounded under this section; and
>
> (e) the order shall be final and shall not be subject to appeal and may be enforced in the same manner as a decree or order of the High Court."

88. By contrast, Section 229 of the EACCMA provides for review to a person directly affected by a decision or omission of the Commissioner, provided the application is lodged within thirty days, with reasons in writing and is made without unreasonable delay. The section substantively provides:

> " Appeals
>
> 1. A person directly affected by the decision or omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.
>
> 2. The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.
>
> 3. Where the Commissioner is satisfied that, owing to the absence from the Partner State, sickness, or other reasonable cause, the person affected by the decision of the Commissioner was unable to lodge an application within the a time specified in subsection (1), and there has been no unreasonable delay

by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection."

89. No doubt, subsection 3 allows the party who was unable to lodge an application for review within 30 days to seek for enlargement of time on the grounds stated in the subsection, being, owing to the absence from the Partner State, sickness, or other reasonable cause. The subsection then conditions the enlargement of time to, and there has been no unreasonable delay by the person in lodging the application.

90. The applicant filed the application seeking for a late review after nearly seven months, only two days short of the seven months after the Commissioner had rejected the application seeking a late review.

91. It is therefore not correct to say that the decision of the Commissioner was final as stipulated in section 219 of the EACCMA since section 229 provides for review and even an appeal is allowed under section 230 of the said Act.

92. Under section 230, the applicant having been dissatisfied by the decision made by the Commissioner under section 229 could only appeal to the Tax Appeals Tribunal and not to seek for judicial review from this Court.

93. The reasons for my above finding are that Section 230 (1) and (2) of EACCMA expressly provides for an appeal from a decision made under section 229 by the Commissioner, which lies to the Tax Appeals Tribunal as established under section 231 of the EACCMA which specifically provides that:

> " 231. Subject to any law in force in the Partner States with respect to tax appeals, each Partner State shall establish a tax appeals tribunal for the purpose of hearing appeals against the decisions of the Commissioner made under section 229."

94. It is also worth noting that Section 12 of the *Tax Appeals Tribunal Act* (TATA), provides for Appeals to the Tribunal over the Commissioners decisions on any tax dispute. It states as follows:

95. Moreover, Section 2 of the TATA defines an Appeal as "an Appeal to the Tribunal against a decision of the Commissioner under any of the tax laws."

96. This section read together with Section 12 of the same Act as above stated herein in the judgement, clearly shows that the decision of the Respondent which is subject of these proceedings, rejecting an application for review out of time, as filed by the applicant is a decision which is appealable to the Tax Appeals Tribunal because it is a decision made pursuant to Sections 229 of EACCMA. As stated above, the tax laws are expounded in Section 2 of the TATA wherein EACCMA is included and section 229(3) which provides for enlargement of time for filing an application for review is equally included.

97. This Court is thus invited to address the jurisdictional question arising from the doctrine of exhaustion of remedies. Upon careful consideration, it is evident that the applicant has not demonstrated any justifiable reason for failing to invoke the appellate mechanism provided under Section 230 of the EACCMA. The Tax Appeals Tribunal (TAT), being the established forum for internal dispute resolution against decisions of the Commissioner, ought to have been approached in the first instance before seeking recourse to Court.

98. Rather than pursuing the appropriate appellate avenue, the applicant elected to approach this Court seeking Judicial review orders among them, an order of mandamus to compel the respondent to consider an application for review filed out of time. Notably, the Commissioner rendered a decision declining to entertain the said application.

99. The fact that the Commissioner referred to the process as an 'appeal' rather than a 'review' does not materially alter the substance of the decision, which was a clear rejection of the applicant's request on jurisdictional grounds, which decision, as I have stated, is appealable under section 230 of EACCMA to the Tax Appeals Tribunal.

100. Having made the above findings, I conclude that the applicant did not exhaust the internal mechanisms available as provided for in section 230 of EACCMA as read with section 12 of the *Tax Appeals Tribunal Act*.

101. The effect of failure to exhaust the internal mechanisms for dispute resolution is now well settled. In Speaker of the National Assembly -vs-Njenga Karume {1992} eKLR, the Court of Appeal discussing the doctrine of exhaustion held as follows:

> " In our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed."

102. Additionally, in the case of Geoffrey Muthiga & Another-vs- Samuel Muguna Henry & Others [2015] eKLR the court while dealing with the same doctrine of exhaustion as aforesaid held:

> " 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 of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution."

103. This is because in essence, the EACCMA provides a clear path for appeal to the TAT. Failing to follow this path without a compelling justification can render a judicial review application fundamentally flawed and lead to its dismissal. Judicial review is not an avenue to bypass established statutory dispute resolution mechanisms; it is typically considered only after the statutory appeal process has been fully utilized or if there are exceptional circumstances, such as a clear abuse of power by the statutory body, whether the decision is unlawful, unreasonable and or the decision is not appealable or the remedy of appeal is not effective or sufficient.

104. It is for this reason that section 9 of the *Fair Administrative Action Act* which Act implements Article 47 of the *Constitution* provides 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 applicant shall first exhaust such remedy before instituting proceedings under subsection (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

105. The applicant did not apply to this court for exemption from exhausting the established appeal mechanism and neither are there any special circumstances that would warrant such exemption by this Court on its own motion. See Ndiara Enterprises Ltd v Nairobi City County Government [2018] KECA 825 (KLR) where the Court of Appeal stated as follows regarding exhaustion of remedies:

> "..Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of the speaker of The National Assembly v Njenga Karume (2008) 1 KLR 425, Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor (2015) eKLR for that proposition.
>
> The appellant also alleged that the respondent's refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section 9 (2) of the Act from reviewing "an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted." The Act however gives the High Court power to exempt a person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows;
>
> > "In addition under Section 9(2) of the *Fair Administrative Action Act* No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and "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 applicant shall first exhaust such remedy before instituting proceedings under suction (1)
> >
> > (4) Notwithstanding Subsection (3) the High Court or subordinate court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice ...
> >
> > 64. From the above provisions of the law and decided cases, it is clear that even the *Fair Administrative Action Act* which the exparte applicant in this case

claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption.

65. In this case, no doubt, the applicant had an avenue for ventilating its grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary."

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent's refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It's clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the *Constitution* was therefore limited or restricted by statute in this instance as found by the Judge..."

106. For the above reasons, this Court finds that the application herein was made without jurisdiction and is amenable for striking out. The principle guiding jurisdiction of courts was laid down in the locus classicus case of Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd (Civil Appeal No 50 of 1989) where it was held that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending

other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

107. Without conceding the issue of jurisdiction and while remaining firmly persuaded that this Court lacks jurisdiction in the present matter, this Court proceeds to address the merits, in the alternative and for completeness.

108. The applicant challenges the legality of the impugned decision on the ground that the alleged offender lacked the requisite authority to act as its agent in the process of compounding the offence. It is the applicant's position that the fraudulent conduct of the said agent cannot, in law, be attributed to or bind it in its capacity as the importer.

109. With respect to the applicant's allegation that the purported agent lacked instructions to admit the offences and to have them compounded by the Commissioner, the Court notes as follows: The record indicates that the applicant, acting through its duly appointed clearing agent, was served with a charge sheet and an offence report. Subsequently, an application for the compounding and settlement of the offences was made by way of a signed and duly lodged Form C35 pursuant to Section 219 of the East African Community Customs Management Act (EACCMA). Following this application, an order for settlement was issued by the Commissioner, and the corresponding penalties and fines were duly paid.

110. The foregoing analysis leads to the inescapable conclusion that the applicant, through its duly appointed clearing agent, admitted to the commission of the offences, which were subsequently compounded by the respondent in accordance with Section 219 of the East African Community Customs Management Act (EACCMA), thereby conclusively settling the matter. Pursuant to Section 147 of the Act, any person who engages in any act in relation to imported goods, whether personally or through an agent, is deemed responsible for compliance with the law. Accordingly, the applicant cannot now repudiate the actions of its agent in an attempt to avoid the legal consequences of a process it willingly participated in and benefited from.

111. Section 147 of the EACCMA provides that:

> 147. A duly authorized agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:
>
> > Provided that nothing herein contained shall relieve the owner of such goods from such liability.

112. It is therefore clear that the owner of goods bears primary responsibility for compliance with the provisions of the Act. Moreover, Section 148 of the East African Community Customs Management Act (EACCMA) expressly provides that an importer is bound by the acts and declarations of its duly appointed agent. The statutory framework thus envisages that, upon the appointment of a clearing agent, customs authorities are entitled to rely on the actions and representations of such agent without being required to inquire into or verify the internal arrangements or instructions as between the principal and the agent.

113. Section 148 provides:

> 148. An owner of any goods who authorizes an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorized agent and may, accordingly, be prosecuted for any offence committed by the agent

in relation to any such goods as if the owner had himself or herself committed the offence: Provided that—

(i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorized agent unless the owner actually consented to the commission of the offence;

(ii) nothing herein contained shall relieve the duly authorized agent from any liability to prosecution in respect of any such offence.

114. The applicant contests the validity of the compounding process, contending that its clearing agent acted without proper instructions and may have engaged in fraudulent conduct. It further asserts that, pursuant to Section 219(2) of the East African Community Customs Management Act (EACCMA), a valid compounding requires a clear admission of guilt by the person who committed the offence. The applicant maintains that it neither committed any offence nor admitted liability in respect thereof.

115. However, this Court notes that the respondent, in its replying affidavit, has annexed documents in support of its position, including mitigation forms which expressly identify Burn Manufacturing USA LLC as the importer and Continental Logistics Networks Limited as its clearing agent. The said forms are duly executed by one Japheth Kilio. Also annexed are request for settlement forms, further evidencing the applicant's participation in the compounding process

116. Section 148 of the East African Community Customs Management Act (EACCMA) clearly provides that an importer is bound by the acts and declarations made by its duly authorized agent. The applicant has sought to impugn the compounding process on the basis that the individual who executed the offence mitigation form was not the same person whose port pass was produced. While the record does reflect this discrepancy, the Court notes that no evidence has been adduced to establish that the two individuals were not acting under the authority of the same licensed clearing agent, namely Continental Logistics Networks Limited, who was duly appointed to act on behalf of the applicant.

117. The respondent's affidavit confirms that the port pass annexed thereto pertains to a representative of the applicant's appointed clearing agent, who was responsible for presenting the relevant compounding forms. It is therefore evident that, although the forms were signed by one individual and physically presented by another, both individuals acted within the authority and scope of the licensed clearing agent, Continental Logistics Networks Limited.

118. It is not in dispute that Continental Logistics Networks Limited was, at all material times, the duly appointed agent of the applicant. Accordingly, by operation of Section 148 of the East African Community Customs Management Act (EACCMA), any acts undertaken by that agent in the course of its duties are binding upon the applicant.

119. Liability therefore properly attaches to the applicant unless it is demonstrated that the statutory exceptions under Section 148 apply, which specifically provides that "...(i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorized agent unless the owner actually consented to the commission of the offence; and that (ii) nothing herein contained shall relieve the duly authorized agent from any liability to prosecution in respect of any such offence."

120. I reiterate that section 148 of the EACCMA is categorical that the owner of the goods is liable for the acts of its duly authorized agent. Accordingly, liability attaches to the principal regardless of which particular representative of the clearing agent undertook the impugned actions, unless evidence is shown that the individual acted outside the scope of authority or by way of fraud.

121. To permit an importer to disown the actions of its duly appointed agent would fundamentally undermine the principles of certainty, predictability, and administrative efficiency that underpin the customs regime. Allegations of fraud, while serious, must be properly substantiated and pursued through the appropriate legal channels. As contemplated under Section 148 of the East African Community Customs Management Act (EACCMA), the proper course in such circumstances lies in instituting private law claims against the agent or initiating criminal proceedings where fraudulent conduct is alleged. Such allegations do not, in and of themselves, provide a lawful basis to set aside or unravel a compounding decision validly made under Section 219 of the Act.

122. Furthermore, in the absence of evidence demonstrating that the alleged fraud was perpetrated by the Commissioner or carried out with his complicity, this Court is without jurisdiction to set aside the compounding decision solely on the basis that the importer now disputes the authority of its agent. The integrity of administrative decisions must be preserved unless there is cogent proof of impropriety or misconduct on the part of the decision-maker.

123. The applicant further raises the question whether the respondent was obligated to conduct due diligence to verify that the individuals who presented the mitigation and request for settlement forms were duly authorized to bind the applicant.

124. On this issue, the statutory framework is unequivocal. Section 147 of the East African Community Customs Management Act (EACCMA) provides that any act performed by an authorized clearing agent shall be deemed to have been performed by the owner of the goods. Complementarily, Section 148 extends liability to the principal for acts and declarations made by such agent.

125. These provisions embody the practical exigencies of customs administration, which necessarily depends on clearing agents as intermediaries between importers and the Commissioner.

126. Consequently, the law imposes no obligation on the respondent to verify the internal authorizations between an importer and its duly appointed agent. To require the Commissioner to investigate and authenticate the authority of every individual presenting documents on behalf of importers would be both impracticable and detrimental to the efficient administration of customs operations.

127. The law accordingly places the risk of any misconduct by an agent squarely upon the importer who appointed such agent. The respondent was therefore entitled to act on the representations and documents presented by the applicant's clearing agent, whose operations clerk, Wilson I. Kahiro, properly identified himself by means of a valid port pass. Should it transpire that the applicant's agent acted without authority or engaged in fraudulent conduct, the proper remedy lies in a private claim against the agent and not in an attempt to shift liability onto the respondent.

128. Discussing a similar issue, the court in the case of Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another [2016] KEHC 5170 (KLR) observed as follows:

> " Section 147 of the EACCMA provides as follows:
>
> A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

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

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

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

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

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

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

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

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

129. That notwithstanding, the court in the case of Republic v Commissioner General Kenya Revenue Authority Ex-Parte Mount Kenya Bottlers Ltd & another [2016] KEHC 5170 (KLR) observed that while a clearing agent was an agent of the importer, there may be circumstances where it might be unfair to saddle the importer with the actions or omissions of the agent. Such instances include if there was evidence of corrupt collusion between the agent and the respondent's agent.

130. The court also held that the importer may well be justified in demanding that action be taken against the agent and the respondent's agents. Further, that the applicant's allegation was however a mere conjecture as the applicant did not adduce evidence to that effect. Such conjecture according to the court, could not be the basis upon which the it could hold that the conduct of the respondent militated against its decision to recover customs due from the applicant.

131. Similar to the above case, the Applicant in this case has failed to adduce any evidence to the effect that there was corrupt collusion between the agent and the respondent.

132. The above said, the question is whether judicial review is the most efficacious remedy in such circumstances. There is no dispute that the applicant did not apply for review in time -within 30 days of the date of the decision as required under section 229(1) of the EACCMA and it proceeded to apply for review of the decision out of time, under der section 229(3) on 20/2/2025, which request was declined on 24th February 2025.

133. My finding is that in view of the provisions of section 230 (1) of the EACCMA, the applicant ought to have appealed the decision to reject a review out of time, to the Tax Appeals Tribunal. The section expressly provides an avenue for challenging the decision of the Commissioner made under section 229 of the EACCMA and that appeal has to be made within 45 days of the date of the decision, as stipulated in subsection 2 of section 230. Instead of filing an appeal to the Tax Appeals Tribunal, the applicant filed this judicial review application.

134. No doubt, the Tribunal is the best body to evaluate the material comprised in the documents which were allegedly signed by the applicant's agent leading to the compounding of offences and make a decision on the genuineness of those documents.

135. A judicial review court cannot on affidavit evidence make a determination as to who between the Applicant and the respondents is to be believed on the question of the genuineness of the evidence submitted by the Applicant in support of export. This position was upheld by the Court in Nairobi HC Judicial Review Application MISC. CAUSE NO. 455 OF 2014 Pwani Oil Products Limited versus The Commissioner of Customs Services and Kenya Revenue Authority. Highlighting the above position, the learned Judge W. Korir J (as he then was) stated as follows and I concur that:

> " 56. I agree with the statement in Republic v Land Registrar Taita Taveta District & another, Mombasa HCJR No. 36 of 2012, [2015] eKLR that:
>
> > " The Judicial Review Court is particularly ill-equipped to deal with disputed matters of fact where, as in this case, it would involve fact finding on an issue of fraud which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. To prove fraud there is need for direct evidence to be adduced and tested through cross-examination of the witnesses before the court can conclude that fraud has been committed and that the applicant had participated in it to warrant revocation of title by the Court under sections 143 of the Registered *Land Act* cap. 300,

> section 23 of the Registration of Titles Act cap. 281 and now....the *Land Registration Act* 2012 which repealed the former two Acts. As I have recently held in Mombasa HC Misc. App. No. 46 Of 2002 Republic v. The Registrar of Titles & Ors. Ex Parte Kalidas Kanji (Africa) Ltd., "Judicial review which proceeds on the basis of affidavits is not the appropriate procedure for determining disputed matters of fact.""
>
> 57. Whether or not the Applicant's documents are forgeries is an issue best left for the determination of the tax tribunal".

136. Additionally, this Court finds that the Respondent's refusal to admit the Applicant's request for review out of time was not arbitrary. This is because a reading of section 229 of the EACCMA reveals that the power to allow an applicant extension of time for review after the lapse of 30 days is discretionary.

137. There is no mandatory duty imposed on the Commissioner to accept a review past the 30 days and even if there was such mandatory duty, section 230 is clear on the avenue for challenging the decisions of the Commissioner made pursuant to the provisions of section 229 of the EACCMA.

138. This Court also notes from the record that the Applicant remained silent until after the guarantee was liquidated. Such conduct amounts to acquiescence and disentitles the Applicant to the discretionary reliefs sought.

139. Judicial review remedies being equitable, a litigant who sleeps on their rights cannot be heard to complain after enforcement. Section 229(3) emphasizes that even if the commissioner is satisfied that there are grounds for review, the application for review out of time under section 229(3) must be made without unreasonable delay. In the instant case, the application was made nearly seven months from the date of rejection of the application for review out of time. this delay was in my view, inordinate.

140. Judicial review is concerned not with the merits of a decision but with the legality of the process leading to it. The court's supervisory jurisdiction is invoked where it is shown that the decision-maker acted in excess of power, committed an error of law, or violated principles of natural justice.

141. As was stated in Pastoli v Kabale District Local Government Council & Others [2008] 2 EA 300, grounds for judicial review fall under three broad heads: illegality, irrationality, and procedural impropriety. It is therefore incumbent upon the Applicant to demonstrate that the Respondent's refusal to entertain its application for review out of time was tainted by one or more of these grounds. Mere dissatisfaction with the outcome or delay in pursuing remedies does not, without more, invite intervention.

142. Furthermore, the issuance of a prohibition order is not warranted on the basis that, following the compounding of the offences, the respondent demanded payment of the duty due, which was subsequently paid. In the circumstances, prohibition cannot be granted to restrain an act that has already been consummated and overtaken by events.

143. In the result, I find and hold that there is no material upon which this court can interfere with the decision of the Commissioner, which decision was appealable to the Tax Appeals Tribunal and not challengeable by way of Judicial Review.

144. I further find that this court is devoid of jurisdiction to entertain the judicial review application and the application dated 21st May 2025 is hereby dismissed.

145. Costs follow the event. However, the respondent is a public entity that has already benefitted from the compounding of the offences on behalf of the public and counsel representing it is in-house. I find that it is in the interest of justice to order that each party bear their own costs of the application.

146. I therefore order that each party shall bear their own costs of the dismissed application.

147. This file is closed.

148. It is so ordered.

DATED, SIGNED, DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2025

R.E. ABURILI

JUDGE