Law Society of Kenya v Attorney General & 4 others (Judicial Review Miscellaneous Application E040 of 2023) [2023] KEHC 22637 (KLR) (Judicial Review) (1 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22637 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW MISCELLANEOUS APPLICATION E040 OF 2023

JM CHIGITI, J

SEPTEMBER 1, 2023

BETWEEN

LAW SOCIETY OF KENYA .... APPLICANT

AND

ATTORNEY GENERAL .... 1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF TRADE, INVESTMENT & INDUSTRY .... 2ND RESPONDENT

PRINCIPAL SECRETARY, THE NATIONAL TREASURY & ECONOMIC PLANNING .... 3RD RESPONDENT

COMMISSIONER FOR CUSTOMS & BORDER CONTROL . 4TH RESPONDENT

KENYA NATIONAL TRADING CORPORATION .... 5TH RESPONDENT

RULING

Brief Background

1. The cause of action in this suit flows from the fact that the Ex parte Applicant/Respondent's dissatisfaction with the 3rd and 4th Respondent's decision approving importation of amongst other goods, 125,000MT duty free cooking oil which decision was made pursuant to paragraph 20 of Part B to the Fifth Schedule of the EACCMA.

2. Section 5 of the EACCMA establishes the 4th Respondent as the sole authority to manage and control customs in Kenya, pursuant to which the 3rd Respondent wrote to the 4th Respondent requesting facilitation of the importation of amongst other goods, 125,000MT duty free cooking oil.

3. Following this request to facilitate, the 4th Respondent made the administrative decision approving the facilitation of the importation of inter alia 125,000MT duty free cooking oil through its internal circular dated 14.02.2023.

4. On 30th June, 2023, the Honourable Court issued orders inter alia granting leave to the Ex parte Applicant to institute judicial review proceedings against the Respondent for the aforementioned set of transactions.

5. Being aggrieved by the said orders, the Applicant/5th Respondent filed a Notice of Motion application dated 13th July, 2023; which is before the Honourable Court seeking inter alia the following orders:

   a. Spent.

   b. Spent.

   c. Spent.

   d. The orders issued on 30th June, 2023 granting the Applicant/Respondent leave to institute Judicial Review proceedings and staying the implementation of the 3rd Respondent letter dated 20th January, 2023 and the 4th Respondent internal circular No. 7 dated 14th February, 2023 be and is hereby discharged/set aside.

   e. An order be and is hereby made that the Chamber Summons Application dated 17th April, 2023 was prematurely before the Court and is hereby struck out for want of jurisdiction and all consequential orders discharged

6. The Application is based on the grounds that the orders issued on 30th June, 2023 were made without jurisdiction, in violation of Section 9(2) of the *Fair Administrative Action Act*, 2015; hence null ab initio. That the Ex parte Applicant/Respondent failed to disclose to the Court the material fact that available statutory mechanisms had not been attempted/exhausted.

7. That the issues in dispute relate to importation of duty-free cooking oil, pursuant to provisions of paragraph 20 of Part II to the Fifth Schedule of the East Africa Community Customs Management Act, 2004 (EACCMA), which Act has a mandatory statutory review and appeal forums--through which the Ex parte Applicant/Respondent could agitate its grievance at first instance.

8. It is the Applicant's/5th Respondent's case that the stay orders do not meet the proportionality test as it subjects the 5th Respondent/Applicant to undue hardship, irreparable harm owing to the risk of perishability of the imports and the colossal financial loss.

9. It also argues that the orders issued on 30th June, 2023 were null ab initio since they were issued by the court without jurisdiction to the extent that they were issued following material non-disclosure of the germane facts that the Ex parte Applicant/Respondent had not exhausted the mandatory statutory dispute resolution mechanisms; hence prematurely invoking the Court's jurisdiction.

10. As a result of the non-disclosure, the Honourable Court prematurely assumed jurisdiction in violation of the mandatory provisions of Section 9(2) of the *Fair Administrative Action Act*, 2015 (FAAA) which bars the Court from reviewing administrative decisions until statutory remedies have been exhausted.

11. Section 229 of the EACCMA provides in mandatory terms that a person aggrieved by the decision or omission of the 4th Respondent, or any other officer on matters relating to custom shall apply for review of the decision before the 4th Respondent.

12. Section 230 of the EACCMA as read together with Section 231 of EACCMA obligates a person aggrieved by the review decision of the Commissioner to appeal against the decision to the Tax Appeals Tribunal (Tribunal).

13. Section 12 of the *Tax Appeals Tribunal Act*, 2013 (TATA) equally provides that any person aggrieved by the decision of the Commissioner on any matter arising out of any tax law shall, subject to the provisions of the relevant tax law, appeal to the Tribunal. Section 2 of the TATA provides tax laws to include EACCMA. The provision of the relevant tax law contemplated in under Section 12 of the TATA is the review mechanism provided for under Section 229 of EACCMA.

14. Section 9 of the FAAA 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 sub-section (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. Any person aggrieved by an order made in the exercise of judicial review jurisdiction of the High Court may appeal to the Court of Appeal."

15. The 5th Respondent argues that the judicial review jurisdiction of this Honourable Court was improperly and prematurely invoked by the Ex parte Applicant/Respondent before it exhausted the available mandatory statutory mechanisms provided under the EACCMA and TATA.

16. Sections 229(1) and (2) and 230 of the EACCMA as read with Sections 2 and 12 of the TATA, 2013 which provide the mandatory statutory remedies that should have been invoked by the Applicant before filing the suit.

17. It is of the strong persuasion that the Court's jurisdiction to review administrative action under Section 9 of the FAAA is only triggered once an Applicant has exhausted the available remedies provided under written law.

18. It is the 5th Respondent's case that the only exception to this is where the Applicant has made an application to the Court and demonstrated exceptional circumstances which excuses the Applicant from exhausting the available statutory procedures and remedies.

19. It relies on the holding of the Court of Appeal in Speaker of National Assembly vs Karume, [1992] KECA 42 (KLR) where the Court held as follows: "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."

20. And the case of Geoffrey Muthiga Kabiru & 2 others -vs Samuel Munga Henry & 1756 others [2015] eKLR, where it was stated that, 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.

21. That it is not in dispute that the Ex parte Applicant/Respondent did not attempt and/or exhaust the statutory mechanisms provided for review and appeal provided under the law under Section 229 and 230 of the EACCMA as read together with Section 12 of TATA and Section 35 as read together with Section 38 and 39 of the Public Procurement and Assets Disposal Act (PPADA) are not effective to address the issues raised in the suit.

22. It relies on the case of Krystalline Salt Limited vs Kenya Revenue Authority [2019] eKLR where the Court held as follows, the second requirement is that on application by the applicant, the court may grant an exemption. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the *Fair Administrative Action Act*. The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. Section 9(4) of the *Fair Administrative Action Act* postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. My reading of the said provision is that the applicant must first apply to the court and demonstrate the existence of exceptional circumstances....

    The above discussion leads to the conclusion that this case offends section 9 (2) of the *Fair Administrative Action Act*. The applicant did not apply for an exemption, as the law requires nor has it satisfied the exceptional circumstances requirement under section 9(4) of the *Fair Administrative Action Act* I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. Having so found, and considering that the court had only invited the parties to address the question of exhaustion, I find no reason to address the question whether the application meets the threshold for grant of leave."

23. It submits that the court lacked the jurisdiction to issue the orders 30th June, 2023 since the Applicant willfully failed to exhaust and also failed to make an application demonstrating the exceptional circumstances excusing it from exhausting the review and appeal remedies as required under Section 9(4) of the FAAA.

24. It relies on the Court of Appeal judgment in Jamal Salim vs Yusuf Abdulahi Abdi & another [2018] eKLR where it held as follows: Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in Adero & Another vs. Ulinzi Sacco Society Limited [20021 1 KLR 577, as follows; The jurisdiction either exists or does not ab initio ...Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal."

25. Further, the Court of Appeal further elaborated the importance of jurisdiction in National Social Security Fund Board of Trustees vs Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR) where it held as that, "Jurisdiction was a threshold matter which went

to the competence of the court to hear and determine a suit. Jurisdiction could be raised at any stage of the proceedings in the High Court, on appeal and even in the Supreme Court for the first time. It could be raised by any of the parties or by the court, and once raised the court would do well to examine it and render a considered ruling on it.

> Jurisdiction, a mantra in adjudication connoted the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A court of law was invested with jurisdiction to hear a matter when:
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> a. it was properly constituted as regards numbers and qualifications of members of the bench, and no member was disqualified for one reason or another;
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> b. the subject matter of the case was within its jurisdiction, and there was no feature in the case which prevented the court from exercising its jurisdiction; and
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> c. the case came before the court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.
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> The above three ingredients had to co-exist in order to infuse jurisdiction in a court. Where a court was drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, would be marooned in the intractable web of nullity."

26. The court has been invited to be guided by the holding in National Social Security Fund Board of Trustees vs Kenya Tea Growers Association & 14 others (Supra) it was held as follows: "If proceedings are conducted by a court without jurisdiction, they are a nullity. See: Desai v Warsaw (1967) EA 351. Any award or judgment and or orders arising from such proceedings of a court acting without jurisdiction are also a nullity. We so find."

27. On whether the application is competent, the 5th Respondent/Applicant relied on, Order 53 Rule 1(4) of the Civil Procedure Rule, which provides that, "the grant of leave...shall, if the judge so directs, operate as a stay of the proceedings in question until determination of the application, or until the judge orders otherwise."

28. The 5th Respondent/Applicant argues that this rule gives the Court the power to review, vary, or set aside an order of stay issued at leave stage. In this regard, it relied on the authority in Republic vs Vice Chancellor Moi University & 3 others Ex Parte Benjamin J. Gikenyi Magare [2018] eKLR where the Court in finding that it had jurisdiction to review, vary, or set aside stay orders stated as follows, "The wording of this sub-rule clearly indicates that the court has jurisdiction to review, vary, set aside or discharge stay and that the powers of court are discretionary."

29. It also relies on the finding in Republic vs Kenya Sugar Board & Attorney General on behalf of Minister for Agriculture Ex-parte Mat International Limited [2004] eKLR where the Court held as follows: "Considering the submissions of counsel on both sides it is my view that under provision of *Law Reform Act*, Cap.26 Section 8 and nine (9) and under the Order 53 rule 1(4) the High Court has jurisdiction to review, vary, discharge or set aside orders of stay granted under sub-rule (4) and an aggrieved party has the option of returning to the judge who issued the orders or to file an appeal to Court of Appeal."

30. It is also its submission that the grounds upon which stay orders issued under Order 53 rule 1(4) may be set aside, are similar to those which an injunction may be varied, reviewed or set aside and include non-disclosure of material facts, concealment of material documents, misrepresentation and where the

application is an abuse of court process. The principles upon which such orders may be made were set out in the case of Republic vs Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR where the Court stated: "I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting such stay orders would only be merited if: -(a) There is non-disclosure of material facts (b) Concealment of material documents (c) Misrepresentation"

31. It was contended that in the present case, the Ex parte Applicant/ Respondent does not dispute the fact that the available remedies for dispute resolution was not embraced before the filing of the suit, which the Ex parte Applicant withheld to the Court as a result of which this Honourable mistakenly assumed jurisdiction.

32. It relied on the holding in Republic vs Cabinet Secretary Ministry for Education & another Ex Parte George Bala; Attorney General & 4 others (Interested Parties) [2022] eKLR where the Court stated that: "I entirely agree with the sentiments of H. Omondi J in Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR where in an application to vacate stay orders in a judicial review application she stated; "To request the court to re-look at the background leading to the issuance of stay, is in my view not asking the court to sit on appeal on orders of a court of equal status. It is simply telling the court to reconsider the orders issued in light of the fact that the beneficiary of those orders concealed or did not disclose all the material facts prevailing. All the other issues raised will be better addressed at the hearing of the main motion."

33. Further reliance was placed on the decision in Republic v Cabinet Secretary Ministry for Education & another Ex Parte George Bala; Attorney General & 4 others (Interested Parties) (supra) where the court held that, "Finally, on the issue of jurisdiction to review its own orders in judicial review, it is trite Law that the Court's role is to do justice to the parties before it. The Court has inherent powers to meet the ends of justice and in my view such powers are available for deployment in judicial review proceedings. The Court should in exercising such inherent powers be in a position to remedy any injustice that may be occasioned by the Court's orders at the ex parte stage in judicial review proceedings."

34. It is the Applicants submission that the Honourable Court is equally clothed with the jurisdiction to review, vary, or set aside/discharge its orders issued on 30th June, 2023.

35. According to the 5th Respondent/Applicant the stay orders do not meet the test of proportionality as it subjected it to undue hardship and irreparable damage for the reasons that:

    a. A stay order cannot be issued where the administrative action complained of has been fully implemented since the acts complained of had been fully implemented.

    b. That the general nature of the orders has had the effect of suspending clearing of goods that are not under challenge before the Court like rice, beans and wheat. Further, these judicial review proceedings are being actuated by malice as the Respondent singled out only cooking oil, yet the other items that were approved pursuant to the same provision of the law.

    c. The 5th Respondent/Applicant has been subjected to incur colossal financial loss resulting from the storage and demurrage charges of the imported goods at the expense of the public funds which is not commensurate to the loss being complained of by the Applicant/ Respondent and the public and that there is no way the 5th Respondent/Applicant can reclaim or recover the losses.

d. The imported goods are perishable in nature with short shelf life and that the continuance of the stay order has exposed them to risk of expiry which might result to substantial loss of public funds.

e. The issue in question in these proceedings relates to the validity of the exemption of the 5th Respondent from paying import duty pursuant to section 114 of the EACCMA. That in the event the Court finds that the exemption was not valid, there is alternative remedy of directing the 4th Respondent to recover the same from the 5th Respondent/Applicant. There the proceedings will not be rendered nugatory.

f. The Applicant/Respondent will not suffer any no prejudice if the stay orders were lifted.

36. According to the 5th Respondent, the Orders of stay issued on 30th June, 2023 do not serve the interests of justice it does not improve the Court's quest to do justice to the parties when the final orders will be made as the 5th Respondent/Applicant as it will never be able to recover the loss it has incurred as a result of the stay orders.

37. It argues that the Honourable Court reserves the inherent power to set aside or review/vary the stay orders if the ends of justice so demand, or where the injunction or the stay orders do not serve the ends of justice as it is in this case.

38. It argues that should the Court find that it has jurisdiction to hear the judicial review proceedings, the remedies under the Judicial Review of certiorari will be issued quashing the decision to exempt and the same is declared by to be of no effect. That the effect of this is that the exemption will be declared to be null ab initio and the 5th Respondent/Applicant will be under obligation to pay the 4th Respondent the amount exempted. However, should the court find that the exemption was lawful, the Respondent/ Applicant will not be able to recover the costs incurred from the storage and demurrage charges which are substantial.

39. It relies on the decision in Wachira Karani vs Bildad Wachira [2016] eKLR where the court stated that:"The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit. [23] The inherent power, as observed by the Supreme Court of India in Raj Bahadur Ras Raja vs Seth Hiralal [24]"has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Lord Cairns in Roger Vs Comptoir D' Escompts De Paris stated as follows:-'One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

40. In buttress its argument, this court was invited to be guided by the decision of the Court of Appeal in M. Mwenesi vs Shirley Luchhurst & Another Civil Application No.170 of 2000 where the court held; "A court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent a court of law is under a duty to exercise its inherent power to prevent injustice."

41. This argument is further buttressed by the Authority in in Patel vs E.A. Cargo Handling Services Ltd [1974] E.A. 75 the court stated that, "There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules."

42. The 5th Respondent/Applicant urges the court to find that the jurisdiction of the Court was prematurely invoked and as a consequence, discharge all the orders issued on 30th June, 2023.

43. In opposing the Setting Aside Application, the Ex-Parte Applicant relies on the filed pleadings, the Ruling of this Court (of 30th June, 2023), the Replying Affidavit of Florence Muturi dated 21st July, 2023, and its written Submissions.

44. The Ex parte Applicant is concerned that instead of appealing the Ruling handed down on 30th June, 2023, the 5th Respondent has opted to take a second bite of the cherry by filing the present Setting Aside Application in a bid to derail the expeditious determination of these proceedings, for an ulterior, mischievous, or collateral purpose.

45. It submits that in furtherance of an initiative of creating a price stabilizer for essential household commodities in Kenya, the Government through the 3rd and 4th Respondents sanctioned a one (1) year duty-free importation of 125,000 MT of cooking fat/oil into the Kenyan market through the 5th Respondent.

46. By the said approval of the 3rd Respondent dated 20th January, 2023 that the Government is purporting the one (1) year duty-free importation of 125,000 MT of cooking fat/oil is in line with Section 114 (2) and Paragraph 20 of Part B to the Fifth Schedule of the East African Community Customs Management Act (EACCMA).

47. However, that Section 114 (2) and Paragraph 20 of Part B to the Fifth Schedule of the EACCMA can only legally sanction the duty-free importation of relief goods which are imported for emergency use in specific areas where natural disaster/calamity has occurred in an East African Community Partner State.

48. It is its belief that the 125,000 MT of cooking fat/edible oils being imported into the Kenyan market are not relief goods, for emergency use in specific areas where natural disaster/calamity has occurred in Kenya. In fact, that the 3rd and 4th Respondents have expressly indicated that the importation is for the purposes of price stabilization of the commodity.

49. Furthermore, the Respondents have not shown any emergency need for edible oils in Kenya or indicated any specific area where natural disaster/calamity has occurred in Kenya where the 125,000MT of cooking fat will be applied. They have also not given any basis or justification as to why the duty-free importation should apply for only one (1) year.

50. It is the Ex parte Applicant's case that the Respondents are relying on a wrong provision of the law, that is Section 114 (2) and Paragraph 20 of Part B to the Fifth Schedule of EACCMA for the ulterior or collateral purpose of circumventing Article 210 read together with Article 114 (3) of *the Constitution* of Kenya, which provide the constitutional procedure for scrutiny and enactment of tax exemptions through Parliament.

51. Given the reason they have given behind the purported duty-free importation; the Respondents have also ignored or circumvented the elaborate provisions of the Price Control (Essential Commodities) Act No. 26 of 2011 which permits the government to control or otherwise stabilize or regulate the prices of essential commodities in order to secure their availability at reasonable prices in the market. There is no justification from the Respondents as to why this law has been disregarded or overlooked.

52. The Ex Parte Applicant also argues that the 5th Respondent, which is a state corporation, has compounded the illegality by procuring the importation of the finished edible oils into Kenya in secrecy, without floating any international tender or following the fair, equitable, transparent,

competitive and cost-effective framework provided under Article 227 of *the Constitution* and the Public Procurement and Assets Disposal Act, 2015.

53. The Ex Parte Applicant, therefore moved to Court seeking leave to institute judicial review orders that would mandate the Respondents to comply with the provisions of *the Constitution* and the law in so far as the procedure for procuring exemptions or waiver of import duties and or other taxes on Products.

54. The Ex Parte Applicant argues further that by a reasoned Ruling handed down by this Honourable Court on 30th June, 2023 after considering the submissions of all the parties apart from the 4th Respondent who chose not to participate, this Court found merit in the Ex Parte Applicant's Application for leave.

55. At paragraph 32 of the Ruling, this court indicated that the leave application presented a case fit for further investigation. At paragraph 41, this court found that the Respondents argument that the impugned administrative actions and decision was implemented was not correct, as the same is of a continuing nature and can only be considered as partly implemented or better yet, not fully implemented, and therefore, the Court could still issue stay orders.

56. At paragraph 42 of the Ruling, the court held that there was need to prevent the implementation and/or further implementation of the said decision until the legality of the Respondents administrative action and decision is established in light of the case pleaded by the Ex-Parte Applicant. This court therefore found it fit to issue an order that the leave so granted operates as a stay order of the Respondent's activities in relation to edible oils.

57. On whether this Honourable Court had the requisite jurisdiction to grant the Orders given on 30th June, 2023, It is submitted that the contention by the 5th Respondent that the Orders given by this Honourable Court on 30th June, 2023 were given without jurisdiction because the Court's jurisdiction was prematurely invoked contrary to the provisions of Section 9 (2) of the *Fair Administrative Action Act*, 2015 is made on a flawed premise and in fact reveals that the 5th Respondent has conflated the Ex Parte Applicant's case.

58. Relevantly, that Section 229 (1), 230 (1) and 231 of EACCMA provide as follows:

> " 229.
>
> (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.
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> 230.
>
> (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.
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> 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."

59. While, Section 12 of TATA 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. Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings."

60. In this case, the Ex Parte Applicant argues that it is not aggrieved or directly affected by the decision or omission of the 4th Respondent or any other officer on matters relating to customs. In this case, the Ex-Parte Applicant is challenging the 3rd Respondent's letter dated 20th January, 2023 approving the duty-free importation of 125,0000 MT of cooking fat/oil by the 5th Respondent and the 4th Respondent's Departmental Circular No. 7 of 14th February, 2023 implementing the duty-free clearance of the Product.

61. The Ex parte Applicant submits that the approval of duty-free importation of edible oil, thereby extending an exemption from import duty on goods without following *the Constitution* or due procedure, is not customs issue, but it is a serious constitutional issue which fundamentally erodes the provisions of Article 47 of *the Constitution*. That indeed, the 5th Respondent itself concedes at paragraph 46 of its submissions that the validity of the exemption from paying duty is the subject of these proceedings.

62. The Ex Parte Applicant's case is that the 3rd Respondent's approval, and the 4th Respondent's almost mechanical implementation of the 3rd Respondent's approval, was anchored on the wrong application of the law and therefore violated the provisions of Article 47 of *the Constitution* which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

63. In addition, the Ex parte Applicant argues that extending an exemption from import duty on goods is a process which requires legislative fiat by virtue of the provisions of Article 114 (3) read together with Article 210 of *the Constitution*. Article 114 (3) defines what a money Bill as a Bill which contains provisions dealing with taxes. Article 210 provides that no tax or licensing fee can be imposed, waived or varied except as provided by legislation. Article 114 (3) read together with Article 210 of *the Constitution* therefore provide the constitutional procedure for scrutiny and enactment of tax exemptions through Parliament.

64. The Ex-Parte Applicant's case is that this Constitutional procedure was not followed by the 3rd and 4th Respondents when they issued the letter dated 20th January, 2023 and the Departmental Circular No. 7 of 14 February, 2023 and therefore, their actions were contrary to Article 47 of *the Constitution*.

65. The issues the Ex-Parte Applicant is raising in this case are issues of the Respondents failure to legally follow the correct Constitutional and statutory path, and not customs or tax controversies as the 5th Respondent would want the Court to think or believe.

66. The Ex-Parte Applicant contends that the 5th Respondent, has compounded the illegalities complained of in these proceedings by procuring the importation of the finished edible oils into Kenya in secrecy, without floating any international tender or following the fair, equitable, transparent, competitive and cost-effective framework provided under Article 227 of *the Constitution* and the Public Procurement and Assets Disposal Act, 2015.

67. The Ex Parte Applicant is not challenging the procurement procedure adopted by the 5th Respondent. The Ex Parte Applicant is saying that in this case, the constitutional and legal requirement for the 5th Respondent to adopt a procurement procedure does not exist. Its non-existence squarely flies in the face of Article 227 of *the Constitution*.

68. It is only the substance of the claim and the relief sought that determines the jurisdictional competence of a court as decided by the Court of Appeal in Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR.

69. In the circumstances, the provisions of Section 229 and 230 of EACCMA, Section 12 of TATA and Sections 35, 38 and 167 of the PPADA did not apply to the present proceedings, and the Ex-Parte Applicant did not in the same circumstances, contravene the provisions of Section 9 (2) of the FAA or any other law or doctrine in failing to apply and follow those provisions.

70. Granted by *the Constitution*, this Honourable Court has all the jurisdiction in the word to grant the Orders given on 30th June, 2023. By virtue of Article 165 (3) (d), this Court has jurisdiction to hear whether any question respecting the interpretation of *the Constitution* including the determination of the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, *the Constitution*.

71. Article 23 of *the Constitution* grants this Honourable Court jurisdiction to grant appropriate relief including an order of judicial review against a claim for violation of Article 47 of *the Constitution*. This is what this Court is being invited to do in these proceedings.

72. In the case of William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties) [2020] eKLR it was held:

> " 61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.
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> 62. In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court."

73. The Ex parte Applicant relies on the Court of Appeal judgment in Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another [2018] eKLR, held:

> " Whereas courts of Law are enjoined to defer to Specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

74. It submits that the High Court is the only court which is properly vested with jurisdiction to handle these kinds of controversies where judicial review orders are sought.

75. Whereas the Tax Appeals Tribunal and the Public Procurement Administrative Review Board may apply and interpret the provisions of *the Constitution*, they have no jurisdiction to grant the judicial review orders sought herein as a result of which the Ex parte Applicant urges the Court apply and follow the reasoning by the Court of Appeal in the case of Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR which held:

> " We have no doubt in our minds that the ELRC did not have any jurisdiction to entertain the three petitions that led to this appeal. A burning and well-founded desire to remedy what are perceived to be violations of *the Constitution* does not justify seeking redress from a forum in which *the Constitution* has not vested the power to issue a remedy. It is a sad case of assuming that a wrong can be made right by another wrong. There is no fidelity to *the Constitution* in seeking to enforce *the constitution* through unconstitutional means. The issues raised in the petitions were weighty but were misdirected to the wrong forum. *The Constitution* has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised. Having come to that conclusion, we have no basis for venturing into the merits of the appeal.
>
> ....
>
> We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply *the Constitution* as held by the High Court in United States International University (USIU) v. The Attorney General & Others [2012] eKLR and this Court in Daniel N. Mugendi v. Kenyatta University & 3 Others [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply *the Constitution* is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters."

76. In responding to the contentions on jurisdiction, the 5th Respondent contends that the Ex-Parte Applicant failed to disclose that it did not attempt and/or exhaust the available mandatory statutory dispute resolution mechanisms provided under Sections 229 and 230 of EACCMA, Section 12 of TATA and Sections 35, 38 and 167 of the PPADA before filing these proceedings.

77. The Ex parte Applicant resubmits that these are not proceedings where the Ex-Parte Applicant is aggrieved or directly affected by the decision or omission of the Commissioner of Customs and Border Control, the 4th Respondent or any other officer, on matters relating to customs duty, or proceedings challenging the procurement procedure which was adopted by the 5th Respondent.

78. The Ex Parte Applicant is challenging the legality of the letter by the 3rd Respondent which approved remission of import duty without the backing of or supporting legislation and the 4th Respondent's Departmental Circular which provided a fiat of the 3rd Respondent's illegality and relies on the case of William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties) [2020] eKLR).

> " 63. Article 165(1) of *the Constitution* vests in the High Court vast powers including the power to 'determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened' and the jurisdiction 'to hear any question respecting the interpretation of *the Constitution*.'

> 64. Though the 4th Petitioner's case against the 5th Respondent is largely with respect to the *Competition Act*, the ripple effect thereof is the subject of the alleged violation of their fundamental rights and freedoms. The issues are therefore intertwined. The statutory provisions available on dispute resolution under the *Competition Act* cannot be construed in a very restrictive manner to oust this Court's jurisdiction, to determine the issues in dispute which qualify under the exceptions set out herein. From the foregoing it is our considered view that the doctrine of exhaustion, though relevant, is not applicable in this case having regard to the nature of the grievance, and the public interest involved.
>
> 65. Hence, while a party is required to exhaust its remedies under the *Competition Act* before bringing an action in Court claiming violations of that Act, the Consolidated Petitions involved polycentric issues and multiplicity of parties including questions related to the fundamental rights of the Petitioners to warrant an exception to the doctrine of exhaustion as developed in our jurisprudence."

79. It argues that it was superfluous for the Ex Parte Applicant to disclose in the leave Application, the little need to employ the dispute resolution mechanisms laid down under Section 229 (1), 230 (1) and 231 of EACCMA, Section 12 of TATA and Sections 35, 38 and 167 of the PPADA before coming to this Honourable Court.

80. The 4th Respondent on its part, at paragraph 10 and 13 of its Replying Affidavit in support of the setting aside application, argues that the Orders issued on 30th June, 2023 were issued following material misrepresentation of the fact that the importation impugned by these proceedings was for the mere purpose of price stabilization in the country and that no natural disaster/calamity has occurred in Kenya necessitating the intervention envisaged under Section 114 (2) read together with paragraph 20 of Part B to the Fifth Schedule to EACCMA. The 4th Respondent also contends that the Ex-Parte Applicant failed to disclose the fact that the impugned exemptions were not limited to cooking oil/fat but also included rice, sugar, wheat, and beans.

81. The foregoing arguments are completely misleading since the Ex Parte Applicant furnished this Honourable Court with the 3rd Respondent's letter dated 20th January, 2023 and the 4th Respondent's Departmental Circular of 14th February 2023, both which clearly indicated all the goods that would be affected by the 3rd Respondent's impugned exemption and which further indicated that the purpose of the initiative was to create a price stabilizer for essential household commodities.

82. Price stabilization or control in this county is governed by the Price Control (Essential Commodities) Act No. 26 of 2011. Waiver of taxes in the Country must also be sanctioned by Parliament through legislation. As such, in so far as the 3rd and 4th Respondents purported to employ Section 114 (2) read together with paragraph 20 of Part B to the Fifth Schedule to EACCMA for an initiative meant to create a price stabilizer and to waive taxes on essential household commodities, the Ex Parte Applicant did not conceal or misrepresent any material fact.

83. In addition, the Ex Parte Applicant in its leave Application clearly indicated why it singled out cooking oil/fat from the other products. This was simply because out of the other products, edible oil is the only product which is manufactured in the country, and which was being imported yet there are numerous edible oil manufacturers in the country contributing significantly to the economy and who are likely

to be affected by the 3rd and 4th Respondents impugned administrative actions. The 4th Respondent's arguments on misrepresentation and non-disclosure of material facts are therefore, baseless.

84. For purposes of the Setting Aside Application, the 5th Respondent was required to, but has absolutely failed to show that there was non-disclosure of material facts, there was concealment of material documents or the withholding of material information, and/or that there was misrepresentation by the Ex Parte Applicant. The Authorities of Republic v Vice Chancellor Moi University & 2 others Ex parte Benjamin J. Gikenyi Magare [2019] eKLR and Republic v Cabinet Secretary Ministry for Education & another Ex Parte George Bala; Attorney General & 4 others (Interested Parties) [2022] eKLR, which the 5th Respondent has sought to rely on are therefore distinguishable.

85. On Whether new facts have arisen or sufficient reasons have been provided to warrant the setting aside of the Orders given on 30th June 2023, the 5th Respondent contends that the stay orders were issued in violation of established principle that a stay order cannot be issued where the administrative action complained of has been fully implemented. It is important to note that this is an argument which was also made during the leave stage of these proceedings in both the 5th Respondent's Replying Affidavit and the 1st, 2nd, 3rd, and 5th Respondents written submissions.

86. The Ex parte Applicant submits that the said argument having been raised, it is obvious, in its humble submission, that the argument was considered by this Honourable Court before the Orders of 30th June, 2023 were given.

87. It is the Ex parte Applicants' further submission that the Setting Aside Application is not an application for review made under Section 80 and Order 45 of the Civil Procedure Rules. The Setting Aside Application is also not an Appeal against the Ruling of this Honourable Court given on 30th June, 2023. The 5th Respondent should therefore have confined its arguments to the grounds of misrepresentation, non-disclosure of material facts and concealment of material documents and resisted the urge to travel towards arguing the Setting Aside Application as if it were an application for review or an appeal.

88. It submits that this Honourable Court should not permit the 5th Respondent to re-litigate issues which had already been considered by this Court in the Ruling handed down on 30th June, 2023, as it may invite the Court to make two conflicting conclusions on the same set of facts.

89. In considering the issue of full or partial implementation of the impugned exemption, it is also important for the Court to consider the stay order that was sought by the Ex-Parte Applicant and granted by this Court. The Ex Parte Applicant sought:

> " That the leave so granted operates as a stay of the implementation of the 3rd Respondent's letter dated 20 January 2023, approving the duty-free importation of 125,0000 MT of cooking fat/oil by the 5th Respondent for a period of one (1) year, the 4th Respondent's Departmental Circular No. 7 of 14 February 2023 facilitating the duty-free clearance of any part of 125,0000 MT of cooking fat/oil by the 5th Respondent for a period of one (1) year from 20 January 2023 and the importation, approval or clearing or the further importation, approval or clearing of duty-free 125,0000 MT of cooking fat/oil pursuant to the 3rd Respondent's letter dated 20 January 2023 and/or any exemption codes issued to the 5th Respondent by the 4th Respondent.

90. The stay order sought and granted is not limited only to the importation of the edible oils. It extends to approval, clearing and further importation, further approval, further clearing and the issuance of exemption codes for only edible oils. The order therefore contemplates the continuing nature of

the implementation of 3rd and 4th Respondents impugned actions and as submitted during the leave application, a continuing violation attracts a stay order.

91. It therefore cannot fall from the 5th Respondent's lips that the actions complained of by the Ex Parte Applicant have already been implemented and it is finished. Since the Court is required to decide cases based on the evidence provided to it, the 3rd and 4th Respondents impugned actions can only be concluded once the exemption codes have already been issued to the 5th Respondents. No such codes have been presented to this Court.

92. Further, since the court is required to decide cases based on the evidence provided to it, it is important to notice that the Packing Lists provided by the 5th Respondent as annexure "PM-4B" of the Supporting Affidavit indicate that only a total weight of 8,974 MT of cooking oil/fat have been delivered out of 125,000 MT approved by the 3rd and 4th Respondent's impugned letter and Departmental Circular dated 20th January, 2023 and 14th February, 2023 respectively.

93. The Ex parte Applicant calls upon this Honourable Court to ask itself is: why is the 5th Respondent seeking to set aside the Orders given on 30th June, 2023 when it also argues that everything has been implemented.

94. The 5th Respondent also argues that the general nature of the orders has the effect of suspending the clearance of sugar, rice beans and wheat that are not under challenge before the Court and as such, the judicial review proceedings are actuated by malice because the Ex Parte Applicant singled out only cooking oil, yet the sugar, rice, beans and wheat were approved pursuant to the same provision of the law.

95. As already mentioned above, the Ex Parte Applicant singled out edible oils or cooking fat from the other products simply because sugar, rice, beans and wheat are not manufactured in the country.

96. These are products which climatic conditions, including drought, may affect. On the other hand, edible oil is manufactured in the county. What is the mischief in importing a product which is not affected by drought, and is locally manufactured by are numerous edible oil manufacturers who contribute significantly to the economy and who are likely to be affected by the 3rd and 4th Respondents impugned administrative actions? The Ex parte Applicant invites this court to take notice, that the stay order sought and granted on 30th June, 2023 and the proceedings generally, focused only on cooking oil/fat and good justification has been given.

97. The 5th Respondent further argues that the issuance of the stay orders has resulted in it being susceptible to breaches of contract with its suppliers, and it being subjected to incur colossal financial loss resulting from the storage and demurrage charges of the imported goods and losing amounts secured by irrevocable Letters of Credit which are redeemable in 180 days from the dates of the Bills of Lading, at the expense of the public funds.

98. The 5th Respondent also argues that the goods imported are also perishable in nature with a short shelf life and that the continuance of the stay order has exposed them to risk of expiry which might result to substantial loss of public funds which is not commensurate to the loss being complained of by the Ex Parte Applicant. These arguments are not true according to the Ex parte Applicant.

99. It invites this Honourable Court to note from the Delivery Orders, Release Orders, Bills of Lading, Packing Lists of the goods annexed to the 5th Respondent's Supporting Affidavit as "PM-3" and "PM-5" that these were issued in April to May, way before 1st June, 2023 when Pamela Mutua swore her affidavit in response to the leave Application. This was therefore, information within the 5th

Respondent's knowledge and no reason has been given as to why they were not disclosed to the Court at the leave stage of these proceedings.

100. The Applicant invites this Honourable Court to note from the copies of the demurrage and disbursement invoices annexed to the 5th Respondent's Supporting Affidavit as "PM-6" which predate the Orders given herein on 30th June, 2023 and relate to "Equipment" as opposed to cooking fat/oil. In the absence of any explanation by the 5th Respondent as to why the invoices relate to "Equipment" and predate the Orders given on 30th June, 2023.

101. The Ex parte Applicant submits that these demurrage and disbursement invoices have been adduced for purposes of misleading the Court that the 5th Respondent is incurring demurrage charges because of the Orders issued on 30th June, 2023.

102. The Ex parte argues that the copies of the demurrage and disbursement invoices annexed to the 5th Respondent's Supporting Affidavit as "PM-6" show that the 5th Respondent had already been incurring these expenses before the Orders of 30th June, 2023 were issued.

103. It is therefore insincere for the 5th Respondent to blame this Court's Order of 30th June, 2023 for the expenses it has sought to support its argument on monetary losses. It is curious to note that the 5th Respondent has not presented to Court even a single expending receipt attributed to it to demonstrate the monetary loss it alleges.

104. The 5th Respondent also argues that there is alternative remedy, of directing the 4th Respondent to recover the exempted import duties from the 5th Respondent and therefore, these proceedings will not be rendered nugatory if the Stay Orders are set aside. The 5th Respondent also says that the Respondent did not indicate the prejudice it stands to suffer.

105. The Ex parte Applicant submits that there is no alternative remedy. The Ex-Parte Applicant brought these proceedings pursuant to its statutory mandate and in the public interest as envisaged under *the Constitution* and unless the stay orders issued are maintained, the Application and the outcome of the successful judicial review proceedings herein will be rendered nugatory and academic because:

  a. The 3rd Respondent's letter dated 20th January, 2023 and the 4th Respondent's Departmental Circular No. 7 of 14th February 2023 sanctioned an illegality, and an illegality is a continuing violation of *the Constitution*. There is no public interest in an illegality or violation of *the Constitution* and Courts cannot sanction an illegality;

  b. The unfair tax treatment against edible oil manufacturers in Kenya by the implementation of the impugned actions will create unfair competition in the edible oils market in Kenya, which is illegal and unconstitutional;

  c. The unfairness in the tax waiver means that many edible oil manufacturers will be unable to compete with the retail prices of the 5th Respondent's products, thus driving them out of business. This means that the 4th Respondent will forfeit tax revenues of close to KES.52 Billion and occasion job losses of about 40,000 direct and indirect employees across the value chain;

  d. The arguable questions raised in the judicial review proceedings have an inextricable and direct bearing on the implementation of the impugned actions and decisions and unless the stay orders are maintained, the questions which this Honourable Court is called upon to answer will be rendered nugatory;

  e. The life of these proceedings is dependent on the orders of 30th June, 2023 being maintained pending the determination of the substantive judicial review application;

f. Unless the stay orders are maintained, even if the judicial review application ultimately succeeds, the outcome will be purely academic; and

g. The effects of the actions impugned herein, will whether in the short term or in the long run, occasion irredeemable prejudice and hardship to many edible oil manufacturers and Kenyans working in their value chain, which will be disproportionate to any the Respondents stand to suffer if at all, while waiting for the substantive judicial review application to be heard and determined on its merits.

106. It submits that the general public stands to suffer in the event the Orders of 30th June, 2023 are not maintained. The court is referred to the case of Aga Khan Education Service Kenya v Republic Ex Parte Ali Seif & 3 Others [2004] eKLR where it was held:

> "… Of course, in England the position is now different and leave or permission is granted inter-parties but in Kenya, the leave stage is still ex parte. We would, however, caution practitioners that even though leave granted ex parte can be set aside on an application, that is a very limited jurisdiction and will obviously be exercised very sparingly and on very clear-cut cases, unless it be contended that judges of the superior court grant leave as a matter of course. We do not think that is correct. Unless the case is an obvious one, such as where an order of certiorari is being sought and it is clear to the court that the decision sought to be quashed was made more than six months prior to the applicant coming to court, and there is, therefore, no prospects at all of success, we would ourselves discourage practitioners from routinely following the grant of leave with applications to set leave aside. Fortunately, such applications are rare and like the judges in the United Kingdom, we would also point out that the mere fact that an applicant may in the end have great difficulties in proving his case is no basis for setting aside leave already granted."

107. The 1st to 4th Respondents support the application and they submit through the Hon. Attorney-General, that this Court has unfettered, unlimited and unrestricted jurisdiction to set aside an order.

108. They relied on the Court of Appeal judgment in Asset Recovery v Charity Wangui Gethi and 3 Others (2020) eKLR (Paragraph 26), which provided guidance on for review, as per Order 45 of the Civil Procedure Rules, requires the establishment of specific grounds. These grounds include demonstrating the discovery of new and significant evidence that was not known to the applicant and could not have been presented during the original decree or order, proving a mistake or error on the face of the record, or presenting any other sufficient reason. It is also essential for the applicant to show that they acted promptly in their application.

109. This position is repeated in Republic V Cabinet Secretary for Interior and Co-Ordination of National Government Ex- Parte and Abulahi Said Salad [2019] eKLR the Court held; "The power of review, as granted by section 80 of the *Civil Procedure Act*, is governed by the rules outlined in Order 45 of the Civil Procedure Rules, 2010.

110. In George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega (supra) it was held that if the decision sought to be quashed has been fully implemented leave ought not to operate as a stay, as there is nothing remaining to be stayed.

111. It is their case as averred in the Replying Affidavit by Pamela Mutua, that the cooking oils have already been procured and received.

112. A similar decision was also made in R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (supra). According to these decisions, it is only in cases where either the decision has not been

implemented or where the same is in the course of implementation that stay may be granted. It was thus held in Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995 that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded.

113. Maraga, J (as he then was) in Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006 was of the view that:

> "As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction... In judicial review applications the Court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited... The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act... A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."

114. The Hon. Attorney-General submits that the orders of 30th June, 2023 are against public interest and ought to be vacated. The Black's Law Dictionary defines 'public interest' as follows; "The welfare of the public as compared to the welfare of a private individual or company. All of society has a stake in this interest and the government recognizes the promotion of and protection of the general public."

115. They submit that the cooking fat/oils is in the custody of the 5th Respondent and the cooking oils cannot be distributed to Kenyans which defeats the primary reason as to why the Government removed duty on their importation and the public risks losing colossal amounts if the cooking oils expires. Further, the Applicant's irrevocable Letters of Credit issued to suppliers pose an additional financial risk.

116. They further submit that the orders of 30th June 2023 have also affected importation of Rice, Sugar, Wheat and Beans which are not subject in this matter and the orders affect persons who are not party to the proceedings.

117. The vacating of the orders will be beneficial to the general public by providing access to affordable commodities. The lifting of the stay orders outweighs any perceived benefit from marinating the stay orders.

118. In the case of Munir Sheikh Ahmed v Capital Markets Authority [2018] eKLR Lady Justice P. Nyamweya held as follows:

> "The second factor that comes to play in the exercise of discretion whether or not to grant a stay in judicial review proceedings is that of the public interest. The public interest as an overriding factor when determining whether or not to grant stay orders was explained by Majanja J. in R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (supra), where the learned judge held that judicial review proceedings are public law

proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders."

119. They submit that it is common ground that the prices of commodities have skyrocketed thus making them unfordable to Kenyans, thus the Government has put in measures to cushion its citizens. This is a matter of high public interest which the Court ought to take judicial notice of.

120. It is the 4th Respondents case that the principles upon which setting aside orders may be made were set out in the case of Republic v Vice Chancellor Moi University & 3 others Ex-Parte Benjamin J. Gikenyi Magare [2018] eKLR where at paragraph 27 the Court stated:

> " I will not attempt to re-invent the wheel regarding the issue of setting aside stay orders issued when leave has been granted to operate as stay. I say so because a host of judicial decisions have now settled the position that setting such stay orders would only be merited if: -
>
> a. There is non-disclosure of material facts
>
> b. Concealment of material documents
>
> c. Misrepresentation"

121. It submits that the Ex parte Applicant made material non-disclosures which had the Ex parte Applicant disclosed to the honorable court, the stay orders would not have been granted being; (a) the impugned exemptions were not limited to cooking oil/fat but also included rice, sugar, wheat and beans. (b) part of the products exempted from duty included 25,000 MT of Wheat being a donation from the Government of the Republic of Ukraine.

122. That the Ex parte Applicant failed to inform the Honourable court that the measures were meant to safeguard livelihoods.

123. It submits further that the impugned orders prejudice public interest relying on the decision in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR where the court stated: "Conservatory Orders" bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions linked to such private-party issues on the "prospects of irreparable harm occurring during the pendency of a case; or "high probability of success" in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case bearing in mind the public interest, the Constitutional values and the proportionate magnitudes, and priority levels attributable to."

124. The impugned orders are injurious to the vulnerable citizens who the Government wishes to cushion against the harsh economic environment brought about by the ongoing drought in the country.

125. They also submit that the Orders of 30th June, 2023 were issued by this Honourable Court through material misrepresentations by the Applicant:

    a. The Applicant misled the Honourable Court by alleging that the 3rd and 4th Respondents indicated that the importation is for the mere purpose of price stabilization in the country.

    b. The Applicant misled the Honourable Court by alleging that no natural disaster/calamity has occurred in Kenya necessitating the intervention envisaged in Section 114 (2) read together with paragraph20 of Part B to the Fifth Schedule to EACCMA.

126. It is their case that given that the impugned orders affect products that the Ex parte Applicant have not disputed should be exempted from the importation fee and the fact that the measures by the Government are meant to save lives.

Analysis and determination:

127. From the foregoing, I have identified the following issues for determination:

i. Whether this Honourable Court has jurisdiction

ii. Whether the orders sought can be granted

128. On Jurisdiction, this court shall address the issue of jurisdiction in two limbs: (a) The place of illegally acquired documents in Kenya; and (b) The doctrine of exhaustion.

129. The first limb, the place of illegally acquired documents in Kenya, in the Affidavit of PAMELA MUTUA for the 5th Respondent, the deponent swore on oath that the exhibits marked "FM-2" and "FM-3" were obtained contrary to the provisions of Part IV of the *Evidence Act* which requires certification of public documents, in particular Sections 80, 81 and 82.

130. The document marked as "FM-2" is the letter dated 20th January, 2023 which is authored by the Cabinet Secretary Mr. Njuguna Ndungu, The National Treasury and Economic Planning to the Commissioner General FCPA. Githii Mburu,MGH,MBS; while the document marked as"FM-3"is the 4th Respondents Departmental Circular No. 7 of 14th February 2023 which is written by Nancy Ngetich for Customs and border Control.

131. These two documents form the vehicle through which the concerned Government departments are using for purposes of communicating the roll out methodology for the critical dispatch from cabinet office executive office of the president dated Thursday, 10th November, 2022 marked as annexure FM -1 which inter alia provides that,

> “As part of the long-term strategy towards securing enduring drought resilience, Cabinet approved the initial phase of incentives that will catalyze recovery efforts by building drought resilience, food security and adoption to climate change resilience programmes through preparedness and recovery through proactive investment in high-impact large-scale water harvesting, storage and distribution.
>
> To address rise in the cost of living, Cabinet approved a framework to position the Kenya National Trading Corporation (KNTC) as the anchor of State initiatives to create a price stabilizer for essential household food items. As such, KNTC, as a trading company, will supplement other State initiatives by creating Strategic Reserves for staple and essential food items, vital farm inputs including fertilizer and any other goods necessary for ensuring stability in the prices of core goods consumed by Kenyans. It was noted that KNTC will leverage on its infrastructure and capacity to help stabilize prices of all essential items in instances where price swings of essential items are abnormal and against the public interest.”

132. These two critical documents are the backbone of the suit. They are the documents that the Ex parte Applicant wants this court to quash. The 5th Respondent, argues that being a trading company, it is allowed to procure for goods for trading purposes outside the Public Procurement Laws in accordance with its policies and advice from the Public Procurement Regulatory Authority (PPRA).

133. The Public Procurement Regulatory Authority (PPRA) through its letter to the National Treasury Ref.: PPRA/6/1/2 VOL. II (6) dated 18th November, 2022 confirmed that procurement for commodities/items for normal business/trading do not constitute procurement in the meaning construed under Section 2 of the Public Procurement and Disposal Act (Rev. 2022).

134. Article 50 (4) of *the Constitution* provides that "evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice."

135. While, Section 80 of the *Evidence Act* provides that, (1) "Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies. (2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section."

136. The object and purpose of The *Access to Information Act* as set out in Section 3 is to:

a. give effect to the right of access to information by citizens as provided under Article 35 of *the Constitution*;

b. provide a framework for public entities and private bodies to proactively disclose information that they hold and to provide information on request in line with the constitutional principles;

c. provide a framework to facilitate access to information held by private bodies in compliance with any right protected by *the Constitution* and any other law;

d. promote routine and systematic information disclosure by public entities and private bodies on constitutional principles relating to accountability, transparency and public participation and access to information.

137. Whereas Section 8 of the Act, provides the procedure which must be followed in the event there is a need for access information being (1) An application to access information shall be made in writing in English or Kiswahili and the applicant shall provide details and sufficient particulars for the public officer or any other official to understand what information is being requested. Notably, Section 14 of the Act creates room for review of decisions by the Commission.

138. In The Supreme Court in Petition 1318 of 2020 Kenya Railways Corporation vs Okiya Omtatah and 5 Others the court made the following findings,

> " [77] In settling the question whether the learned Judges erred in expunging documents in support of the petitions filed by the 1st, 2nd and 3rd Respondents at the High Court The 1st and 2nd Respondents, in their cross-appeal, fault the superior courts' decision to expunge the documents annexed to the affidavits of Okiya Omtatah and Apollo Mboya in support of the petitions.
>
> The expunged documents comprised various correspondence between: officers of government institutions and Exim Bank of China; Ministry of Transport and CRBC; CRBC and the then Prime Minister's office; the Embassy of the People's Republic of China and Ministry of Transport; the

Office of the then Deputy Prime Minister and the Ambassador, Embassy of the People's Republic of China; the Attorney General's Office and the Ministry of Transport; KRC and Public Procurement and Oversight Authority; KRC and CRBC; the Ministry of Transport and KRC; Public Procurement and Oversight Authority and the Attorney General's office; and between the Office of the Deputy Petition No. 13 & 18 (E019) of 2020 26 President and the Attorney General's Office. Apart from the correspondence, the additional documents expunged were Memorandum of Understanding between Ministry of Transport and CRBC; the feasibility study relating to the project; the commercial contracts between the KRC and CRBC for the construction of the railway and for supply and installation of facilities, locomotives and rolling stock; requests for, and legal advice from the Attorney General and the Solicitor General on the contracts and the SGR project and Cabinet Memorandum.

(78) In expunging the documents, the High Court found that the public servants who provided the expunged documents to the 1st, 2nd and 3rd respondents did not fit the legal definition of whistle blowers under Article 33 of the United Nations Convention Against Corruption. This provision requires such persons to make reports in good faith and on reasonable grounds to competent authorities any facts of corrupt conduct. Secondly, it found the public servants who provided the documents to have breached the *Public Officer Ethics Act*, 2003 as the documents were confidential in nature. Further, that the documents were inadmissible under the *Evidence Act* and that admitting stolen or irregularly obtained documents infringes on the appellant's rights under Article 31 of *the Constitution*.

The High Court was of the position that the 1st, 2nd and 3rd respondents ought to have properly compelled the Government to provide the documents under Article 35 of *the Constitution*. This position was affirmed by the Court of Appeal which added that admitting such documents would be detrimental to the administration of justice and against the principle underlying Article 50(4) of *the Constitution*.

(79) The question now before us is whether the superior courts below were correct in expunging the documents relied on by the 1st , 2nd and 3rd respondents in support of their petitions at the High Court. We note from the pleadings filed at the High Court that the 1st, 2nd and 3rd respondents did not disclose their source for the documents. They averred that exposing the source or identity of persons who availed the documents would silence whistle blowers who act in public interest and good faith. They instead asked the court to admit the documents which they believed would give a candid exposition of the issues in dispute and enable the court to determine whether the procurement was lawful. Petition No. 13 & 18 (E019) of 2020 27 [80] The *Evidence Act* Cap. 80 Laws of Kenya applies to all proceedings, including constitutional petitions save for the exceptions set out therein. Section 2 thereof, provides that: Application. (1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator. (2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.

(81) The *Evidence Act* provides for admissibility of evidence with section 80 setting out the manner in which public documents may be produced in court. It states: Certified copies of public documents. (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies. (2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

(82) This procedure ensures the preservation of the authenticity and integrity of the public documents filed and produced in court. Further, section 81 of the *Evidence Act* allows the production of certified copies of documents in proof of the contents of the documents or parts of the documents of which they purport to be copies. [83] From the foregoing provisions, public documents can only be produced in court as evidence through the procedure set out above. They can be produced as evidence in court by way of producing the original document or a copy that is duly Petition No. 13 & 18 (E019) of 2020 28 certified. The documents having been adduced in evidence without adhering to these rather straightforward provisions, were thereby outrightly rendered inadmissible."

(84) Article 35 of *the Constitution* of Kenya 2010 provides for the right to access information held by the State, including that held by public bodies. The *Access to Information Act* No. 31 of 2016 was enacted to give effect to Article 35 and sets out the procedure to be followed when requesting information including on the mandate of the Commission on the Administrative Justice. Pursuant to this provision, citizens should be able to access the information by first, requesting for the information from the relevant State agency.

139. I am bound by the findings of the Supreme Court. In the case before me, when the issue of the source of the controversial documents was raised by the 5th Respondent, the Ex parte Applicant did not offer any explanation as to the source of the letter dated 20th January, 2023 "FM-2" and the 4th Respondents Departmental Circular No. 7 of 14th February 2023 "FM-3".

140. The Ex parte Applicant did not demonstrate that it had made a request to be formally furnished with the two documents from the Respondents or that the request was declined by the Respondents or that it applied for a review thereafter.

141. This information would have probably empowered the court to invoke its powers in admitting the letter dated 20th January 2023 -"FM-2" and the 4th Respondents Departmental Circular No. 7 of 14th February 2023 "FM-3" in the event it found that the denial of the access to formally access the information by The Respondents unjustified. The court was denied that critical information.

142. In the case of Kahindi Lekalhaile & 4 others v Inspector General National Police Service & 3 others Nrb. Petition No. 25 of 2013 [2013] eKLR, the High Court stated as follows: "However, in order for

this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. ... In the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized."

143. The Ex Parte Applicant has failed to demonstrate the source of the documents or that it formally or otherwise sought for the letter dated 20th January 2023 -"FM-2" and the 4th Respondents Departmental Circular No. 7 of 14th February 2023 "FM-3", and that access to such information was denied within the framework and architect of The *Access to information Act* and The *Evidence Act*.

144. I am bound by, the Supreme Court in Petition 1318 of 2020 Kenya Railways Corporation vs Okiya Omtatah and 5 Others judgment in reluctantly expunging the letter dated 20th January 2023 -marked as "FM-2" and the 4th Respondents Departmental Circular No. 7 of 14th February 2023- marked as "FM-3"which I hereby do.

145. The Applicant sought orders of certiorari to quash these two expunged annexures. Having expunged the documents that the Ex parte Applicant wanted the court to quash, then the court is left with nothing else to quash or any evidence that can form a basis for granting the orders sought in the substantive Motion, and I so find.

146. After expunging the two documents, what is left are documents that the Ex parte Applicant did not ask the court to quash. They are documents which in any event cannot stand on their own without the expunged principle documents.

147. This is to call upon all the citizens who are public interest driven to access information that they intend tender as evidence in the courts through the *Access to Information Act* avenue. The *Access to information Act* has set out a very elaborate framework that compliments the right to Fair Administrative Action under Article 47 of *the Constitution*. In order to promote the rule of law, this court has the duty to ensure that fair administrative action is realized within the purview of the rules of admissibility of *Evidence Act*. This duty cannot be discharged if the court admits illegally obtained evidence.

148. Much as Article 159 of *the Constitution* enjoins this court to shun technicalities, the court has a duty to guarantee the authenticity and integrity of public documents filed and produced in court by litigants. This will help in the promotion of our national values and the principles of governance and the rule of law. To do otherwise would go against public policy.

149. The authority and the jurisdiction of the court flows from *the Constitution* and Statutes. A court that admits and determines a case based on illegally obtained evidence is a court that acts without jurisdiction.

150. The issues of jurisdiction can be raised at any stage in the proceedings. Upon expunging the two documents, it is clear to me that the court's jurisdiction was not properly invoked ab initio. I am persuaded that the Applicant has made out a case to grant the review and setting aside of the orders as sought.

151. On the Second limb, the doctrine of exhaustion, the 5th Respondent argues that the Orders given by this Honourable Court on 30th June, 2023 were given without jurisdiction because the Court's jurisdiction was prematurely invoked contrary to the provisions of Section 9 (2) of the *Fair Administrative Action Act*, 2015.

152. The Ex parte Applicant is of a contrary view and argues that the 5th Respondents' submission is predicated on a flawed premise and that the 5th Respondent has conflated the Ex Parte Applicant's case.

153. According to the Ex parte Applicant, Section 229 (1), 230 (1), and 231 of EACCMA provide as follows:

> "
>
> " 229.
>
> (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.
>
> Section 231 provides that 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.
>
> Section 232 stipulates that 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."

154. Section 12 of *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. Provided that such person shall before appealing, pay a non-refundable fee of twenty thousand shillings."

155. I have looked at Section 18 TATA which provides that where an appeal against a tax decision has been filed under this Act, the Tribunal may make an order staying or otherwise affecting the operation or implementation of the decision under review as it considers appropriate for the purposes of securing the effectiveness of the proceeding and determination of the appeal.

156. Section 29A (1) of the Act provides that a person who is aggrieved by a decree or an order from which no appeal has been preferred from the Tribunal to the High Court, may apply for review of the decree or the order within seven days from the date the decree or order was made by the Tribunal.

157. Section 32 (1) of the TATA stipulates that a party to proceedings before the Tribunal may, within thirty days after being notified of the decision or within such further period as the High Court may allow, appeal to the High Court, and the party so appealing shall serve a copy of the notice of appeal on the other party.

158. The Ex-Parte Applicant moved the court because there is a dispute wherein it is challenging 3rd Respondent's letter dated 20th January 2023 approving the duty-free importation of 125,0000 MT of cooking fat/oil by the 5th Respondent and the 4th Respondent's Departmental Circular No. 7 of 14th February, 2023 implementing the duty-free clearance of the Product.

159. The Ex parte Applicant has issues with the approval of duty-free importation of edible oil, thereby extending an exemption from import duty on goods without following *the Constitution* or due procedure, is not customs issue, but it is a serious constitutional issue which fundamentally erodes the provisions of Article 47 of *the Constitution*.

160. The Ex Parte Applicant argues that it is challenging the legality of the letter by the 3rd Respondent which approved remission of import duty without the backing of or supporting legislation and the 4th Respondent's Departmental Circular which provided a fiat of the 3rd Respondent's illegality.

161. The Ex Parte Applicant is aggrieved by what it argues is the Respondents' failure to legally follow the correct Constitutional and statutory path and in particular Article 47 of *the Constitution* which guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, as opposed to the customs or tax controversies as the 5th Respondent would want the Court to think or believe.

162. The 5th Respondent concedes at paragraph 46 of its submissions that the validity of the exemption from paying duty is the subject of these proceedings.

163. The Ex parte Applicant further argues that in addition, extending an exemption from import duty on goods is a process which requires legislative fiat by virtue of the provisions of Article 114 (3) read together with Article 210 of *the Constitution*. Article 114 (3) defines what a money Bill as a Bill which contains provisions dealing with taxes. Article 210 provides that no tax or licensing fee can be imposed, waived or varied except as provided by legislation. Article 114 (3) read together with Article 210 of *the Constitution* therefore provide the constitutional procedure for scrutiny and enactment of tax exemptions through Parliament.

164. It is The Ex Parte Applicant's case that this Constitutional procedure was not followed by the 3rd and 4th Respondents when they issued the letter dated 20th January, 2023 and the Departmental Circular No. 7 of 14th February, 2023 and therefore, their actions were contrary to Article 47 of *the Constitution*.

165. In contending as such, the Ex-Parte Applicant is not challenging the procurement procedure adopted by the 5th Respondent. The Ex Parte Applicant is arguing that in this case, the constitutional and legal requirement for the 5th Respondent to adopt a procurement procedure does not exist. Its non-existence squarely flies in the face of Article 227 of *the Constitution*.

166. The Ex parte Applicant argues that is only the substance of the claim and the relief sought that determines the jurisdictional competence of a court according to the Court of Appeal in Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR. In the circumstances, the provisions of Section 229 and 230 of EACCMA, Section 12 of TATA and Sections 35, 38, and 167 of the PPADA did not apply to the present proceedings, and the Ex-Parte Applicant did not in the same circumstances, contravene the provisions of Section 9 (2) of the FAA or any other law or doctrine in failing to apply and follow those provisions.

167. The Ex parte Applicant also relies on the Court of Appeal in Fleur Investments Limited -vs- Commissioner of Domestic Taxes & another [2018] eKLR, held:

> "Whereas courts of Law are enjoined to defer to Specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under *the Constitution* and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly."

168. It is the Ex parte Applicants' case that the High Court is the only court which is properly vested with jurisdiction to handle these kinds of controversies where judicial review orders are sought. The Ex parte Applicant argues that the Tax Appeals Tribunal and the Public Procurement Administrative Review Board have no jurisdiction to grant the judicial review orders sought herein.

169. It urges the Court apply and follow the reasoning by the Court of Appeal in the case of Attorney General & 2 others v Okiya Omtata Okoiti & 14 others [2020] eKLR which held:

> " We have no doubt in our minds that the ELRC did not have any jurisdiction to entertain the three petitions that led to this appeal. A burning and well-founded desire to remedy what are perceived to be violations of *the Constitution* does not justify seeking redress from a forum in which *the Constitution* has not vested the power to issue a remedy. It is a sad case of assuming that a wrong can be made right by another wrong. There is no fidelity to *the Constitution* in seeking to enforce *the constitution* through unconstitutional means. The issues raised in the petitions were weighty but were misdirected to the wrong forum. *The Constitution* has granted the High Court the requisite jurisdiction to hear and determine those issues and that is where they ought to have been raised. Having come to that conclusion, we have no basis for venturing into the merits of the appeal.
>
> We have no doubt that the ELRC and the ELC have jurisdiction to interpret and apply *the Constitution* as held by the High Court in United States International University (USIU) v. The Attorney General & Others [2012] eKLR and this Court in Daniel N. Mugendi v. Kenyatta University & 3 Others [2013] eKLR. However, the jurisdiction of those specialized courts to interpret and apply *the Constitution* is not original or unlimited like that of the High Court. It is limited to constitutional issues that arise in the context of disputes on employment and labour relations or environment and land matters."

170. I am satisfied that the Ex parte Applicant is a person within Article 260 of *the Constitution* and that the Ex parte Applicant is disputing the decision of the Commissioner and in particular the Departmental Circular No.7 of 14th February, 2023. This directive was issued by the Commissioner while exercising his statutory powers as conferred upon him under the East African Community Act which is a tax law.

171. Further, the Departmental Circular No. 7 of 14th February 2023 "FM-3"was issued by Nancy Ngetich for the Commissioner customs and border control. The approval is in accordance with the provisions of Section 114(2) of East African Community Customs Management Act, 2004 and the provisions of paragraph 20 of Part B of the Fifth Schedule to the Act.

172. It is the Ex-Parte Applicant's case that the Constitutional procedure was not followed by the 3rd and 4th Respondents when they issued the letter dated 20th January, 2023 and the Departmental Circular No. 7 of 14th February, 2023; and therefore, their actions were contrary to Article 47 of *the Constitution*.

173. In determining the first limb, on the jurisdiction question, this court expunged the letter dated 20th January, 2023 -marked as "FM-2" and the 4th Respondents Departmental Circular No. 7 of 14th February, 2023 marked as "FM-3".

174. This court cannot delve into the issue of whether or not the doctrine of exhaustion or avoidance can apply after "FM-2" and "FM-3" have been expunged. I cannot apply the doctrine of exhaustion on nothingness.

175. The other annexures cannot form the basis of determining whether or not the Ex parte Applicant is bound by the doctrine of exhaustion or not. These annexures are consequential and transactional

documents that flow from the fountain of the expunged exhibits and they cannot stand on nothing, and I so hold. The court is coram non judice, and I so hold.

Disposition:

176. The letter dated 20th January, 2023 -"FM-2" and the 4th Respondents Departmental Circular No. 7 of 14th February 2023 "FM-3", were illegally obtained, and I so hold and I proceed to expunged them.

177. The authority of the court flows from *the Constitution* and statutes. A court that admits and determines a dispute before it based on illegally obtained evidence is a court that acts without jurisdiction. This court finds that it lacks jurisdiction to determine a suit on the basis of illegally acquired documents.

178. In arriving at my findings herein, this court is also guided by the Supreme Court Case of Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR, [36] wherein it was observed that, "Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non judice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel "Lillian S" v Caltex Oil, (Kenya) Ltd [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".

SUBPARA (38)

It is a settled legal proposition that conferment of jurisdiction is a legislative function and it can only be conferred by *the Constitution* or statute. It cannot be conferred by judicial craft. See Samuel Kamau Macharia & Another v Kenya commercial Bank & 2 Others, SC Application No. 2 of 2011; [2012] eKLR. Nor can parties, by consent confer on a court power it does not have."

179. The finding on the second issue flows from the findings in the first issue.

Orders:

1. The Application dated 13th July, 2023 is allowed.
2. The orders issued on 30th June, 2023 granting the Applicant/Respondent leave to institute Judicial Review proceedings, and the stay of the implementation of the 3rd Respondent's letter dated 20th January, 2023 and the 4th Respondent's internal circular No. 7 dated 14th February, 2023 are hereby set aside.
3. The Chamber Summons Application dated 17th April, 2023 is hereby struck out for want of jurisdiction and all consequential orders are hereby discharged.
4. Each party shall bear its costs, owing to the public interest nature of the suit.

DATED, SIGNED, AND DELIVERED THIS 1ST DAY OF SEPTEMBER 2023.

J. CHIGITI (SC)

JUDGE