REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 137 OF 2019

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

THE COMMISSIONER OF CUSTOMS

AND BORDER CONTROL.....2ND RESPONDENT

AND

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....1STINTERESTED PARTY

THE DIRECTOR OF PUBLIC PROSECUTIONS.....2NDINTERESTED PARTY

AND

CMC DI RAVENNA-ITINERA JV.....*EX PARTE* APPLICANT

JUDGMENT

The Parties

1.The applicant CMC DI Ravenna-Itinera JV, describes itself as a joint venture between two companies, namely, Cooperativa Muratoti e Cementisi-CMC di Ravenna incorporated in Italy on the one part and Itinera SPA also incorporated in Italy. It states that it has a registered branch in Kenya, through which it engages in complex technological projects in the transportation, hydroelectric and underground works sectors.

2. The first Respondent, Kenya Revenue Authority (KRA), is a body corporate with perpetual succession and a common seal established under section 3 of the Kenya Revenue Authority Act (herein after referred to as the KRA Act.[1]). Pursuant to section 5 of the KRA act, KRA under the general supervision of the Minister, is an agency of the Government for the collection and receipt of all revenue. Under section 5(2) of the KRA act, in the performance of its functions under subsection (1), the KRA shall—

a) administer and enforce—

i. all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws;

ii. the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws;

b) to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and

c) to perform such other functions in relation to revenue as the Minister may direct.

3. The second Respondent, The Commissioner of Customs and Border Control is appointed section 5 (1) of EACCMA. Under section 5(2), the Commissioner shall be responsible for the management and control of the Customs including the collection of, and accounting for, Customs revenue in the respective Partner State.

4. The 1st Interested Party is the Director of Criminal Investigations (herein after referred to as the DCI), established pursuant to section 28 of the National Police Service Act[2] under the direction, command and control of the Inspector-General. Pursuant to section 29(8) of the act, the Director of Criminal Investigations in the performance of the functions and duties of office, is responsible to the Inspector-General. Under section 29 (9) of the act, the Director of Criminal Investigations is— (a) the chief executive officer of the Directorate; (b) responsible for— (i) implementing the decisions of the Inspector-General in respect of the Directorate; (ii) efficient administration of the Directorate; (iii) the day-to-day administration and management of the affairs of the Directorate; and (iv) the performance of such other duties as may be assigned by the Inspector General, the Commission, or as may be prescribed by the Act, or any other written law.

5. The 2nd Interested Party is the Director of Public Prosecutions (herein after referred to as the DPP), established under Article **157** of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.[3]

The factual Matrix

6. The applicant states that it entered into a contract with the Kerio Valley Development Authority dated 5th April 2017 for the engineering, procurement, execution and completion of the Arror and Kimwarer dams. It states that in order to meet its operational needs under the contract, it purchased the vehicles listed in exhibit 1 of verifying affidavit. It states that it applied tax exemption for the said vehicles on grounds that the vehicles would be used in the Arror and Kimwarer Projects. It states that it qualified for the exemption, and, that the National Treasury vide its letter dated 19th November 2018 confirmed that any equipment and machinery for the project would be eligible for tax exemption provided the equipment and machinery was solely for use in the projects.

7. It states at as it waited for a reply from the National Treasury, it sought and was granted approval by KRA to transfer the vehicles to bonded warehouses, but on 20th March 2019, it learnt that the Respondents had issued Notices of Seizure in respect of its vehicles. It states that the said Notices are based on purported investigations being carried on by the DCI. It states that it only learnt about the said investigations in the media, and, that the Notices are aimed at frustrating its operations.

8. It states that the only money paid to it is provided for in both the contract and the tender documents, and, that, the funds paid are fully secured in advance payment guarantees and are recoverable. It states that the reason there are no works on the ground is because the sites are yet to be handed over to it because the land acquisition process is still undergoing.

Legal foundation of the application

9. The applicant states that the Notice of Seizure is unreasonable because:- (a) KRA had cleared the vehicles for bonded warehousing without raising any claims or objections, and, (b) it was in the process of handling the exemption process, (c) there are no pending claims against the vehicles to warrant the seizure. It also states that the impugned Notices are vague, ambiguous and that the investigations do not form the basis for seizure and forfeiture under the law. It states that the East African Community, Customs Management Act, 2004 (herein after referred to as ECCMA) sets out the conditions upon which seizure and forfeiture may be undertaken, and, that, the Notices of Seizure are unlawful and lack effect in law.

10. The applicant states that section 4 of the Fair Administrative Action Act[4] (herein after referred to as the FAA Act) provides that every person has the right to an administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair and to be issued prior and adequate written notice of the nature and reasons for the proposed administrative action. It also states that the impugned action is *ultra vires* as the Respondents acted in excess of their powers under the EACCMA by issuing a notice on grounds not contemplated by the law. Further, it states that the impugned Notice is void on grounds of unreasonableness, irrationality, and, taking into account irrelevant factors not contemplated under the law.

11. Also, the applicant states that the Respondents failed to give the applicant adequate written notice of the nature and reasons justifying the issuance of the Notices contrary to section 4 (3) (a) of the FAA act, and, failed to provide it with an opportunity to be heard and to make representations before the Notices could be issued contrary to section 4(3) (b) of the FAA Act.

12. Further, the applicant states that the Notices violate its legitimate expectation that :- (i) it would be issued with a letter of exemption; (ii) its right to be issued with adequate reasons prior to the seizure, and, (iii) an opportunity to be heard. It also states its right to own property has been breached.

The reliefs sought

13. The applicant prays for the following orders:-

> *a. An order of certiorari to remove into the High Court and quash the Respondent's Notices of Seizure Numbers 66801, 66802, 66803, 66804 and 66806 all dated 20th March 2019 (Notices of Seizure) which all relate to the applicant's 28 vehicles bearing the chassis numbers as particularized hereunder:-*

MITCHELL COTTS BONDED WAREHOUSE

S/N	*NOTICE SEIZURE NUMBER*	*CHASSIS NUMBER*	*TYPE OF MOTOR VEHICLE*
1.	*66801*	*i. AHTBB3JE200023202* *ii. AHTBB3JE100023109* *iii. AHTBB3JE900023164* *iv. AHTBB3JE400023072* *v. AHTBB3JE400023086*	*Toyota Corolla Saloon*
2.	*66802*	*i. AHTFB8CD203870266* *ii. AHTFB8CD303870375* *iii. AHTFB8CD003870365* *iv. AHTFB8CD603870354* *v. AHTFB8CD403870367* *vi. AHTFB8CDX03870373* *vii. AHTFB8CD403870370* *viii. AHTFB8CD103870374*	*Toyota Hilux Double Cabin*
3.	*66803*	*i. JTFSS22PX00168941* *ii. JTFSS22P900168980*	*Toyota Hiace*
		i. AHTKA3FS500619034 *ii. AHTKA3FS000619040* *iii. AHTKA3FS500619115*	*Toyota Fortuner*
SIGNON GROUP LIMITED BONDED WAREHOUSE			
4.	*66804*	*i. AHTFB8CD703870959* *ii. AHTFB8CD403871048* *iii. AHTFB8CD303870960* *iv. AHTFB8CD603871049* *v. AHTFB8CD003871046*	*Toyota Hilux Double Cabin*
5	*66806*	*i. AHTKB8CB802854756* *ii. AHTKB8CB902854815* *iii. AHTKB8CB702854764* *iv. AHTKB8CBX02854810* *v. AHTKB8CB002854623*	*Toyota Hilux Single Cabin*
	TOTAL	***TWENTY EIGHT (28)***	***MOTOR VEHICLES***

b. A declaration that the Respondents have acted ultra vires and in excess of their powers as vested by the East African Community Customs Management Act, 2004.

c. A declaration that the Respondents have failed to comply with the requirements and tenets of fair administrative action contrary to the provisions of section 4 (1) of the Fair Administrative Action Act No. 4 of 2015 and Articles 10 of the Constitution.

d. A declaration that the Respondents in issuing the Notices of Seizure to the applicant have abrogated the applicants rights to a fair administrative action as guaranteed under Article 47 of the Constitution and as provided for under sections 3, 4, 5 and 6 of the Fair Administrative Action Act No. 4 of 2015, and the applicant's right to its property as provided for under Article 40 of the Constitution.

e. An order for damages on account of the Respondents' violations of the applicant's constitutional and statutory rights, such damages to comprise general, aggravated and punitive damages.

f. The costs of this application be provided for.

The Respondents' Replying Affidavit

14. John Cherutich, an officer appointed under Section 13 of the KRA act working at KRA's Investigations and Enforcement Department swore the Replying affidavit dated 24th May 2019. He averred that the Respondent following intelligence reports that there were motor vehicles that had been subject of an ongoing investigation by the DCI and which were in the KRA's custody, sought to establish the status of the vehicles and to secure the same.

15. He deposed that KRA and DCI officers visited Mitchell Cotts Bonded warehouse and Siginon Bonded warehouse where the twenty-eight (28) motor vehicles were being warehoused, and, established that taxes had not been paid on the said vehicles nor had exemptions been granted despite having been at the Bonded Warehouses for more than six months contrary to Section 57 of the EACCMA.

16. He deposed that the Respondents established that the motor vehicles were imported into the country between November 2017 and May 2018 by Toyota Tsusho East Africa Limited, under Customs warehousing regime W700 provided for under Section 34 of the EACCM Act. He averred that KRA's officers seized the vehicles and issued the corresponding Notices of Seizure awaiting payment of taxes or production of exemption (s) granted if any to facilitate release/removal of the said motor vehicles. He deposed that they acted within the confines of the law and in particular the provisions of Section 210 of the EACCMA, which empowers the Commissioner seize unaccustomed goods such as the subject motor vehicles. He further averred that the Respondents are mandated by the KRA act to implement the EACCMA, which makes provisions for management and administration of Customs and related matters.

17. Mr. Cherutich averred that the second Respondent has authority to ensure that goods entering the country are properly declared and full duty where applicable is paid, and, that, the clearance of goods is a process that involves verification of quantity, quality, HS Classification etc of goods as provided for under the EACCMA. He deposed that clearance establishes whether the goods are restricted or prohibited; verification of place of origin, whether the goods meet the environmental, public safety and health requirements etc to ensure that goods meet the International standards and Government Enforcement Agencies such as Interpol, Kenya Bureau of Standards, Port Health, and Anti Counterfeit Agencies among others are involved in the process.

18. Mr. Cherutich deposed that to undertake the above, the Government saw the need for all agencies involved in the process of clearance to work jointly to ensure a smooth flow of the same and formed a Multiagency Team comprising of the DCI, Anti-Counterfeit, Port Health, Kenya Ports Authority, Kenya Revenue Authority, KEBS, KEPHIS, Ministry of Health, NEMA, Anti-Counterfeit, amongst others, and, that, the said agencies, though independent are mandated to enforce different statutes.

19. He deposed that it is from the foregoing that any of the Law Enforcement agencies including the Respondent would call upon any member of the Multi Agency Team to undertake any investigation to verify whether a customs offence has been committed, and, in the instant case, the applicant was issued with Notices of Seizure, which clearly stated that the same was to allow investigations, by the DCI.

20. He also deposed that the DCI is mandated under the National Police Service Act[5] to carry out investigations and initiate criminal proceedings on the commission of an offence including customs offences, and, that KRA is authorised under EACCMA to seize any goods or vessels which are subject to customs control. He further deposed that it is not in dispute that the applicant has not paid any duty on the said motor vehicles.

21. Mr. Cherutich deposed that it is within the applicant's knowledge that goods held in bonded warehouses are goods which are uncustomed awaiting the completion of a customs process before they can be allowed for home use. In addition, he deposed that a bonded warehouse is an extension of the port and goods therein are still under customs control. He averred that the applicant is misguided in stating that the motor vehicles had been cleared and entered into a bonded warehouse since warehousing was granted to Toyota Tsusho East Africa Limited who is the importer of the subject Motor vehicles.

22. Mr. Cherutich deposed that the transaction between the applicant and Toyota Tsusho East Africa Limited does not in any way bind the Respondents, and, that KRA still has control over the subject motor vehicles until they are dealt with in accordance with EACCMA 2004. He

deposed that all the relevant laws were complied with before the seizure of the motor vehicles was undertaken.

23. He averred that the applicant has failed to provide evidence to show that the requisite taxes were paid or exempted, hence, the Respondents are justified to hold the vehicles pending processing of the exemptions if any was to be granted or upon payment of the requisite taxes. He deposed that the applicant's case is premature and cannot be sustained at this point, and, that, issuance of exemptions or waiver of taxes is the sole mandate of the Cabinet Secretary to the Treasury, and not the Respondents.

24. He deposed that although the KRA allowed the vehicles to be warehoused by Toyota Tsusho East Africa Limited at the time of importation, it did not guaranteed or give an undertaking on the grant of tax exemptions, and, that, the letter dated 9th November 2018 was from the National Treasury and not from the Respondents.

25. Mr. Cherutichi averred that the Notice was served on the requisite parties, that is, the Bonded warehouse keepers, and, that, the Notice is adequate as provided for under the EACCMMA. He averred that no legitimate expectation arose in favour of the applicant that it would be issued with a letter of exemption, and, that, the Respondent had not given any promise or undertaking to the applicant that it would be issued with a letter of tax exemption and, that, Legitimate expectation cannot arise contrary to the law.

26. He also averred that the applicant's assertions that they continue to suffer hardship and inconvenience is not true because no exemptions have been granted and the motor vehicles will remain under the control of Customs as provided for under Section 16 of the EACCMA, until the exemptions or taxes due thereon are paid.

27. He averred that Respondents have not in any way infringed on the applicant's right to own property since the motor vehicles are still in the bonded warehouses and can only be released to the applicant's possession once the applicant is granted letter of exemption and/ or pays the requisite duties assessed on the vehicles as required by law.

Applicant's supplementary Affidavit

28. Mr. Mario Ruolo, the applicant's Chief Financial Officer swore the supplementary affidavit dated 24th June 2019 in response to Mr. Cherutichi's Replying Affidavit. He averred that save for the investigations relating to Arror and Kimwarer dams, the applicant is not aware of any investigations relating to the seized vehicles.

29. He averred that no claim or demand has ever been made by the Respondent touching on the seized vehicles, and, that the applicant applied to KRA for tax exemption and while awaiting for the same KRA allowed it to transfer the vehicles. He deposed that KRA granted extensions of the warehousing and as at the time of issuing the Notices, KRA was aware that the goods were in a warehouse.

Respondents' further affidavit

30. John Cherutich, swore the further affidavit dated 24th July 2019 in reply to the above supplementary affidavit. He deposed that the applicant admits that the vehicles were purchased for use in the above dam projects, hence the basis for applying for tax exemption. He averred that it was in the public domain that there were ongoing criminal investigations on embezzlement of funds allocated for the construction of the said dams which the applicant were undertaking, and, that, criminal proceedings have been instituted against certain individuals including the applicant's directors and the applicant company itself in connection with the embezzlement of public funds meant for the construction of the dams.

31. He deposed that the subject motor vehicles are suspected to have been purchased with the said funds, which suspicions can only be cleared through the investigations by the DCI. He averred that the investigations culminated in criminal prosecutions against the said persons, hence, the applicant is estopped from feigning ignorance on the investigations.

32. He deposed that the Respondents acted reasonably and swiftly to secure the vehicles pending the outcome of the investigations, and, that, the Respondents extended the warehousing period of the said motor vehicles to preserve the motor vehicles pending the outcome of the investigations, which have culminated in criminal prosecutions.

33. Mr. Cherutich deposed that it is in the public interest that the Notices of Seizure on the subject motor vehicles remain in place pending the conclusion of the ongoing criminal proceedings. He further deposed that the *applicant's right to property under Article 40 is subject to constitutional limits under the Constitution to protect public interest in detection, prevention and prosecution of corruption and economic crimes.*

34. He also deposed that the extension of the warehousing period by the Respondent does not in any way guarantee issuance of the tax exemption by Treasury, and, that, the subject motor vehicles are uncustomed as per the definition provided in the EACCMA and an application for tax exemption to the National Treasury does not amount to actually obtaining the exemption nor does it guarantee that Treasury will grant the exemption.

35. Further, he deposed that extension of the warehousing period did not create a legitimate expectation that the vehicles at the bonded warehouses would not be interfered with while awaiting tax exemption. He also deposed that the seizure is necessary to preserve the motor vehicles, which may be used as exhibits in the ongoing criminal proceedings, hence, the motor vehicles ought to be preserved without any interference from the applicant.

36. He averred that if the orders sought are granted, the applicant is likely to frustrate the ongoing criminal prosecutions and subvert the public interest of recovering corruptly acquired property, and subvert the role of investigations and prosecutions as set out in the Constitution.

First and second Interested Party's Replying Affidavit

37. IP Gilbert Kitalia, a criminal investigator at the Directorate of Criminal Investigation Headquarters, Serious Crime Unit and the lead investigating officer in *Criminal Case No. ACC 18, 19, 20 and 21 of 2019 Republic –vs- Henry Rotich & 26 others* swore the Replying affidavit dated 4th September 2019. He averred that on the 18th of September 2018 the DCI received a complaint that there were governance and operation challenges in the management of the Kimwarer and Arror dam projects that required urgent attention, and, an inquiry file was opened to investigate the procurement process, award and construction of the said dams.

38. PI Kitalia deposed that investigations revealed that there was a Tender advertisement through Request for Proposal for the two projects and CMC Di Ravenna – South Africa Branch was awarded the contract to design and construct the said dam.

39. He deposed that though the contract was awarded to CMC Di Ravenna – South Africa Branch, the transactions transitioned to involve two other companies namely:-CMC Di Ravenna- Itinera JV a company registered in Italy and the applicant in this suit, and CMC Di Ravenna- Kenya Branch which was incorporated in Kenya on 6th September 2017, almost 3 years after the award of the contract.

40. IP Kitalia averred that despite the contract being awarded to CMC Di Ravenna- South Africa, Advance payments of USD 41,611,140.83 (approx. Ksh. 4,292,651,060.25) for Arror dam and USD 33,663,324.59 (approx. Ksh. 3,485,500,628.00) for Kimwarer dam were paid to CMC Di Ravenna- Itinera JV.

41. He averred that it is with these funds that the applicant CMC DI Ravenna- Itinera JV is believed to have purchased the 28 motor Vehicles, the subject of this suit through Toyota Kenya at Ksh.77,133,000/= which was paid via the applicant's account No. 2038590513 Barclays Bank Waiyaki Way Kenya Shillings Account.

42. IP Kitalia averred that clearance of goods at the port is a process that involves verification of quantity, quality, classification etc. which involves several independent government agencies, hence, the government established a Multi-Agency Team to ensure smooth flow of the clearance process at the port and ease the verification processes. He deposed that the team comprise of the DCI, Anti- Counterfeit, Port Health, Kenya Port Authority, Kenya Revenue Authority, KEBS, KEPHIS, Ministry of Health, NEMA among others.

43. He averred that the DCI in collaboration with KRA customs officers visited the two bonded warehouses and confirmed that the 28 motor vehicles at the warehouses were indeed the vehicles purchased by CMC Di Ravenna- Itinera JV, and through the teams initiative, it was agreed that the said vehicles be seized and detained due to the then ongoing investigations. He deposed that KRA issued the Seizure Notice for the 28 vehicles.

44. IP Kitalia deposed that the applicant's averment that they were not aware of any ongoing investigations by the DCI relating to the seized vehicles is untrue because the DCI on 21st May 2019 wrote a letter summoning the applicant's Directors to record their statements, but instead of attending, they wrote a letter through a one Mario Ruolo stating that they were not available. He deposed that investigation revealed that the applicants had not paid taxes for the seized vehicles as they were waiting for tax exemption from from the National Treasury.

45. IP Kitalia averred that in the letter dated 9th November 2018 the former Permanent Secretary to the National Treasury indicated that the exemption was given because the dams construction was ***"An official aid funded project financed by the Italian Government.,"*** which was clear fraud as the government of Kenya had already paid 168,498,863.34 Euros (Approximately Ksh. 20,525,865,874.12) as advance payments for the dam projects and yet, the intended tax waiver amounted to USD 190,100,464 (Approximately. Ksh.19, 010,046,400/=) an amount similar to the monies that had already been paid, hence, had the waiver been successful, the public would have lost Ksh. 39,535,912,274/=.

46. He deposed that the said fraud is one of the subject matters to be established in the criminal case as the applicants in this suit are suspected to have colluded with officials at the Kenya National treasury, and, that, the motor vehicles are liable for forfeiture and or confiscation at the conclusion of the criminal case thus to release them at this time, would injure the public interest and compromise the justice of the matter as per section 54 of the Anti-corruption and Economic Crimes Act[6] (herein after referred to as ACECA) should a conviction be returned.

47. He deposed that the motor vehicles will be relied on at the trial as exhibits thus any order of release would compromise the trial, and, that, the chain of custody of the motor vehicles has since shifted to the DCI as they are exhibits in the criminal case and KRA is only holding them as custodian since the vehicles are subject to custom control and the same cannot leave the bonded warehouse.

48. IP Kitalia deposed that the criminal cases involve colossal sums of public funds thus recovery of such funds is a top priority and any asset that may have been acquired in relation to such property must be preserved in the public interest till the trials are concluded.

49. In addition, he deposed that the courts have a duty to balance the rights of the applicants and the interest of justice and as much as the court is expected to preserve their right to fair administrative action, the court must take into account public interest and the duty of the State to preserve and protect public property and uphold the integrity of the criminal justice system.

Issues for determination

50. Upon analysing the facts presented by the parties herein and their respective advocates legal submissions, I find that the following issues distil themselves for determination:-

a. Whether this court is divested of jurisdiction by virtue of the doctrine of exhaustion of remedies.

b. Whether the impugned decision is ultra vires the Respondents' statutory mandate.

c. Whether the issuance of the Notices of Seizure is tainted with unreasonableness.

d. Whether the Respondent erred in failing to give the applicant a Notice of the intended action.

e. Whether the applicant's right to legitimate expectation has been violated.

f. Whether the applicant is entitled to any of the prayers sought.

a. Whether this court is divested of jurisdiction by virtue of the doctrine of exhaustion of remedies.

51. Despite the fact that this is a fairly dispositive issue, Mr. Njogu, the applicant's counsel did not address it in his written and oral highlights. However, upon being prompted by the court, he argued that no alternative remedy exists since exemption applies to goods seized under the act. Mr. Njogu maintained that the reason stated in the seizure document, namely, "pending investigations by the DCI" is not provided in the enabling statute, which is EACCMA.

52. M/s Nganga, the Respondents' counsel submitted that the applicant rushed to court contrary to the procedure provided Section 216 of the EACCMA. To buttress her argument, she cited section 9 of the FAA Act and argued that where the Constitution or an act pf Parliament prescribes a procedure for redress of any particular grievance, that procedure should be strictly followed. She relied *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others cited in Krystalline Salt Limited v Kenya Revenue Authority[7]* and submitted that the applicant failed to exhaust the procedure provided for under Section 216 of the EACCMA, hence, any orders it seeks should fail.

53. Mr. Taib, counsel for the Interested Parties cites section 214 (4) of the EACCMA which provides that *"Where anything liable to forfeiture under this Act has been seized, then, subject to subsection (1) (a) and subsection (3) the owner* ***may, within one month of the date of the seizure or the date of any notice given under subsection (1) as the case may be, by notice in writing to the Commissioner claim such thing."***

54. Mr. Taib pointed out that the above information is also clearly stated at the tail end of the body of the Notice of Seizure as follows: - *"If you claim or intend to claim that the things seized are not liable to forfeiture, you should within one calendar month from the day of the notice, give notice in writing of your claims in accordance with the provisions of the Customs and Excise Act. In default of such notice, the things seized will be deemed to have been lawfully condemned and will be liable to be disposed of in such manner as the commissioner may direct."*

55. He submitted that the applicant never took the relevant step prescribed in the above section and pointed out that at the time of filing this application, the motor vehicles had been seized due to ongoing investigations by the DCI and no criminal proceedings at the time had been instituted against the applicants in this suit. He submitted that the applicant had an opportunity to file a formal claim with the Respondents within 30 days from the date of the notices.

56. In addition to section 214 of EACCMA cited by Mr. Taib, section 216 cited provides that:-

216. (1) Where any notice of claim has been given to the Commissioner in accordance with section 214, the Commissioner may, within a period of two months from the receipt of such claim, either—

(a) by notice in writing to the claimant, require the claimant to institute proceedings for the recovery of such thing within two months of the date of such notice; or

(b) Himself or herself institute proceedings for the condemnation of such thing.

(2) Where the Commissioner fails within the period of two months either to require the claimant to institute proceedings, or the Commissioner fails to institute proceedings, in accordance with subsection (1), then such thing shall be released to the claimant: Provided that if the thing is prohibited goods or restricted goods which has been imported, or carried coastwise or attempted to be exported in contravention of this Act, the thing shall not be released to the claimant but may be disposed of in such manner as the Commissioner may direct.

57. Part XX of the EACCMA, at section 229 provides for application for Review to the Commissioner in the following words:-

1) A person directly affected by the decision or Application omission of the Commissioner or any other officer on matters for review or relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

2) The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

3) Where the Commissioner is satisfied other that, owing to absence from the Partner State, or omission, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within the a time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).

4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.

6) During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person upon payment of duty as determined by the Commissioner or provision of sufficient security for the duty and for any penalty that may be payable as determined by the Commissioner.

58. Subsection (1) above is coached in broad terms to cover any matters relating to customs. Also relevant is section 230 of the EACCMA which provides as follows:-

1) A person dissatisfied with the decision of the commissioner under section 229 may appeal to a tribunal established in accordance with section 231 tax appeals.

2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner.

59. My reading of the above provisions is that a person must submit himself to the processes provided under the above sections and if aggrieved by the decision, he has recourse in the Tax Appeals Tribunal. The above provisions are to be read together with section 231 of EACCMA which provides for establishment of Tax Appeals Tribunals in the partner states in the following words:-

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.

60. Section 3 of the Tax Appeals Tribunal Act[8] establishes the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner. The act defines “tax law” means— (a) the Income Tax Act;[9] (b) the Customs and Excise Act;[10] or (c) the Value Added Tax;[11] (d) the East African Community Customs Management Act, 2004; (e) any other tax legislation administered by the Commissioner. It defines the “Tribunal” to mean the Tax Appeals Tribunal established under section 3 of the Act.

61. The preamble to the Tax Procedures Act[12] provides that it is an act of Parliament to harmonise and consolidate the procedural rules for the administration of tax laws in Kenya, and for connected purposes. Also, of great significance is section 2 which states as follows:-

1) The object and purpose of this Act is to provide uniform procedures for—

a) consistency and efficiency in the administration of tax laws;

b) facilitation of tax compliance by taxpayers; and

c) effective and efficient collection of tax

2) Unless a tax law specifies a procedure that is unique to the administration of a tax thereunder, the procedures provided for under this Act shall apply.

62. Section 2 (3) of the Tax Procedures Act[13] provides that the Act shall be interpreted to promote the object of the Act. Section 52 (1) of the act provides that a person who is dissatisfied with an appealable decision may appeal the decision to the Tribunal in accordance with the provisions of the Tax Appeals Tribunal Act.[14] The act defines an "appealable decision” to mean an objection decision and **any other decision made under a tax law other than**— (a) a tax decision; or (b) a decision made in the course of making a tax decision.

63. Section 3 of the Tax Appeals Tribunal act[15] establishes a Tribunal known as the Tax Appeals Tribunal to hear appeals filed against any tax decision made by the Commissioner. Also relevant is section 12 of the act. It provides that 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.

64. The foregoing provisions of the law warrant no explanation. The question is whether this court has the jurisdiction to entertain this dispute in view of the said provisions. Differently stated, does this suit offend the doctrine of exhaustion of statutory remedies?

65. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya.[16] The Court of Appeal[17] in *Speaker of National Assembly vs Karume,*[18] *a pre-2010 decision* upheld the doctrine 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."

66. Many post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution.[19] In *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 others,*[20] the Court of Appeal provided the constitutional rationale and basis for the doctrine as follows:-

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

67. In the *Matter of the Mui Coal Basin Local Community,*[21] the High Court added its voice thus:-

> *"The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases..."*

68. From the above jurisprudence, two principles emerge. *First,* while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies.[22] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

69. From the statutory definitions discussed earlier, I have no doubt that the decision under challenge is an appealable decision under the Tax Procedures Act.[23] Section 9(2) of the FAA Act[24] provides that the High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. Also relevant is sub-section (3) which provides that *"*the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section (2) have been exhausted, direct that an applicant *shall* first exhaust such remedy before instituting proceedings under sub-section (1).

70. It is instructive to note the use of the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analysing and solving the problem of the effect to be given to their directions.[25]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[26] The real question in all such cases is whether, a thing, has been ordered by the legislature to be done, and what is the consequence, if it is not done. The general rule is that an absolute enactment must be obeyed, or, fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

71. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

72. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[27] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[28] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

73. A proper construction of section 9(2) & (3) of the FAA Act leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by section **9(4),** which provides that: - *"*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. Two requirements flow from the above sub-section. *First*, the applicant must demonstrate exceptional circumstances.

74. What constitutes exceptional circumstances depends on the facts of each case[29] and it is not possible to have a closed list. Article 47 of the Constitution is heavily borrowed from the South African Constitution. In addition, the FAA Act is heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer useful guidance. Flowing from the foregoing conclusion, I find that the following points from a leading South African decision relevant:-[30]

> *i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or*

different . . .”

ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.

iv. Depending on the context in which it is used, the word “exceptional” has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.

75. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile.[31] There is no definition of ‘exceptional circumstances’ in the FAA Act, but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[32]

76. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case.

77. It has not been established that applying the dispute resolution mechanism will be impractical, nor has it been demonstrated that the dispute is purely legal and must be determined by the court. A look at the powers of the Commissioner and the jurisdiction of the Tribunal and the facts of this case suggests otherwise. It has not been shown that the mechanism is not effective nor has it been demonstrated that the applicant cannot obtain an effective remedy from the Commissioner and if aggrieved, from the Tribunal.

78. 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 FAA Act.[33] 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.[34] Section 9(4) of the FAA 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.

79. The law is that Section 9(4) of the FAA Act[35] postulates an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances. The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine. No application was presented before this court to determine the existence of exceptional circumstances; nor do I see any exceptional circumstances in the circumstances of this case.

80. Perhaps, I should add that it is uncontested that the impugned decision constitutes an administrative action as defined in section 2 of the FAA Act. Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the applicant can show exceptional circumstances to exempt him from this requirement.[36] An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[37] An internal remedy is adequate if it is capable of redressing the complaint.[38]

81. There was no suggestion that the remedy under the act does not offer a prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.

82. The principle running through decided cases is that where there is an alternative remedy, or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted. In determining whether an exception should be made, and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism, in the context of the particular case, and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined, and whether the appeal mechanism is suitable to determine it.

83. The other principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that, a

statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the court to consider valid grievances from parties who may not have audience before the forum created, 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. The rationale behind this reasoning is that statutory provisions ousting court's jurisdiction must be construed restrictively.

84. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The powers of the Commissioner and the jurisdiction of the Tribunal is expressly provided under the act. A reading of the act shows that the Commissioner and the Tribunal are clothed with jurisdiction to determine the dispute.

85. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the applicant ought to have exhausted the available mechanism before approaching this court. It follows that this case offends section 9 (2) of the FAA Act. The applicant has not satisfied the exceptional circumstances requirement under section 9(4) of the FAA Act. Simply put, this application offends the doctrine of exhaustion of statutory available remedies. It must fail. On this ground alone, this case is dismissed.

86. Notwithstanding my finding on the above issue, I proceed to examine the merits of the case.

b. Whether the impugned decision is ultra vires the Respondents' statutory mandate

87. Mr. Njogu, the applicants counsel argued that the Notices of Seizure were issued pursuant to section 213(1) of EACCMA which allows an officer or a police officer or an authorised public officer to seize and detain goods liable to forfeiture under the EACCMA. He argued that the Seized Vehicles are not liable for seizure and forfeiture under the EACCMA. He submitted that the reason stated for the seizure is criminal investigations for unknown alleged offences. He argued that the applicant is unaware of criminal investigations relating to the vehicles, but it is only aware of investigations relating to the Arror and Kimwarer dams contracts. He argued that the question that arises is whether criminal investigations by the DCI is a basis for seizure and forfeiture under the EACCMA. He cited section 210 of the EACCMA which provides that restricted, prohibited and unaccustomed goods are liable for seizure and forfeiture. It was his submission that the said section outlines the goods liable for seizure/forfeiture as follows:-

a. any prohibited goods;

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

c. any unaccustomed goods;

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

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

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

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

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

88. Mr. Njogu also argued that EACCMA also provides for other circumstances under which goods are liable to forfeiture as follows:-

a. goods brought in into or out any customs area or customs airport, in other points other than an entrance or exit appointed- section 51 of the EACCMA;

b. in respect of goods where person in charge of any vehicle arriving overland at a frontier of the Partner States from a place outside the Partner States causes or allows the vehicle to enter the Partner States at any place other than at a port appointed and fails to produce the required documents - sections 29, 83, 84 of the EACCMA;

c. goods are removed from the Customs Area and disposed without producing the required documentation – section 31 of the EACCMA;

d. in respect of goods where a person contravenes conditions set out for removal of goods from any transit shed or Customs area – sections 39, 53 of the EACCMA;

e. the cargo to be loaded for export on any aircraft or vessel is not entered by the owner of such cargo in the manner prescribed- section 73 of the EACCMA; and

f. In respect of goods where a person who uses or permits premises to be used for manufacturing under bond without a licence or

contravenes terms of the license – section 160 of the EACCMA.

89. He argued that from the above provisions, the grounds upon which goods are liable for seizure and forfeiture are limited, hence, the investigations, for non-disclosed offences by the DCI do not form a basis for seizure under the EACCMA. He referred to the preamble to the act which provides that it is "An Act of the Community to make provisions for the management and administration of Customs and for related matters." To buttress his argument, he argued that the purpose of the EACCMA was expounded in *Crywan Enterprises Limited v Kenya Revenue Authority**[39]* as follows:-

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

90. Fortified by the above passage, Mr. Njogu argued that the Respondents' mandate to seize goods liable for forfeiture is primarily aimed at ensuring customs are paid, and the movement of certain types of goods in the country is controlled. He submitted that the reasons stated in the Notices of Seizure are not based any of the above. Mr. Njogu argued that there is no mention in the Notices of Seizure that the Seized Vehicles are un-customed, or even that the alleged pending investigations by the DCI are on account of unpaid taxes. He argued that the Respondents' argument that the Seizure was on account of unpaid taxes was clearly an afterthought, as nothing precluded them from stating this as the reason in the Notices of Seizure were it a genuine reason grounded on EACCMA.

91. In addition, Mr. Njogu argued that no claim or demand has been made for the Seized Vehicles as to any unpaid customs, character, or quality of goods, so as to make them liable for seizure and forfeiture. He argued that the applicant was given approval by KRA to transfer the vehicles to a bonded warehouse while awaiting approval for its application for tax exemption, hence, there is no reason for it to believe that its application will/has been rejected as there has not been any communication to this effect.

92. He submitted that the criminal investigations on its own is not a ground under which goods would be liable for seizure and forfeiture under the EACCMA. He submitted the Notices of Seizures are therefore based on non-existent grounds under the EACCMA, extraneous to the purposes of the EACCMA. He argued that the application is primarily founded on Section 4 of the FAA act which provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair and to be issued prior and adequate written notice of the nature and reasons for the proposed administrative action.

93. It was his submission that all that the applicant has to demonstrate is that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. For this proposition, he relied on *Council of Civil Unions v Minister for the Civil Service**[40]* and *Bukoba Gymkhana Club*;[41] and *Pastoli v Kabale District Local Government Council & Others.**[42]* In addition he cited *Council of Civil Unions v Minister for the Civil Service**[43]* and *an application by Bukoba Gymkhana Club* and *Pastoli v Kabale District Local Government Council & others* which defined illegality to mean "when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint, acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality." To further buttress his argument, Mr. Njogu cited *Konton Trading Limited v Kenya Revenue Authority & 3 others*,[44] in which the court categorized "Illegality/*ultra vires*" into two:

> *"…those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple ultra vires and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category."*
>
> He also cited *Aiminist v Foreign Compensassion Commission [1969] AC 147.*

94. Mr. Njogu submitted that the the issuance of the Notices of Seizure by the Respondents is *ultra vires* as the Respondents acted without any jurisdiction under the EACCMA and that it considered extraneous issues, which is a blatant error in the face of the law. He submitted that on the first limb, the test to be applied is the "intent of the legislature and the conditions and powers contained in the enabling legislation." – *Konton Trading Limited v Kenya Revenue Authority & 3 others* (supra) cited.

95. In addition, Mr. Ngogu relied on *AA Investments (Pty) Ltd vs Micro Finance Regulatory Council**[45]* for the proposition that "*the doctrine of legality requires that power should have a source in law, is applicable whenever public power is exercised . . . Public power . . . can be validly exercised only if it is clearly sourced in law.*"

96. He argued that the applicant has established that criminal investigations is not a ground on which goods may be liable for seizure and forfeiture under EACCMA and that section 210 of the EACCMA is very categorical on circumstances under which goods may be liable for seizure and forfeiture. He insisted that criminal investigations are not one of grounds. It was his submission that the intention of the EACCMA is to manage and administer duty and control the movement of imported goods until duty has been paid. It is certainly not the legislation for criminal investigations and procedures that are unrelated to administration of taxes. He argued that there are legal processes available to the DCI if it has any reason to believe that the seized vehicles should be investigated for whatever reasons.

97. Mr. Njogu argued that the Notices of Seizure did not state the basis of investigations to be on account of unpaid taxes, hence it was

ambiguous. He argued that the Notices are illegal and void *ab initio* for want of jurisdiction. He also argued that in basing the Notices of Seizure on grounds not provided for in the EACCMA, the Respondents considered extraneous factors in issuing the Notices of Seizure, therefore satisfying the second limb of illegality.

98. He submitted that courts have severally held that decisions made on factors outside those provided under an enabling act are *ultra vires* and should therefore be quashed. For this proposition, he relied on *Keroche Industries Limited v Kenya Revenue Authority & 5 Others*[46] in which the court found that the assessment of excise duty was based on factors outside the Excise Duty Act,[47] and as such, the basis or substratum of the taxes was *ultra vires.* He also relied on *R (Brunce) v Pensions Appeals Tribunal**[48]* where it was held that the Tribunal went beyond the jurisdiction granted by statute and therefore *ultra vires* by considering extraneous issues. He also cited *R (Lumba) v Secretary of State for the Home Department*[49]for the proposition that statutory powers must be used for the purpose for which they were conferred and not for some other purpose. He urged the court to quash the impugned Notices because the Respondents adopted a reason outside the provisions of EAACMA, hence the Notices of Seizure are therefore *ultra vires*.

99. M/s Nganga, the Respondents' counsel submitted that the Respondents acted within their mandate as provided by section 5 (1) (2) of the KRA Act. She submitted that that KRA is required to administer and enforce all provisions of the written laws set out in Part 1 & 2 of the First Schedule to the Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. She argued that among the laws the KRA enforces is the EACCMA. She cited Section 213 (1) of the EACCMA which grants KRA powers to seize or detain goods liable for forfeiture under Section 210 of the act or on which there is reasonable ground to believe they are liable to forfeiture regardless of the fact that any prosecution for an offence under the Act which renders that thing liable to forfeiture has been, or is about to be instituted.

100. M/s Nganga cited Section 210 of EACCMA which provides a list of the kind of goods liable for forfeiture among them *"any uncustomed goods"* defined in Section 2 of the act as *"dutiable goods on which the full duties due have not been paid, and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the Customs laws."* She argued that the motor vehicles were uncustomed as no duty has been paid nor any tax exemption obtained and are therefore liable for forfeiture as per Section 210 (c) of the EACCMA. She submitted that goods held in bonded warehouses are goods that are uncustomed awaiting the completion of a customs process before they can be entered for home use, and, that, a bonded warehouse is an extension of the port and goods therein are still under Customs control, and are liable to forfeiture if they offend the provisions of Section 210 of the EACCMA or any such other sections of the EACCMA that provide for forfeiture of goods.

101. M/s Nganga argued that the 2nd Respondent has authority to ensure that goods entering the country are properly entered/declared and full duty where applicable is paid. She submitted that clearance of goods involves verification of quantity, quality, Harmonized System Classification etc. of goods as provided for under the EACCMA to establish whether the goods are restricted or prohibited; verification of place of origin; whether the goods meet the environmental, public safety and health requirements etc. She argued that verification ensures that goods conform to the International standards and Government Enforcement Agencies such as Interpol, Kenya Bureau of Standards, Port Health, Anti Counterfeit Agencies among others are involved in the process, hence the rationale for Multiagency Team comprising of the DCI, Anti-Counterfeit, Port Health, Kenya Ports Authority, Kenya Revenue Authority, KEBS, KEPHIS, Ministry of Health, NEMA, Anti-Counterfeit, amongst others. She submitted that the said agencies are mandated to enforce different statutes. In this regard, she submitted that the DCI can call upon the Respondents or any member of the Team to assist it in the discharge of its legal duties under section 35 of the National Police Service Act.[50]

102. She submitted that it is in the public domain that the applicant purchased the subject motor vehicles with funds allocated for the construction of the Arror and Kimwarer dam projects, which projects were under investigations and criminal proceedings have been lodged against certain individuals, directors of the applicant Company and the applicant herein. She argued that it was only reasonable for KRA to secure the vehicles to allow DCI to conduct and conclude their investigations seamlessly as any outcome of the investigations would materially affect KRA since the vehicles are under customs control. She argued that it was necessary to secure the vehicles in line with Section 213 of EACCMA.

103. M/s Nganga argued that there was reasonable ground to seize the vehicles because they were subject of investigations by the DCI since the vehicles are still under customs control. She submitted that the Respondent's actions were well within the confines of Section 210 and 213 of the EACCMA and Government agencies should be allowed to work together in order to further the interests of the Constitution and the law as envisioned under Article 3 (1) of the Constitution, hence there was no illegality.

104. Mr. Taib, counsel for the Interested Parties submitted that on the 18th September, 2018 the DCI received a complaint that there were governance and operation challenges in the management of the Kimwarer and Arror dam projects that required urgent attention triggering investigations on the procurement process, award and construction of the said dams. He submitted that in the course of this investigations that the DCI discovered that the applicant had purchased 28 Motor Vehicles allegedly for the dam projects. He submitted that the DCI and the respondents visited the two bonded warehouses housing the vehicles and upon confirming the status of the motor vehicles, it was agreed that the same be preserved.

105. Mr. Taib submitted that upon conclusion of the investigations, it was recommended that the applicant in this suit be charged, and on 23rd July, 2019 the applicant alongside others were charged in *Republic –vs- Henry Rotich & 26 others**[51]* with several offences related to the dam projects. He submitted that the said motor vehicles are listed among the exhibits to be relied upon in support of the criminal proceedings.

106. Replying Mr. Nogu's submission that the Respondent acted *ultra vires* its mandate under section 210 of the EACCMA, Mr. Taib recalled Mr. Njogu's core reasons as follows:-*That Criminal Investigations are not a ground in which goods may be liable for seizure and forfeiture under section 210 EACCMA; That the intention of EACCMA is to manage and administer duty and control the movement of imported goods until duty has been paid and is therefore not a legislation for criminal investigations and procedures that are unrelated to administration of taxes.* He also recalled that Mr. Njogu relied *Crywan Enterprises Limited v Kenya Revenue Authority**[52]* where the court stated that *"EACMMA deals with the imposition and collection of duty on goods imported into the country, governing the storage movement of goods until duty is paid and also preventing smuggling and evasion of customs duty."*

107. He pointed out that the court in the above case citing section 213(1) of EACCMA stated *"The ability to seize and detain goods upon reasonable grounds is one of the powers conferred on police and public officials to seize goods liable for forefeiture….it is a power that falls within the schemes of the Act and without this power the purpose for the Act are diminished. I find and hold that power to seize goods on the basis of reasonable grounds provided in the Act is rationally connected to the purpose of the Act to secure and collect taxes."* Riding on the said passage, Mr. Taib argued that the Mr. Njogu's submission is erroneous.

108. On the submission that the Respondent acted *ultra vires*, Mr. Taib referred to the mandate of KRA under section 5 of the KRA act and also referred to section 7 of the EACCMA which provides *"For the purpose of carrying out the provisions of this Act, every officer shall, in the performance of his or her duty, have all the powers, rights, privileges, and protection, of a police officer of the Partner State in which such officer performs his or her duty."*

109. In addition, he cited section 210 of EACCMA and argued that it provides that goods which can be liable for forfeiture include **uncustomed goods,** which under Section 2 of the same act are defined to *"include dutiable goods on which the **full duties due have not been paid**, and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the Customs laws."* He added that section 213(1) of EACCMA provides that *"An officer or a police officer or an authorized public officer may seize and detain any aircraft, vessel, **vehicle,** goods, animal or other thing **liable to forfeiture under this Act** or **which he or she has reasonable ground to believe is liable to forfeiture**; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained **regardless** of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted."*

110. Mr. Taib cited *Republic v Commissioner of Customs & Excise Ex-Parte Abdi Gulet Olus **[53]*** while addressing section 213 of EACCMA stated that *"….It is clear that the standard for test for seizure is pegged at **the lower 'reasonable ground to believe' not the certainty of liability to forfeiture.** The question in this case therefore is whether the vehicle the subject of these proceedings was liable to forfeiture or, **alternatively, whether the respondent's officer had reasonable grounds for believing the vehicle was liable to forfeiture**. If the vehicle was used in the transport of goods liable to forfeiture, the vehicle would itself be liable to forfeiture, **and the respondent's officers need not demonstrate reasonable grounds for believing the vehicle to be liable."*** Mr. Taib relied on Lord Diplock in *Council of Civil Service Unions v Minister of the Civil Services **[54]*** who summarized the grounds for judicial review *illegality, irrationality and the third procedural impropriety*. He submitted that the respondents followed the procedures laid down in Law in seizing the motor vehicles.

111. He submitted that the applicant was charged in ACC 18,19,20,21 of 2019, *Republic v Henry Rotich and Others* and from the investigations conducted, the applicant irregularly received advance payments of USD 41,611,140.83 (approx. Ksh. 4,292,651,060.25) for Arror dam and USD 33,663,324.59 (approx. Ksh. 3,485,500,628.00) for Kimwarer dam funds which were transferred to them through the Kenya National Treasury for the projects. He argued that the applicant purchased the 28 Motor vehicles at Ksh.77,133,000/= through Toyota Kenya using the same funds. He stated that the said charges involve charges of corrupt conduct that intended to swindle Kenyan tax payers Billions of Shillings.

112. Mr. Taib cited section 2 of the Proceeds of Crimes and Anti- Money Laundering Act[55] which defines a proceed of crime as *"**any property** or economic advantage **derived or realized, directly or indirectly, as a result of or in connection with an offence irrespective of the identity of the offender and includes**, on a proportional basis, **property into which any property derived or realized directly from the offence was later successively converted,** transformed or intermingled, as well as income, capital or other economic gains or benefits derived or realized from such property from the time the offence was committed."*

113. Mr. Taib submitted that the motor vehicles in question were purchased using funds which had been illegally and irregularly transferred to the applicant which falls under the definition of proceeds of crime as the motor vehicles are *"properties derived as a result of or in connection with an offence."* He argued that the motor vehicles being proceeds of crime do not form part of properties protected under Article 40 of the Constitution. He cited Article 40(6) of the constitution which provides that the provisions of Article 40 do not extend to any property that has been found to have been unlawfully acquired. To buttress his argument, Mr. Taib cited *Teckla Nandjila Lamecks v President of Namibia **[56]*** which held that *"proceeds of unlawful activity would not constitute property in respect of which protection is available."*

114. In addition, he cited section 61(1) of Proceeds of Crime and Anti-Money Laundering Act[57] which provides that *"Whenever a defendant is convicted of an offence, the court convicting the defendant shall, on the application of the Attorney-General, the Agency Director or of its own motion, **inquire into any benefit which the defendant may have derived from**:-*

> *i. **that offence**;*
>
> *ii. any other offence of which the defendant has been convicted at the same trial; and*
>
> *iii. any criminal activity which the court finds to be sufficiently related to that offence,*
>
> *and, if the court finds that the defendant has so benefited, the court shall, in addition to any punishment which it may impose, make an order against the defendant for the payment to the Government of any amount it considers appropriate and the court may make any further orders as it may deem fit to ensure the effectiveness and fairness of that order.*

115. He also submitted that even without being convicted or prosecuted of the offence, section 56 of the Proceeds of Crime and Anti-Money Laundering Act[58] provides for independent proceedings that the Asset Recovery Unit established under Section 53 of the Act can institute to freeze, seizure and confiscate proceeds of crime. He pointed out that these proceedings may proceed whether or not a defendant has been charged with a criminal offence or convicted. He argued that all that needs to be established is that the property is a proceed of crime as highlighted above and file civil proceedings.

116. In addition, Mr. Taib cited *The Assets Recovery Agency v Quorandum Limited & 2 others **[59]*** for the holding held that "…***civil***

forfeiture proceedings are not subject to presumption of innocence *which is a criminal law phenomenon. Lastly, the grant of the forfeiture orders ...is not affected by the outcome of the criminal proceedings where the 1st Respondent has been charged.* He pointed out that the court relied on Section *92(4) of* Proceeds of Crime and Anti-Money Laundering Act[60] *by stating that the validity of an order under subsection (1) is not affected by the outcome of criminal proceedings, or of an investigation with a view to institute such proceedings, in respect of an offence with which the property concerned is in some way associated."*

117. To further buttress his arguments, Mr. Taibu argued that ACECA provides for forfeiture of unexplained assets. He cited section 55 (2) of the act which provides that *"The Commission may commence proceedings under this section against a person if:-*

> *i. after an investigation, the Commission is satisfied that the person has unexplained assets; and*
>
> *ii. the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.*

118. He also referred to section 55(6) of the act which provides that *"…if a court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct."* Section 55(1) (a) of ACECA *defines corrupt conduct to mean conduct that constitute corruption and economic crimes.*

119. Counsel submitted that the charges in the criminal cases Acc. Nos. 18, 19, 20 and 21 of 2019 *Republic v Henry Rotich and others* are mainly on corrupt conduct which include abuse of office and misuse of public funds, and, that, the cited provisions of the law show that the motor vehicles are deemed to be proceeds of crime acquired through criminal conduct and therefore liable for forfeiture.

120. The starting point is that our Constitution requires a purposive approach to statutory interpretation.[61]The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[62] The often-quoted dissenting judgment of Schreiner JA, eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."*[63]

121. The Supreme Court of Appeal of South Africa in *Natal Joint Municipal Pension Funds v Endumeni Municipality****[64]*** acknowledged the interpretation that gives regard to the manifest purpose and contextual approach as the proper and modern approach to statutory interpretation. Wallis JA pointed out that "in resolving a problem, where the language of a statute leads to ambiguity the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation."[65]

122. In the United Kingdom, the Chancery Division of the High Court, per Lord Greene MR in *In re Birdie v General Accident Fire and Life Assurance Corporation Ltd*[66] stated the following on the contextual approach to statutory construction:-

> *"The real question to be decided is, what does the word mean in the context in which we here find it, both in the immediate context of the sub-section in which the word occurs and in the general context of the Act, having regard to the declared intention of the Act and the obvious evil that it is designed to remedy."*

123. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.[67] In *Stopforth v Minister of Justice and Others; Veenendaal v Minister of Justice and Others****[68]*** Stopforth Olivier JA provided useful guidelines for the factors to be considered when conducting a purposive interpretation of a statutory provision:-

> *"In giving effect to this approach, one should, at least, (i) look at the preamble of the Act or at the other express indications in the Act as to the object that has to be achieved; (ii) study the various sections wherein the purpose may be found; (iii) look at what led to the enactment (not to show the meaning, but also to show the mischief the enactment was intended to deal with); (iv) draw logical inferences from the context of the enactment."*

124. The above excerpt is useful while ascertaining the purpose of a statute. This position becomes clear if we read the preamble to the enabling act, which reads *"An Act of the Community to make provisions for the management and administration of Customs and for related matters."* Also relevant is the preamble to the KRA act which provides *"An Act of Parliament to establish the Kenya Revenue Authority as a central body for the assessment and collection of revenue, for the administration and enforcement of the laws relating to revenue and to*

provide for connected purposes."

125. A purposive construction of the above statutes requires courts and regulatory bodies tasked with enforcement of the Act to interpret and apply the acts in a manner that gives effect to the objects as set out in the preamble to the above acts.

126. Consistent with the cannon of statutory construction that requires a holist reading of a statute in order to get its full meaning, purpose

and effect without excessive peering the language of the statute, it is convenient to start by examining KRA's mandate pursuant to the enabling statute. Under section 5(2) of the KRA act, in the performance of its functions under subsection (1), the KRA is mandates to administer and enforce—*all provisions of the written laws set out in Part I of the First Schedule and for that purpose, to assess, collect and account for all revenues in accordance with those laws; the provisions of the written laws set out in Part II of the First Schedule relating to revenue and for that purpose to assess, collect and account for all revenues in accordance with those laws; to advise the Government on all matters relating to the administration of, and the collection of revenue under the written laws or the specified provisions of the written laws set out in the First Schedule; and to perform such other functions in relation to revenue as the Minister may direct.*

127. The laws listed in the said schedule include EACCMA. The applicant's argument on *ultra vires*, as I understand it is anchored on two grounds. *First*, investigation by DCI is not a ground contemplated under the act. *Second*, KRA acted illegally in issuing the Notice since the applicant was waiting approval on its application for tax exemption.

128. The two grounds cited are legally frail and unsustainable. I will start with the second ground. Section 5 of EACCMA creates the office of the Commissioner of Customs and Excise whose responsibilities include the management and control of the Customs including the collection of, and accounting for, Customs revenue in the respective Partner State. The act also provides for powers of the officers authorized by the Commissioner under Section 5, which include rights, privileges, and protection, of a police officer of the Partner State in which such officer performs his or her duty.

129. The applicants counsel kept on reiterating that KRA had cleared the goods to be kept in a bonded warehouse, hence it acted illegally by issuing the Notice. This argument collapses on *four* fronts. *One*, it ignores the fact that the reason why the vehicles were kept in a bonded Warehouse is because the applicant had not paid duty. Bonded warehouse is a place authorized by Customs Officials, where goods on which duties are unpaid are stored under bond. Such goods are taken out of the warehouse for consumption only on the payment of the duties.

130. Differently put, Bonded Warehouse is a warehouse authorized by Customs authorities for storage of goods on which payment of duties is deferred until the goods are removed. When goods enter a bonded warehouse, both the importer and the warehouse proprietor incur financial and legal liability under a bond.

131. *Two*, upon entry of goods into the warehouse, the importer and warehouse proprietor incur liability under a bond. This liability is generally cancelled when the goods are exported; or deemed exported; withdrawn for supplies to a vessel or aircraft in international traffic; destroyed under Customs supervision; or withdrawn for consumption domestically after payment of duty.

132. *Third*, fact that the applicant had applied for exemption is irrelevant because the goods remain uncustomed until the customs duty is paid or the exemption is granted.

133. *Fourth*, section 2 of EACCMA defines uncustomed goods as including: "*dutiable goods on which the full duties due have not been paid, and any goods, whether dutiable or not, which are imported, exported or transferred or in any way dealt with contrary to the provisions of the customs law."* It is beyond argument that the goods fall squarely within the ambit of this definition.

134. Section 213 (1) of EACCMA has repeatedly been cited by the parties. It provides that an officer or a police officer or an authorized public officer may seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.

135. A reading of the above section leads me to the conclusion that all that the Respondents are required to satisfy themselves to trigger the issuance of the Notice is reasonable grounds exist for forfeiture. Reasonable grounds means information that establishes sufficient articulable facts that give a trained law enforcement or criminal investigative agency officer, investigator, or employee a reasonable basis to believe that a definable criminal activity or enterprise is, has been, or may be committed. **Rudd J** in *Kagane v Attorney General*[69] set the test for reasonable and probable cause. Citing *Hicks vs. Faulkner*,[70] *Herniman vs. Smith*[71] and *Glinski vs. McIver*[72] the learned judge stated thus:-

> "*Reasonable and probable cause is an honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person charged was probably guilty of the crime imputed...Excluding cases where the basis for the prosecution is alleged to be wholly fabricated by the prosecutor, in which the sole issue is whether the case for the prosecution was fabricated or not, the question as to whether there was reasonable and probable cause for the prosecution is primarily to be judged on the basis of objective test. That is to say, to constitute reasonable and probable cause the totality of the material within the knowledge of the prosecutor at the time he instituted the prosecution, whether that material consisted of facts discovered by the prosecutor or information which has come to him or both, must be such as to be capable of satisfying an ordinary reasonable prudent and cautious man to the extent of believing that the accused is probably guilty. If and insofar as that material is based on information, the information must be reasonably credible, such that an ordinary reasonable prudent and cautious man could honestly believe to be substantially true and to afford a reasonably strong basis for the prosecution...If it is shown to the satisfaction of the judge that a reasonable prudent and cautious man would not have been satisfied that there was a proper case to put before the court, then absence of reasonable and probable cause has been established. If on the other hand the judge considers that prima facie there was enough to justify a belief in an ordinary reasonable prudent and cautious man that the accused was probably guilty then although this would amount to what I call primary reasonable and probable cause the judge may have to consider the further question as to whether the prosecutor himself did not believe in the probable guilt of the accused, and this is obviously a matter which is to be judges by a subjective test. This subjective test should only be applied where there is some evidence that the prosecutor himself did not honestly believe in the truth of the prosecution...Inasmuch as this subjective test only comes into operation when there were circumstances in the knowledge of the prosecutor capable of amounting to*

reasonable and probable cause, the subjective test does not arise where the reason alleged as showing absence of reasonable and probable cause is merely the flimsiness of the prosecution case or the inherent unreliability of the information on which the case was based, because this is a matter for the judge alone when applying the objective test of the reasonable prudent and cautious man. Consequently the subjective test should only be applied where there is some evidence directly tending to show that the prosecutor did not believe in the truth of his case. Such evidence could be afforded by words or letters or conduct on the part of the prosecutor which tended to show that he did not believe in his case, as for example a failure or reluctance to bring it to trial, a statement that he did not believe in it and, I think possibly, an unexplained failure to call an essential witness who provided a basic part of the information upon which the prosecution was based."

136. Here is a case where customs duty had not been paid and the application for exemption had not been granted. Section 210 of EACCMA lists circumstances upon which goods are liable for forfeiture. The circumstances include uncustomed goods. There is no contest that the vehicles fall within this definition.

137. The second ground advanced by the applicant is that the reason stated in the Notices, namely, "pending investigations" is not one of the reasons under the act. To me this is a narrow and pedantic interpretation of the law. The applicant's argument ignores the powers of the police to investigate crime. Pursuant to section 29(9) of the National Police Service Act,[73] the DCI in the performance of the functions and duties of his office, is responsible for *inter alia* the performance of such other duties as may be assigned by the Inspector General, the Commission, or as may be prescribed by the Act, or any other written law. Simply put, it is the duty of the police to investigate crime. To do otherwise is an affront to the law.

138. The applicant's counsel's argument also ignores that EACCMA provides for powers of the officers authorized by the Commissioner under Section 5, which include rights, privileges, and protection, of a police officer of the Partner State in which such officer performs his or her duty.

139. The investigations led to criminal prosecution of the applicant herein and others. The charges include offences relating to the manner in which the tax exemption was applied. A pertinent issue as to whether the goods qualified for exemption is alive in the criminal trial. It beats logic for the applicant to question the manner in which the Notice was frames, ie. Pending investigations. The purported application for tax exemption and whether the goods qualified for exemption is a tax issue within KRA's mandate. Similarly, the source of funds used to buy the vehicles is a live issue in the criminal trial. The applicant's desperate attempt to separate the grounds under the act with these clear issues which fall under what the preamble describes as connected purposes is bound to fail. The foregoing extinguishes the applicant's argument challenging the reasons cited in the Notices. From the foregoing provisions of the law, it is not in doubt that the Respondents officers acted within the scope of enabling provisions of the law.

140. Differently put, it is not for cosmetic purposes that Parliament in its wisdom used the phrases "related purposes" and "connected purposes" in the preambles to the two statutes. To argue that investigations as used in the notice is *ultra vires* to the act, within the factual matrix presented in this case to be unfaithful to law and a desperate attempt to strain the clear provisions to justify a meaning never intended by Parliament. In particular the investigations revealed evident mischief in attempting to obtain tax exemption where it was not deserved. This to me amounts to tax evasion which falls within the mandate of the Respondents. In this context, the use of the word investigations in the Notice is perfectly in order and within the Respondents mandate. The rest is a matter for the criminal court.

141. In addition, the investigations questions the source of the funds and raised a pertinent question of whether the vehicles are proceeds of crime. In this regard, the use of the word investigations in the Notice and the involvement of the DCI is perfectly legal. The rest is a matter for the criminal court. It will suffice for me to state that the assault on the Notice on the grounds that the reasons given is not provided under the act fails.

142. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[74]where it was held that once a Judicial Review court fails to sniff any *illegality, irrationality* or *procedural impropriety*, it should down its tools forthwith. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature and hence not contravening the will of Parliament, then a court will not interfere with the decision.

143. No convincing argument has been presented in this case to show that the Respondent's officers acted outside their legal mandate or that they improperly exercised their discretionary powers. It is an established principle of law that the courts should not substitute their judgment for that of the agency. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and also established its limits.

144. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the Constitution, a statute or delegated legislation. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments.

145. Whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[75] and the relevant statutory provisions and applicable Regulations. The court is obliged not only to avoid an interpretation that

clashes with the constitutional values, purposes and principles but also to seek a meaning that promotes the purposes objectives of the enabling statute. A court of law should strive to enforce the intention of the legislature but not to stifle it as the applicant desires this court to do.

146. A proper construction of the impugned decision, the provisions of Constitution and the Act leaves me with no doubt that the Respondents' action are firmly grounded on the law. Put differently, the applicant has not demonstrated that the Respondents acted *ultra vires* their statutory mandate. Simply put, the applicant has not demonstrated *illegality.* Instead, the applicant moved to court in an attempt to evade duty payment or to defeat criminal prosecution. The impugned decision has not been shown to be *ultra vires* or outside the functions of the Respondents and the Interested Party. In fact, a look at the relevant sections discussed above shows that the impugned decision falls within the ambit and scope of the Respondent's and Interested Party's statutory mandate. The applicant's argument that the impugned decision is *ultra vires* collapses.

c. Whether the issuance of the Notices of Seizure is tainted with unreasonableness

147. Mr. Njogu submitted that the decision is unreasonable and irrational. He relied on *Council of Civil Unions v Minister for the Civil Service**[76]*** and *an application by Bukoba Gymkhana Club* which defined *Irrationality* to mean "*when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision.*" He argued that the Respondents acted unreasonably as they misdirected themselves in law in seizing the vehicles without legal basis, and on grounds not provided under EACCMA. He urged that public authorities should exercise their powers in strict adherence to the law, and, that, it is unreasonable for a public body to import extraneous factors, not provided for under law in making a decision.

148. He argued that no authority or public officer exercising acting with due appreciation of its responsibilities and legal mandate would have reached the same decision as the Respondents and issue the Notices of Seizure on other grounds other than those provided under the EACCMA. He argued that KRA had cleared the vehicles for bonded warehousing without raising any claims or objections, and had itself indicated that the vehicles would be released upon the approval of the tax exemption application, hence, to suddenly purport to seize the vehicles without legal cause is plainly irrational.

149. Mr. Njogu argued that issuing the Notices of Seizure in the circumstances was unreasonable, punitive, and in disregard of the applicant's proprietary interests. He cited *Republic v Commissioner of Customs & Excise Ex-Parte Abdi Gulet Olus**[77]*** for the holding that there exists a reasonable fear that the vehicle would deteriorate or risk of damage by the time it is eventually cleared of the threat of forfeiture depending on the outcome of the trial. He argued that forfeiture of a vehicle is mainly a punitive prescription and that it would be oppressive to the applicant if he were to eventually succeed in his claim only to lose the whole value of the vehicle on account of its long detention and attendant deterioration. He argued that the Respondents have to date not demanded any taxes from the applicant, and which would certainly have been an alternative, before making such a draconian move.

150. M/s Nganga, counsel for the Respondents submitted that every person has an obligation to respect, uphold and defend the Constitution[78] and argued that Articles 10 and 47 relied upon by the applicant should be considered with Articles 201 (b), 209 and 210 of the Constitution, and not elevate Article 47 above those of 201 (b), 209 and 210. She argued that it is not in dispute that the applicant has neither paid duty nor has it obtained any such tax exemption.

151. She submitted that after the Respondents received intelligence reports from the DCI that they were conducting investigations on the motor vehicles, hence, it was only reasonable for the Respondents to seize them which cannot in anyway be said to be unconstitutional and illegal. She cited *Crywan Enterprises Limited V Kenya Revenue Authority*[79] which relied on *R v Lyon**[80]**discussing similar provisions in the Australian customs legislation and held that* it is the duty of KRA to keep track of all imported dutiable goods. She argued that it was necessary and reasonable to seize the vehicles and keep them under customs control pending the investigations by the DCI on the embezzlement of public funds meant for construction of the dams. She added that it is in the public domain that certain individuals, including the applicant and its director are being prosecuted in relation to the said corruption, hence, the decision is justifiable.

152. She argued that the Respondents extended the warehousing period to preserve the vehicles pending the outcome of the criminal proceedings, and, that, the applicant has failed to establish that the Respondents acted unreasonably or irrationally within the *Wednesbury* Principle. M/s Nganga further submitted that a refusal to act in the circumstances would have been a failure to perform their mandate. She cited *Nyaga vs. Housing Finance Company Ltd of Kenya**[81]*** for the holding that where a party has a statutory right of action, the court will not usually prevent that right from being exercised except that the court may interfere if there was no basis on which the right could be exercised or it was being exercised oppressively.[82]

153. Lastly, M/s Nganga she submitted that the applicant has a defence of statutory authority and cited *Allen v Gulf Oil Refinery*,[83] in which Lord Wilberforce stated that where Parliament by express direction or by necessary implication has authorised a function, Parliament must be taken to have authorised it and argued that the Respondents actions are lawful, reasonable and rational and ought not to be interfered with.

154. Mr. Taib, counsel for the Interested Party urged the court to understand what an aid-funded project is and cited section 2 of the Value added Tax Act[84] which defines an aid funded project to be *"a project funded by means of a grant or concessional loan in accordance with an agreement between the Government and any foreign government, agency, institution, foundation, organization or any other aid."* He submitted that the issue of the dams being an aid funded project is an aspect that will be determined in the criminal trial. He maintained that the Kenyan government never received a loan/ grant from the government of Italy, hence the application has no merit. He submitted that Kenyan government took a Loan from 4 local banks in Italy which are not owned by the government of Italy to fund the dams' project. He submitted that the loan received was USD 244,422,163.93 with respect to Kimwarer and USD 277,407,605.50 for Arror dam, hence, the projects are not aid funded and therefore do not qualify for tax exemption.

155. Arriving at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. As stated in *R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd,**[85]*** it is a reviewable error either to

take into account irrelevant considerations or to ignore relevant ones, provided that if the relevant matter had been considered or the irrelevant one had been ignored, a different decision or rule might (but not necessarily would) have been made. Many errors of law and fact involve ignoring relevant matters or taking in to account irrelevant ones. Ignoring relevant considerations or taking account irrelevant ones may make a decision, or rule unreasonable.

156. As Cooke J pointed out in *Ashby v. Minister of Immigration*[86] considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Tribunal to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be.[87] Where the decision-maker fails to consider those obligatory considerations expressed or implied in the act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide by such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. The number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule.

157. All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been taken into account.[88] In effect, under this head the courts only require the decision-maker to show that specified considerations were or were not adverted to. In technical terms, the burden of proof is on the applicant, but the respondent will have to provide a greater or less amount of evidence as to what factors were or were not considered and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough.[89] It is suffice to say that where the decision-maker fails to take relevant considerations into account but takes those irrelevant ones, there is high probability that the outcome of the decision may be affected by defects than not. So, the interference of the court to review such kind of decisions seems justifiable.

158. If, in the exercise of its discretion on a public duty, an authority takes into account considerations which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public authority's decision are of two kinds: there are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a *Wednesbury*-unreasonable manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

159. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot* (1983),[90] where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The court emphasized that the weighing of those relevant considerations was a matter for the decision maker, not the courts. [91]

160. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment* (1995),[92] a planning law case. Lord Hoffmann discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority".[93] His Lordship stated:-

> *"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all."*

161. When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account. [94] If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.

162. It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters[95] and it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision. [96] However, if the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than extraneous purpose, though the line of demarcation between the two grounds of invalidity is often imperceptible.[97]

163. If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was overlooked,[98] even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining what factors may or must be taken into account by the authority, the courts are again faced with problems of statutory interpretation. If relevant factors are specified in the enabling Act it is for the courts to determine whether they are factors to which the authority is compelled to have regard.[99] If so, may other, non-specified considerations be taken into account or are the specified, considerations to be construed as being exhaustive?

164. A decision may be invalid (where an irrelevant consideration has been taken into account by a decision-maker. Two issues commonly arise in applying this criterion; one what matters were taken into account by a decision-maker? This is primarily an issue of fact, to be answered by analysis of evidence; and, two, were any of the matters that were taken into account an irrelevant consideration? This is

commonly an issue of law, resolved by construction of the statute that confers a power. A criteria of relevance may also be found outside a statute, by reference to other aspects of the legal framework within which decision-making occurs.

165. A court will be **cautious** in deciding that an issue that was taken into account was irrelevant. In the simplest scenario, the legislation will exhaustively list the considerations or factors that can be taken into account. However, more often it will be necessary to draw inferences from other features of the legislation, including; Language of the statute, Purpose or object, the subject matter of the statute, the nature of the power being exercised and the nature of the office held by the decision-maker.

166. The principal focus will always be the words of the statute but other legal assumptions may be taken into account by the court, such as: A general legal presumption that legislation can never be administered to advance the personal interests of the decision-maker. A conclusion that a particular matter was considered can often be drawn from such evidence as:-A statement of reasons; Contemporaneous administrative decisions; Reliance by the decision maker upon an irrelevant policy statement.

167. Turning to the facts of this case, it is common ground that the applicant has not paid duty nor had it obtained the tax exemption. It has been argued that the project is not a aid funded project as defined section 2 of the Value added Tax Act [100]and therefore it does not qualify for tax exemption. It is common ground that the application for exemption is now the subject of criminal proceedings. The source and use of the funds is also the subject of criminal proceedings. There are assertions that the vehicles are proceeds of crime. Sincerely, to argue that in issuing Notices pending investigations the Respondents acted unreasonably is a gross affront to the Respondents statutory mandate.

168. The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion.[101] The law remains, as I see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and so long as it acts in good faith (and reasonably and rationally) a court of law cannot interfere.

169. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the FAA Act. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[102] O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.*[103]

> "*The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock... as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. … Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him*."

170. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it*[104] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[105] In *Prasad v Minister for Immigration*,[106] the Federal Court of Australia held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt, and when "looked at objectively… so devoid of any plausible justification that no reasonable body of persons could have reached them."

171. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:-

> *i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;*
>
> *ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;*
>
> *iii. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;*

172. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[107]

173. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might

differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

174. As stated earlier, the reason for issuing the Notices of seizure was "pending investigations by DCI." The DCI has powers under the law to investigate crime under any law. The tax exemption the applicant has been riding on is one of the issues cited in the criminal trial. Whether the project was is funded is a fundamental issue that cannot be ignored. The Respondent properly directing its mins to its mandate which includes collection of taxes could not ignore such fundamental issues which verge on tax evasion. similarly, the question whether the vehicles are proceeds of crime is pertinent question falling within the mandate of the DCI and since the vehicles were still in the custody of the Respondents, it was reasonable to preserve them pending the outcome of the investigations.

175. It is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been *bona fide* exercised or his judgement *bona fide* expressed, the court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a court of law either to make him change his mind or to substitute its conclusion for his own. Unreasonableness must be so gross that something else can be inferred from it, such as *mala fides,* ulterior motive or failure to apply one's mind. In my view, the decision is based on the subjective state of mind of the administrator.

176. Justifiable administrative action must be objectively tested against the three requirements of suitability, necessity and proportionality which requirements involve a test of reasonableness. Applying the above test to this case, I find and hold that there is nothing to show that a reasonable body, faced with the same set of facts and the law would have arrived at a different conclusion. In other words, I find that the applicant has not demonstrated that the decision is tainted with unreasonableness or irrationality.

d. Whether the Respondent erred in failing to give the applicant a Notice of the intended action

177. Mr. Njogu submitted the the Respondents neglected to give the applicant adequate written notice of the nature and reasons justifying the Notices of Seizure as required under section 4 (3) (a) of the FAA act, thus abrogating the applicants right to procedural fairness. He submitted that the duty to give reasons arises where it is required in legislation, rules or policy or where it is called for in fairness or legitimate expectation.[108] He argued that the Respondents were statutorily mandated to issue reasons to the applicant.

178. In addition, he submitted that the reason given is inadequate under section 4 (3) of the FAA act. He argued that the importance of adequacy of reasons cannot be over emphasized. He relied on *South Bucks District Council v Porter (No. 2)*,[109] which was held that:-

> *"reasons for a decision must be intelligible and thy must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the controversial issues. . Reasons can be briefly stated…but the reasoning must not give rise to a substantial doubt as to whether the decision maker erred in law for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rationale decision on relevant grounds".*

179. Counsel argued that the reason provided by the Respondents was simply "pending investigations by the DCI. He argued it is vague since no particulars on the nature and reasons for the investigations are provided.

180. M/s Nganga argued that the notices were duly served on the requisite parties, being the Bonded warehouses keepers, Mitchell Cotts and Signon. She cited Section 2 of the EACCMA which defines "'*Owner' in respect of – (a) an aircraft, vessel, or vehicle, includes <u>every person acting as agent for the owner, or who receives freight or other charges payable in respect of, or who is in possession of control of, the aircraft, vessel, or vehicle</u>*." She submitted that the notice issued to the bonded warehouses was adequate as provided for under Section 214 of the EACCMA. She stated that the reason for seizure of the motor vehicles was clearly indicated as *"pending investigations by the Directorate of Criminal Investigations."*

181. It was her submission that the Notice met the threshold provided under Section 4 of the FAA Act, and submitted that there is nothing vague in the reason cited because the motor vehicles are uncustomed and there was reasonable ground for KRA to seize the vehicles because they were the subject of investigations by the DCI. She relied on *Republic v Commissioner of Customs & Excise Ex-Parte Abdi Gulet Olus**[110]*** for the holding that the object of section 214 of the Act was clearly fulfilled and there is no merit in the submission that the notices were defective.

182. Mr. Taib submitted that to establish that the Respondents violated the applicant's right to a fair administrative action, the applicant must prove that the impugned action amounted to infringement of its constitutional rights to be informed before KRA exercised its statutory right of seizure. He submitted that the Notice of seizure is standard statutory form which the Respondents issues when they intend to have goods in their custody seized in exercise of their statutory mandate, and, that, the form does provide for the nature of goods to be seized and the reason why the goods are considered liable for forfeiture.

183. The applicant's argument on the issue under consideration collapses on two grounds. *First,* the right to a fair administrative action is context sensitive and it will depend on the decision in question. Whether or not a person was given adequate Notice depends on the circumstances and the type of the decision to be made.

184. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[111]The foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used "fairness" as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing

mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on "wrongful" or "mistaken" assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

185. I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*[112] which succinctly elucidated the law in cases of this nature. It held fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[113]

186. Upon applying the legal principles discussed above to the facts and circumstances of this case, I find that the governing law provides for issuance of a Notice. It is not disputed that the Notice was served. The law provides for a mechanism of challenging the Notice and time frame for doing so. Sincerely, if at all the applicant never understood the Notice or required any other information, he had a statutory right to challenge the Notice. It never did so.

187. Administrative justifiability should be objectively determined. The court must assess the surrounding facts and circumstances and consider the relevant facts. In order to prove justifiability an administrative action must be objectively tested against the requirements of suitability, necessity, and proportionality. They involve the test of reasonableness. The constitutional test embodies the requirement of proportionality between the means and end. Justifiable administrative action refers to good, proper and suitable administrative action. There must be a reasonable explanation between the means and ends of the administrative action. This means that there must be a reasonable connection between the administrative action and the reasons given for such an action.

188. In addition, the applicant's argument that the reason was vague or he was not aware of any investigations demonstrates the applicant's dishonesty. There is evidence that the applicant's director was summoned for interrogation and he refused to attend citing unavailability. There is evidence that the applicant and its directors are facing criminal charges arising from the same investigations. He cannot now turn round, feign ignorance and claim that he never understood the nature of the investigational the DCI was undertaking. In any event, a prudent law abiding citizen would have sought for the particulars or challenge the Notices as the law provided. The argument citing violation of the right to be provided with reasons is baseless, totally unmerited and made in bad faith. It must fail.

e. Whether the applicant's right to legitimate expectation has been violated

189. Mr. Njogu submitted that the Respondents actions violated the applicant's right to legitimate expectation. He placed heavy reliance on following passage from *Keroche Industries Limited v Kenya Revenue Authority & 5 Others Nairobi*[114] thus:-

> *"...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way…..Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."*

190. He argued that the National Treasury issued to the applicant a letter dated 9th November 2018 confirming that any equipment and machinery for the contracts with Kerio Valley Development Authority ("**KVDA**") dated 5th April 2017 for the engineering, design, procurement, execution and completion of the dams would be eligible for tax exemption. He argued that that KRA cleared the vehicles for bonded warehousing without raising any claims or objections. He argued that whilst it is admitted that the tax exemption was not guaranteed, the applicant had a legitimate expectation that whilst awaiting its processing, its vehicles would not be interfered with at the bonded warehouses.

191. M/S Nganga submitted tax exemption is a preserve of the National Treasury and that the Respondents are not in any way involved, and, that KRA only administers exemptions once granted by the National Treasury. She relied on *Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited* [115] which defined legitimate expectation as *"a promise made to a party by a public body that it will act or not act in a certain manner and for the promise to hold, the same must be made within the confines of law since a public body cannot make a promise which goes against the express letter of the law."*

192. M/s Nganga also submitted that the three basic questions on the doctrine of legitimate expectation identified in *R (Bibi) vs. Newham London Borough Council*[116] are:- "*…, the first question is to what has the public authority, whether by practice or by promise, committed itself to; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do*." In addition, she relied on *R vs. Jockey Club ex p RAM Racecourses*[117] which held that the basic hallmarks of an unqualified representation are:-

> *"(1) A clear and unambiguous representation. (2) That since the [claimant] was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the [claimant] to rely upon it without more…(3) That it did so rely upon it.(4) That it did so to its detriment(5) That there is no overriding interest arising from [the defendant's] duties and responsibilities."*

193. Lastly, M/s Nganga referred to *Judicial Review of Administrative Action*[118] that:- *"a legitimate expectation arises where a person*

responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage..." She submitted that KRA had not at any given time given any promise or such undertaking to the applicant that it would be issued with a letter of tax exemption or that taxes would be waived. On the allegation that legitimate expectation arose because the motor vehicles at the bonded warehouses would not be interfered with, she submitted Section 213 of the EACCMA provides for the powers to seize goods or vehicles where there is reasonable ground to believe that such goods are liable for forfeiture.

194. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First,* it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second,* if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

195. The first step in the analysis has both an objective and a subjective dimension. *First,* it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.[119] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

196. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[120] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[121] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-

> *"Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."**[122]***

197. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[123] The fear in protecting legitimate expectations substantively is that administrators may be forced to act *ultra vires.* That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act *contra legem.* It is clear that such representations will not be upheld by the court.[124] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law.

198. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[125] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

199. Discussing legitimate expectation, *H. W. R. Wade & C. F. Forsyth**[126]* states thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

200. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute.

201. The Respondents are mandated to enforce collection of customs duty and to administer and enforce all tax laws. The vehicles in question are subject to customs duty. The application for waiver was made to the National Treasury. The vehicles were stored in a bonded warehouse pending either payment of customs duty or the exemption. The Respondents learnt that the DCI was conducting investigations, and since duty had not been paid nor exemption, it issued the Notices. Payment of duty is legal requirement. The investigations were premised on the reasonable grounds, hence, within the confines of the law. Preserving the vehicles in their custody was a legally sound decision. Granting of the waiver is not automatic nor is it a right. It is a matter of ministerial discretion to defeat the requirements of the law underlying the issuance of the Notices. It follows that the allegation of violation of the right to legitimate expectation fails.

f. Whether the applicant is entitled to any of the prayers sought

202. The applicant prays for several declarations and an order of *Certiorari*. Mr. Njogu argued that the remedy of a declaration is granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a public body's powers and duties, the rights of individuals or the law on a particular issue.[127] I entirely agree with Mr. Njogu's proposition. However, as I have already held, the applicant has not demonstrated that the Respondents acted illegally.

203. I agree with M/s Nganga's submission that the applicant has not established any of the grounds for judicial review set out in section 7 of the FAA act and that the applicant is seeking a merit review which amounts to abuse of the judicial process.

204. In addition, I find merit in Mr. Taibu's argument that even if the applicant had established any grounds, (which it did not), from the material before the court, the vehicles were bought by CMC di Ravenna JV Kenya Branch, and not the applicant before the court which is a separate and distinct legal entity. The applicant before the court is not the owner or importer of the vehicles, hence there is no basis upon which the orders sought can be granted to it.

205. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for judicial review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued.

206. *First,* the applicant consistently maintained that it was not aware of any investigations by the DCI. Evidence tendered by the interested Party revealed that the applicant's director who swore the affidavits in support of this case was actually summoned by the DCI and wrote back to the DCI stating that he was not available. The directors and the applicant are accused persons in the criminal case. To turn around and claim that the applicant was not aware of investigations relating to the vehicles is the hallmark of dishonesty sufficient to warrant the court not to exercise its discretion in favour of the applicant. There is deplorable lack of candour on the part of the applicant.

207. *Second*, the applicant has not paid duty, and, the basis upon which the applicant purported to apply for tax exemption is a live issue in criminal proceedings against the applicant, its directions and other persons. It has been argued that the project does not qualify for the tax exemption, yet the applicant claims to have received communication to that effect from the National Treasury officials who are co-accused persons in the criminal case. The Interested Party's counsel described the alleged tax waiver as a product of impunity and a basis for one of the charges against treasury officials in the criminal case. All these reinforces the need for the Notice of Seizure to remain *in situ* until the criminal cases are conclusively determined.

208. *Third*, the vehicles are now exhibits in the pending criminal case. I have already explained that exhibits remain in the hands of the police until they are formally introduced in court as evidence after which they remain in the courts custody until the matter is determined either by the court of first instance, and in the event of an appeal, by the final appellate court.

209. *Fourth*, the source of the funds used to purchase the vehicles is under challenge in criminal proceedings. It is alleged that public funds meant for the project were diverted and used to pay for the vehicles. The accounts used to move the funds have been cited by the Interested Party. The conclusion of the criminal proceedings will determine the fate of the vehicles and the next course of action by the parties including the applicant. For now, the circumstances demand that the Notices of Seizure remain in force.

210. *Fifth*, the Respondents remain entitled to recover the taxes unless the questioned tax waiver is established to be consistent with the law, hence, the need for the Notices of Seizure to remain in force.

211. *Sixth*, this court respects the constitutional and statutory mandate of the Respondents and it cannot intervene where there is clear abuse of powers. The court cannot grant orders which will impede the Respondents from lawfully performing their legal mandate.

212. *Seventh*, the Court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. I have already held that the Respondents lawfully exercised their statutory powers.

213. In view of my analysis of the facts, the law and my conclusions herein above, I find and hold that this judicial review application fails in its entirety, and, that, the same is fit for dismissal. Accordingly, I dismiss the applicant's amended Notice of Motion dated 14th August 2019 with costs to the Respondents and the Interested Party.

Orders accordingly.

Dated, Signed and Delivered and Dated at Nairobi this 17th day of January 2020

John M. Mativo

Judge

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[1] Cap 469, Laws of Kenya.

[2] Act No. 11A of 2011.

[3] Article 157 (6) of the Constitution.

[4] Act No. 5 of 2015.

[5] Act No. 11A of 2015.

[6] Act No. 3 of 2003.

[7]{2019} e KLR.

[8] Act No. 40 of 2013.

[9] Cap 470, Laws of Kenya.

[10] Cap 472, Laws of Kenya.

[11] Cap 476, Laws of Kenya.

[12] Act No. 29 of 2015.

[13] Act No. 29 of 2015.

[14] Act No. 40 of 2013.

[15] Act No. 40 of 2013.

[16] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[17] Ibid.

[18] {1992} KLR 21.

[19] Ibid.

[20] {2015} eKLR.

[21] {2015} eKLR.

[22] Ibid.

[23] Act No. 29 of 2015.

[24] Act no. 4 of 2015.

[25]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[26] Ibid.

[27] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[28] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[29] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[30] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H.

[31] See *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) para 39, Mokgoro J

[32] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[33] Act No. 4 of 2015.

[34] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[35] Act No. 4 of 2015.

[36] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[37] Ibid para 44.

[38] Ibid paras 42, 43 and 45.

[39] {2013} e KLR.

[40] {1985} AC 2.

[41] {1963} EA 478, 479

[42] {2008} 2 EA 300 at pages 303 to 304.

[43] {1985} AC 2.

[44]{2018} e KLR.

[45] {2006} ZACC 9; 2007 (1) SA 343 (CC).

[46] {2007} e KLR.

[47] Act No. 23 of 2015.

[48] {2009} EWCA.

[49] {2010} UKSC 12 [2012] 1 AC 245.

[50] Act No. 11A of 2011.

[51] Acc No. 18, 19, 20 & 21.

[52] {2013} e KLR.

[53] {2014} e KLR.

[54] {1984} 3 ALL ER 935.

[55] Act No. 9 of 2002.

[56] 2012(1) NR 255(HC).

[57] Act No, 9 of 2002.

[58] Act No, 9 of 2002.

[59] {2018} e KLR.

[60] Act No, 9 of 2002.

[61] For examples of a purposive approach to statutory interpretation, see *African Christian Democratic Party v Electoral Commission and Others* {2006} ZACC 1; 2006 (3) SA 305 (CC); 2006 (5) BCLR 579 (CC); at paras 21, 2

5, 28 and 31; *Daniels v Campbell NO and Others* {2004} ZACC 14; 2004 (5) SA 331 (CC); 2004 (7) BCLR 735 (CC) at paras 22-3; *Stopforth v Minister of Justice and Others*; *Veenendaal v Minister of Justice and Others* {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[62] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Consultants, Cape Town 2000) at 244-50.

[63] *Jaga v Dönges NO and Another; Bhana v Dönges NO and Another* 1950 (4) SA 653 (A) at 662-3.

[64] 2012 4 SA 593 (SCA).

[65] Ibid, at (610B–C).

[66]1949 Ch D 121 130.

[67] *Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others* {2000} ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[68] {1999} ZASCA 72; 2000 (1) SA 113 (SCA) at para 21.

[69] {1969} EA 643.

[70] {1878} 8 QBD 167 at 171.

[71] {1938} AC 305.

[72] {1962} AC 726.

[73] Act No. 11A of 2011.

[74] {2015} eKLR.

[75] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[76] {1985} AC 2.

[77] {2014} eKLR.

[78] Citing *Centre for Rights Education and Awareness & 2 others v Speaker the National Assembly & 6 others* {2017} e KLR.

[79] {2013} e KLR

[80] **{1906} HCA 17.**

[81] Civil Appeal No. 134 of 1987.

[82] She also cited *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & 3 others* {2005} e KLR.

[83]{1981} A C 1001 House of Lords.

[84] Act No. 35 of 2015.

[85] {1987} 1 WLR 1166.

[86] *{1981} 1 NZLR 222 at 224.*

[87] See Wade & Forsyth, p.381.

[88] See *Cannock Chase DC v Kelly* [1978] 1 All ER 152.

[89] *R v Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941

[90] *R. v. Boundary Commission for England, ex parte Foot* [1983] EWCA Civ 10, [1983] Q.B. 600, C.A. (England and Wales).

[91] Ibid.

[92] *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] UKHL 22, [1995] 1 W.L.R. 759, H.L. (UK).

[93] Ibid.

[94] These three considerations were set out by Simon Brown L.J. in *R. v Somerset CC Ex p. Fewings* [1995] 1 W.L.R. 1037, at 1049.

[95] *R. v London (Bishop)* (1890) 24 Q.B.D. 213 at 226–227 (affd. on grounds not identical, sub nom. *Allcroft v Bishop of London* [1891] A.C. 666); *Ex p. Rice; Re Hawkins* (1957) 74 W.N. (N.S.W) 7, 14; *Hanks v Minister of Housing and Local Government* [1963] 1 Q.B. 999 at 1018–1020; Re Hurle-Hobbs' Decision [1944] 1 All E.R. 249

[96] *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233, 271; *R. v Barnet & Camden Rent Tribunal Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342; *Bristol DC v Clark* [1975] 1 W.L.R. 1443 at 1449–1450 (Lawton L.J.); *Asher v Secretary of State for the Environment* [1974] Ch. 208 at 221, 227.

[97] *Marshall v Blackpool Corp* [1935) A.C. 16; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *R. v Rochdale MBC Ex p. Cromer Ring Mill Ltd* [1992] 2 All E.R. 761.

[98] *R. v London (Bishop)* (1890) 24 Q.B.D. at 266–227, 237, 244; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] A.C. 663 at 693 (Lord Denning); *R. v Paddington Valuation Officer Ex p. Peachey Property Corp Ltd* [1966] 1 Q.B. 380.

[99] On mandatory and directory considerations, see 5–049; e.g. *Yorkshire Copper Works Ltd v Registrar of Trade Marks* [1954] 1 W.L.R. 554 (HL held that the Registrar was bound to have regard to specific factors to which he was prima facie empowered to have regard); *R. v Shadow Education Committee of Greenwich BC Ex p. Governors of John Ball Primary School* (1989) 88 L.G.R. 589 (failure to have regard to parental preferences).

[100] Act No. 35 of 2015.

[101] Lawrence Baxter Administrative Law 1ed (1984) at 505.

[102] {2004} ZACC 15; 2004 (4) SA 490 *CC* at 512, para 44.

[103] {1995} 1 All ER 129 (HL) at 157.

[104] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[105] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[106] {1985} 6 FCR 155.

[107] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[108] Citing Michael Fordham QC Judicial Review Handbook 6th Edition, at paragraph 62.3.

[109] {2004} UKHL 33 [2004] 1 WLR 1953.

[110] {2014} e KLR.

[111] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[112] {2015} e KLR.

[113] Ibid.

[114] {2007} KLR 240.

[115] {2012} e KLR.

[116] {2001} EWCA Civ. 607 [2002] 1 WLR 237 at [19].

[117] {1993} 2 All ER 225, 236h-237b.

[118] De Smith, Woolf & Jowell 6th Eition, Sweet & Maxwell page 609.

[119] Case C-80/89, *Behn v Hauptzollamt Itzehoe*, 1990 E.C.R. I-2659.

[120] Søren Schønberg, *Legitimate Expectations in Administrative law* 118 (2003); *C.f*. Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMB. L. J. 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today than is the case in EU law, *see*, Administrative Law of the European Union, its Member States And The United States 285 (Rene

Seerden & Frits Stroink eds., 2002).

[121] Ibid.

[122] Ibid.

[123] Joined Cases 205-215/82, Deutsche Milchkontor GmbH et al. V Germany, 1983 E.C.R. 2633.

[124] Søren Schønberg, Legitimate Expectations in Administrative Law 118 (2003).

[125] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in *South African Veterinary Council and another v Szymanski* 2003 (4) BCLR 378 (SCA) at paragraph 19 and in *Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another* [2003] 2 All SA 616 (SCA) at paragraph 65.

[126] *Administrative Law*, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000, at pages 449 to 450.

[127] Citing Judicial Review Miscellaneous Application 586 of 2017 Republic *v Kenya Revenue Authority Ex-parte Neolife International Limited* {2018} e KLR ; and Judicial Review Application 34 of 2018, *Republic v Institute of Certified Public Accountants of Kenya Ex Parte Kosieyo and Partners* {2018} eKLR.