REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NO. 1 OF 2018

REPUBLIC.....APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

AND

KENOL KOBIL LTD.....INTERESTED PARTY

EX-PARTE

RAYAN LOGISTICS LTD.....EX-PARTE APPLICANT

JUDGMENT

1. Pursuant to leave granted by the Court on 15/01/2018, the Applicant instituted the present Judicial Review Application. It seeks three prayers as follows:

> ***1)*** *That the Honourable Court be pleased to issue an Order of Certiorari to remove into this Honourable Court and quash the tax demands entries 2017NKU 130226, 2017NKU 130227 and 2017NKU 130228 by Kenya Revenue Authority dated 16th December, 2017.*
>
> ***2)*** *That the Honourable Court be pleased to issue an Order of Prohibition to prohibit the enforcement of the tax demands entries 2017NKU 130226 2017NKU 130227 and 2017NKU 130228 by Kenya Revenue Authority dated 15th December, 2017.*
>
> **3)** *That costs of this Application be provided for and the same be borne by the Respondent*.

2. The Application is supported by the Supporting Affidavit of Adan Mohamud and a Further Affidavit by the same person. The material facts are as follows.

3. The Applicant is engaged in the petroleum products transit business. Among other businesses, the Applicant is a reseller of petroleum products of Kenol Kobil (the Interested Party herein). On the other hand, the Respondent (KRA), is a statutory body established under the Kenya Revenue Authority Act, and tasked with the mandate of collecting revenue on behalf of the Government of Kenya and the enforcement of revenue law, including the Value Added Tax Act 2013, the Excise Duty Act 2015, and the East African Community Customs Management Act of 2004. In that capacity, the Respondent made three tax demands through entries 2017NKU 130226, 2017NKU 130227 and 2017NKU 130228 all dated 15/12/2017.

4. The Applicant claims that it purchased fuel from the Interested Party for resale in March, 2017. The terms of sale, it says, were Free on Board (FOB). The purchased fuel was loaded, the Applicant says, in two trucks being KBJ 253Z/ZD 2244 and KBA 561B/ZD 9694. The products loaded were PMS Petro in the quantity of 80 metric cubes i.e 80,000 litres. Each truck was loaded with 40,000 litres.

5. The transaction took place at the Nakuru Kenya Pipeline (KPC) Depot on 22nd March, 2017 and the fuel was loaded and the fuel was bonded for sale in the South Sudan Market.

6. The Applicant insists that it re-sold the purchased fuel to Waves Petroleum Ltd which intended and, indeed, exported the fuel to South Sudan. According to the Applicant, the terms of sale to Waves Petroleum Ltd by the Applicant was also FOB (Free on Board) and the

petroleum products were re-sold to Waves Petroleum Ltd sold while loaded in two trucks being KBJ 253Z/ZD 2244 and KBA 561B/ZD 9694.

7. It is the Applicant's case that since the petroleum products are for the export market, they were bonded. The bonds were supposed to ensure that the products are not sold in the domestic market but in the declared export market. The bonds are supposed to be a guarantee to the Respondent to ensure if the products are dumped/sold in the domestic markets then they recover the tax payable from the bonds. The security bonds were provided by two clearing agents being Kenfreight East Africa Ltd and Urgent Cargo Handling Ltd.

8. The Applicant states that the Kenya Revenue Authority duly inspected the seals for the products as loaded in the two trucks at Nakuru and approved the seals as duly done and that the products were not for the Kenyan market. The Respondent proceeded to duly issue the requisite document being T812 – Document showing the products are not for the Kenya market. In addition, the Respondent duly loaded this information in their Simba Information System and issued the Applicant with a Gate-Pass for the Border Point.

9. The Applicant insists that the two trucks duly left Nakuru for South Sudan market through Uganda via the Malaba border point. At the Malaba border point, the Applicant says the Respondent's officers carried out a new inspection and approved that the products were intact and the seals were not interfered with. The Respondent, then, issued Certificates of Export (COE).

10. The Applicant further states that the trucks moved to Uganda and on the Uganda side the Uganda Revenue Authority carried out their own inspection and fitted their own seals on the trucks to confirm that the goods were destined for export to the South Sudan and not the local market. Further, that the Uganda Revenue Authority duly issued the two trucks with two documents confirming that the trucks had the products that were destined for export; first, Rotation Number – which is similar to Kenya Revenue Authority's Certificate of Export, which shows that the trucks were verified, and second, TI which document is similar to Kenya Revenue Authority's T812, which shows that the products are for the export market and thus duty should not be paid.

11. The Applicant further states that the Uganda Revenue Authority, after physical inspection, and verification, re-sealed the trucks and gave the go ahead for the trucks to proceed to the destination market i.e South Sudan.

12. According to the Applicant, the issuance of these documents by the Uganda Revenue Authority and the verification by the Kenya Revenue Authority at the Malaba Border point confirms and proves that the petroleum products left the Kenya market for the destined export market and were not dumped in the Kenyan market without payment of duty. It further argues that the fact that the Respondent duly cancelled the security bonds after the documents were verified and upon the Respondent's satisfaction that the products were not diverted to the local market.

13. Therefore, the Applicant argues, it was with utter shock that it received a demand from the Respondent to re-submit the documents proof that the products were indeed exported and not dumped in the local market. Even then, the Applicant says it duly compiled and re-submitted the documents.

14. Thereafter, the Respondent sent the tax demands which are the subject matter of these proceedings. The demands are dated 15/12/2017 and they are for: tax demands entries 2017NKU 130226 2017NKU 130227 and 2017NKU 130228 demanding Ksh. 1,096,892.00, Khs 475,489.00 and Ksh 1,572,282.00 respectively as duty for the products which the Respondent says purport were sold in the local market and were not exported.

15. The Applicant's primary position is that the Respondent's action is unreasonable and violates its right to fair administrative action. This is so, it argues, since it is manifest through the documents issued by the Kenya Revenue Authority at the Malaba Border point and documents issued by the Uganda Revenue Authority that the petroleum products left Kenya and were not dumped in the Kenyan market.

16. The Applicant further argues that the tax demands violate the Applicant's right to legitimate expectation having complied with the tax procedures and the prior representation by the Respondent through the cancellation of the security bond that the Applicant had complied with all the requisite procedure and duly exported the petroleum products. It maintains that the decision of the Respondent to demand duty from the Applicant is adverse to the Applicant and has been arrived at in contravention of the law, including the East African Community Customs Management Regulations 2010, and thus breaches the requirement that all administrative decisions comply with the doctrine of legality.

17. The Applicant finds the actions by the Respondent to have breached its legitimate expectations of integrity of the proceedings to have violated the Applicant's right to procedural fairness and natural justice. It also maintains that the decision is arbitrary and in excess of jurisdiction as it lacks mandate to demand for payment of duty in the circumstances herein. Moreover, the Applicant finds the decision to be irrational, baseless, unreasonable, unlawful, biased, discriminatory, and an abuse of powers for failing to accord the Applicant an opportunity to explain its position.

18. Finally, the Applicant finds the Respondent's decision to have been motivated by bad faith and to have been reached by failing to take into account relevant considerations and/or took into account extraneous factors/irrelevant considerations.

19. On the other hand, the Respondent filed a Replying Affidavit sworn by Maureen Pamela Agutu sworn on 19/04/2018.

20. In short, the Respondent's position is that while the Applicant had initially represented that it had consigned the petroleum products to be resold in South Sudan, its investigations revealed that the petroleum products did not leave the Kenyan borders; that, instead, the petroleum products were dumped back into the Kenyan market.

21. The Respondent's case is that the trucks ferrying the consignments were released from Kenya Pipeline Depot in Nakuru on 22nd March, 2017 but that the two trucks never exited at the Malaba Border on 23rd March, 2017 as the Applicant claims.

22. The Respondent says that in June 2017, its Investigation and Enforcement Department, Rift Valley Region together with the Kenya Police received information that the particular consignments did not cross the Kenyan border into Uganda; that investigations revealed that the entries were fraudulently captured in the absence of trucks purportedly to be used to cancel the bond. The conclusion that the Respondent drew was that the consignments, therefore, were diverted and consumed in Kenya. It was on that premise that the Responded made the demand for the tax entries that are impugned in these proceedings.

23. It is the Respondent's case that they established through thorough investigations that the consignments were diverted and consumed in Kenya. The Respondent produced a letter from the Directorate of Criminal Investigations (DCI) and an email printout from the Uganda Revenue Authority which seem to show that the consignment did not exit Kenya.

24. The letter from the DCI which is attached to the Replying Affidavit by the Respondent shows that the DCI was investigating "a case of diverting for sale in Kenya petroleum products destined for other markets contrary to section 95(2) of the Energy Act 2006 among other offences." The vehicles allegedly involved in the fraud are the self-same trucks that ferried the Applicant's consignment.

25. The second letter, an email by a Mr. David Dongo of the Uganda Revenue Authority, was in response to an inquiry by the Respondent's officer on whether the Asycuda declarations made by the Applicant were authentic. Asycuda declarations would be the forms which would conclusively prove that the consignments crossed over to Uganda. The email response by Mr. Dongo of URA deserves reproduction in full:

> *Good morning, Tabitha.*
>
> *This case was picked up by our intelligence/investigation team, and it was established that the trucks/tankers did not cross over to Uganda.*
>
> *According to the investigation, the T1 entries were fraudulently captured in the absence of trucks purportedly to be used to cancel the bond on Kenya side (sic). You may establish further how the references 2017NKU130227 & 2017NKU130227 were dealt with at Malaba KRA side.*
>
> *Thus, with guidance from our Litigation, these T1 entries were cancelled on that merit.*
>
> *About three individuals (agents) suspected to be involved in that falsification at Malaba were arrested and case is now in Court.*

26. Based on these facts, the Respondent argues that its actions to make the tax demands were therefore, lawful and justified. The Respondent insists that it has the mandate to make the tax demands and that it did not, in any way, exceed its authority in doing so. Neither did it, it argues, treat the Applicant in an administratively unfair or oppressive manner. In any event, the Respondent argues that the Applicant has jumped the gun by coming to Court in the first instance: it ought to have filed its grievance before the Tax Appeals Tribunal after giving notice, in writing, to the Commissioner of KRA. The fact that the Applicant failed to exhaust these mechanism means, argues the Respondent, that the suit before the Court is premature.

27. The paragraphs above comprehensively describes the two protagonists' factual positions on the controversy and briefly adumbrates the legal arguments they have advanced in support of a verdict in their favour. In my view, the controversy here calls for the following questions for determination:

> ***a. Is the suit premature under the doctrine of exhaustion of remedies?***
>
> ***b. Has the Respondent violated the doctrine of legality and exceeded its mandate in making the tax demands?***
>
> ***c. Is the Respondent's demand for the taxes in question illegal, irrational and unreasonable?***
>
> ***d. Has the Respondent otherwise breached the law?***
>
> ***e. Do the tax demands violate the legitimate expectations of the Applicant?***
>
> ***f. Does the Interested Party Have any Interest in the Matter and Should it Have been Made a Party to the Suit?***
>
> ***g. Are the reliefs sought merited?***

a) <u>Is the Suit Premature by Dint of the Doctrine of Exhaustion</u>

28. The Respondent argues that Judicial Review is a remedy of last resort and where another remedy or statutory procedure lies, then the same ought to be followed before resort to Judicial Review. The Respondent cites ***Enkasiti Flowers Growers Limited v Kenya Revenue Authority [2010] eKLR*** where the Court observed:

> *The law is that availability of an alternative remedy is not a bar to Judicial Review. This is because Judicial Review is a different kind of remedy. It does not address the merits of the impugned decision but the court looks at whether the process by which the decision was arrived at was fair and in accordance with the statutory provisions. Section 229 of EACCMA does provide the mode of redress for a taxpayer who is aggrieved by the decision of the Commissioner. The party has a right to seek review within 30 days. However, it is a requirement that the aggrieved party seeking Judicial Review should disclose to the court at the time of seeking leave that there exists an alternative remedy and demonstrate how that remedy was not suitable in the circumstances. An applicant*

for Judicial Review has a duty to make full and frank disclosure of all material facts as to whether there was an alternative remedy, delay or adverse authority etc.

29. The Respondent argues that the Applicant is challenging a tax demand. As such, under section 3 of the Tax Appeals Tribunal Act, 2013, the challenge should be to the Tribunal established under section 12 of the Tax Appeal Tribunal Act, 2013. The section reads as follows:

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

30. The Respondent argues that given the availability of this alternative mechanism for resolving the dispute which is statutory, it was incumbent upon the *Ex Parte* Applicant to first approach the Tribunal and only come to the High Court if the dispute was not resolved to its satisfaction. Given that the *Ex Parte* Applicant had elected to come directly the High Court, the Court did not have jurisdiction. The Respondent relied on the celebrated ***Republic v Commissioner for Income Tax & Another Ex Parte Stockman Rozen (K) Ltd [2015] eKLR*);** and ***Republic v National Environment Management Authority [2011] eKLR*.**

31. The *Ex Parte* Applicant has taken the position that Judicial Review is the eminently proper remedy in the circumstances of the case. The Applicant's argument is that where the decision giving rise to the dispute amounts to no decision at all or was arrived at illegally, then a party is not required to exhaust internal remedies.

32. For this position, the Applicant has cited a number of cases in our tapestry of emerging jurisprudence on the question. The lead case cited is ***R vs Non-Governmental Organizations and Coordination Board Ex Parte Kalonzo Musyoka [2018] eKLR***. In that case, Judge Aburili ruled that the *Ex Parte* Applicant was not disabled from filing for Judicial Review despite availability of statutory mechanisms to resolve a dispute where the action complained against was outside the powers of the respondent body. The Learned Judge held:

However, where it is apparently clear that the orders made by an administrative body are illegal and or as it is in this case, are outside the powers of the Respondent body, an appeal to the Minister can only be effective if the decision made by the Board was within its statutory power and not in excess of its powers; and it is for that reason that this Court would not hesitate to prohibit the Board from implementing illegal orders made ultra vires its powers…

….*I reiterate that there is no lawful decision made by the Respondent pursuant to the Act, capable of appeal before the Cabinet Secretary for consideration. An unlawful decision cannot be allowed to be implemented in the name of exhaustion of alternative remedies. Such a decision is amenable to be reviewed by the Court through Judicial Review*.

33. The *Ex Parte* Applicant also relied on ***R v Commissioner of Income Tax Ex Parte SDV Transami (Kenya) Ltd [2005] eKLR; R vs Commissioner of Domestic Taxes – Large Tax Payers' Office Ex Parte Barclays Bank of Kenya Ltd [2012] eKLR; and R vs Commissioner of Domestic Taxes – Large Tax Payers' Office Ex Parte Barclays Bank of Kenya Ltd [2012] eKLR***. The rule of law announced in these cases is that where what is being questioned is the exercise of a public power by a public body, judicial review is an eminently appropriate recourse; and that the existence of an alternative remedy is not a bar to seeking judicial review.

34. However, I believe that the position stated by Aburili J. in the ***Ex Parte Kalonzo Musyoka Case*** represents the majority and more prudential position in our decisional law: when a Respondent body has clearly and patently travelled outside its remit in the purported exercise of its functions under a statute, a party aggrieved by the actions of that body are not limited to pursuing remedies identified under the Act in seeking redress. This is because, as Aburili J. observes, there is really no decision to be challenged using the statutory scheme in such a scenario.

35. In a case such as this one, the question, then, turns on whether it can be said that the Respondent, in its exercise of public power travelled outside its remit such that it can properly be said that the decision it made is a nullity in law; that it amounts to no decision at all such that it exempts any aggrieved person from challenging the action taken by the party exercising using the statutory remedy. One must begin by appreciating that it is not every time an Applicant pleads that the Respondent body has acted "illegally" or has "exceeded its remit" that automatically grants the Court jurisdiction. If such a position were taken, it would amount to undermining the esteemed judicial doctrine of exhaustion of local remedies which has received constitutional imprimatur in Article 159 of the Constitution.

36. A party must be able to demonstrate, at least *prima facie* and on the basis of its pleadings, that the Respondent body was clearly acting illegally and beyond its remit. I do not believe that by its pleadings, the *Ex Parte* Applicant has been able to demonstrate that the Respondent took actions that are outside its jurisdiction or powers. Instead, the primary challenge by the Applicant is that the Respondent was wrong either in procedure or outcome in making the decision it did. Indeed, as presented in the summary above, the dispute among the parties here is intensely factual: it turns on the question whether the Respondent is correct in reaching its factual conclusion that the Applicant diverted the petroleum products in question to the local market or whether the Applicant is correct that the petroleum products did, indeed, cross the border into Uganda and onto South Sudan.

37. Although the Applicant, in its submission, cleverly seeks to present the question as one that challenges the powers of the Respondent to make the impugned demands, in truth the real contest is whether the Respondent's factual findings are correct or not. If the Respondent's factual findings are correct, for example, it would be absurd to hold that the Respondent did not have the legal powers to demand for the taxes. It cannot, then, be that the question of whether the Respondent has legal powers or not turns on whether the Respondent is correct in its findings or not. The legal powers to make a decision based on findings of fact must surely definitionally include the inherent right to get the factual finding "wrong" without divesting the decision-maker or fact-finder of their legal powers or jurisdiction to make that decision.

38. I am, therefore, not persuaded that the Applicant has demonstrated that the Respondent does not have the legal powers to have made the decisions it made. My hesitation in accepting that line of thought is both logical and policy-based. If a party is able to short-circuit the requirement that it exhausts statutory remedies before approaching Court merely because it claims that a decision-maker or fact-finder made

the decision in a way that was irrational or unprocedural, and that the irrationality or unprocedural character of the process *ipso facto* divests the decision-maker or fact-finder of jurisdiction to make that decision, we would be blitzing the esteemed doctrine of exhaustion into oblivion. It would only take a clever drafter of legal pleadings to make the pre-textual argument to gain a toe-hold in Court. Once, there, then the party would simply use the familiar Judicial Review analysis to torpedo the decision.

39. Yet, this is precisely what the Legislature was trying to avoid by requiring exhaustion of remedies in particular kinds of disputes.

40. Perhaps the Applicant would stand on a firmer footing if its argument is that Judicial Review is a more efficacious remedy and that it comes within an established exception to the requirement of exhaustion. This was the holding in the Court of Appeal decision cited by the Applicant in its Further Submissions: ***Kenya Bureau of Standards v Powerex Lubricants Limited [2018] eKLR***. In that case, the Court of Appeal held as follows:

> *Did existence of an alternative remedy bar the respondent from moving to the Judicial Review Court" We think not. Where the available alternative remedy is less effective or efficacious, then a party cannot be barred from seeking recourse in judicial review. In this case, the respondent's business had been paralysed, samples had been taken and in order for the door to the Standard Tribunal to be opened, the tests had to be carried out, result communicated 14 days after the tests and the decision of the Board or Council had to be in place. Yet there was no time limit within which the samples were supposed to be tested. As was observed earlier, two years down the line, the said samples have yet to be tested. Would it have been rational to expect the respondent to wait indefinitely for the cause of action to accrue yet it could not trade" That in our view is the height of unreasonableness. We also note that by the time the respondent herein moved to court on Judicial Review, no cause of action that could be taken to the Standards tribunal had crystallised. The circumstances of this case were therefore clearly distinguishable from the* ***Cortec Mining case*** *(supra). Moreover, the Court did not delve into the merits of the case and only dealt with the process and left the merits to be determined after the results of the tests on the samples, which tests were never carried out*.

41. In the same vein, a three-judge bench of the High Court recently pointed out, this jurisprudential policy that a party must exhaust available statutory remedies provided by statute before filing a suit in Court, has outer limits. In ***R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte the National Super Alliance (NASA) Kenya [2017] eKLR.*** the Court stated the outer limits of the doctrine thus:

> *[46] What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the* ***Shikara Limited Case****, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.*
>
> *[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.*

42. A four-judge bench of the High Court recently expounded on these outer limits thus:

> *While our jurisprudential policy is to encourage parties to exhaust and honour alternative forums of dispute resolution where they are provided for by statute* ***(See The Speaker of National Assembly vs James Njenga Karume [1992] KLR 21.****), the exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. Thus, in the case of* ***Dawda K. Jawara vs Gambia (ACmHPR 147/95-149/96-A decision of the African Commission of Human and Peoples' Rights)*** *it was held that:*
>
> *"A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case."*

43. Is there any sense in which it can be said that the Judicial Review remedy is more *accessible, affordable, timely and effective* than the Tax Appeals Tribunal referenced in Section 12 of the Tax Appeals Tribunal Act, 2013? If there is any such way, it has not been demonstrated to the Court. All the Applicant has insisted is that the decision by the Respondent violates the doctrine of illegality and that, therefore, the requirement of exhaustion of internal remedies does not apply. However, as I pointed out above that only results in circular logic: either one's claim that a decision by the Respondent violates the doctrine of legality and that gains them access to the Court; or the Court examines the facts underpinning the decision and controversy to see if it in fact illegal. The mid-level position is the one I have adopted above which is for the Court to make a determination based on a tentative review of the pleadings. The Applicant has already failed on that score.

44. The only other way it could have come to Court in the first instance would have been to demonstrate that Judicial Review is a more *accessible, affordable, timely and effective* remedy. It did not do this. And neither is there self-evident logic why the Tax Tribunal is not an accessible, affordable, expeditious or effective that recommends itself to me.

45. In the circumstances, I would conclude that the suit is not ripe: the Applicant ought, in the first instance, to approach the Tax Tribunal as stipulated in section 12 of the Tax Appeals Tribunal Act, 2010 and only come to Court as a last resort.

46. The above finding is dispositive of the case. However, supposing my finding on ripeness and exhaustion doctrine are wrong, would I grant the reliefs sought? I answer that question in the rest of this judgment.

b) Has the Respondent violated the doctrine of legality and exceeded its mandate in making the tax demands?

47. The Applicant says the Respondent breached the law in three separate ways:

> **a.** That the decision of the Respondent to demand duty from the Applicant is adverse to the Applicant and has been arrived at in contravention of the law, including the East African Community Customs Management Regulations, 2010, and thus breaches the requirement that all administrative decisions comply with the doctrine of legality;
>
> **b.** That the decision of the Respondent to demand duty from the Applicant is arbitrary and in excess of jurisdiction as it lacks mandate to demand for payment of duty in the circumstances herein; and
>
> **c.** That the tax demand by the Respondent is in clear and blatant breach/disregard of legal duty owed to the Applicant herein.

48. To reach these conclusions, the Applicant rehashes its factual narrative of the case which includes the factual position that the petroleum products exited Kenya through the Malaba border and entered Uganda. It insists that the issuance of Certificate of Export (COE) by the Respondent's officers in Malaba (which is not denied) and Rotation Number and T1 documents by the Uganda Revenue Authority proves that the petroleum products left the Kenyan market for the destined export market; and that they were not dumped in the Kenyan market without payment of duty.

49. The Applicant argues that it is unjustified and illegal for the Respondent to purport to impose tax on the Applicant where "it is evident and there is clear documentation that the goods were exported and certified as such by both the Kenya Revenue Authority and the Uganda Revenue Authority." In the Applicant's view, the documents issued by the Respondent and URA and the cancellation of the security bonds should be conclusive proof that the goods left the country. As such, by dint of the East African Community Customs Management Regulations, 2010, it is illegal for the Respondent to impose duty on goods that have been exported or that are in transit. The argument, then, is that it was illegal for the Respondent to impose a tax on goods that were in transit or were meant for export.

50. The Respondent insists that the petroleum products did not leave the Kenyan market hence its decision to impose a tax on it. As documented above, the Respondent produced two documents which are the end products of investigations by the Kenyan DCI and Uganda Revenue Authority. Both investigations concluded that the consigned petroleum products did not exit Kenya through the Malaba border. The URA concluded that the two trucks that were allegedly ferrying the petroleum products were not physically present in Uganda when the Rotation Number and T1 were issued but that three of its agents acted fraudulently to issue them. In an email to the Respondent, the URA proceeds to say that it had no cancelled those entries since it had concluded that the two trucks never entered Uganda.

51. On the basis of these factual findings, the Respondent reached the conclusion that custom duty was payable to the petroleum products in question since its conclusions were that there was no longer credible evidence that the petroleum products exited the Kenyan market. Was this factual finding by the Respondent factually wrong? Possibly. There is a possibility that the investigators got it wrong in their conclusions. Was it irrational, that is, so wrong that no reasonable decision-maker or fact-finder would make such a conclusion? Clearly not. The factual findings were based on investigations done by two agencies which are legally mandated to do that kind of investigations. The DCI investigations focused on "intel" received on the dumping; while the URA investigations focused on a review of its internal documents to determine the authenticity of the T1 Document issued to the Applicant. Was the decision illegal? Certainly not. It is within the mandate of the Respondent to conduct investigations and make factual findings such as those it did in this case. It may be wrong in making such findings; and its methodology may be impeached on merit. But it is certainly has the legal mandate, as long as it is acting reasonably, to make the factual findings.

52. What would be the recourse if the factual findings are wrong leading to imposition of a customs duty on products meant for export or transit within the East African Community region? The recourse would be to challenge the merit of the decision at the Tax Tribunal where one might be permitted to demonstrate that the factual finding was erroneous, illogical or plain wrong. If a party is still aggrieved by the finding of the Tax Tribunal, then one can access the Court on appeal as a last resort.

53. Based on this analysis, it is my finding, therefore, that the Respondent did not violate the doctrine of legality or exceed its mandate in making the tax demands.

c) *Is the Respondent's demand for the taxes in question illegal, irrational and unreasonable?*

54. The analysis provided above on the doctrine of legality sufficiently responds to this question. I have concluded above that the Respondent was within its right and legal powers to conduct its investigations and come up with factual findings. The Applicant cannot challenge the merit of the factual findings in a Judicial Review proceedings unless it demonstrates that the finding was irrational or unreasonable. In determining what is irrational or unreasonable, as demonstrated above, the Court must give due deference to the Respondent's factual findings as the technical agency imbued with the mandate and technical knowhow as long as the factual findings are not unreasonable.

55. In the present case, as shown above, there has been no showing that the Respondent's factual findings and conclusions were irrational or unreasonable. It would, therefore, be inappropriate for the Court to intervene by way of Judicial Review as opposed to an appeal on merits.

d) Has the Respondent Otherwise Breached the Law?

56. The specific question presented here is whether the Respondent has in any other way breached the law in a way that it would invite Judicial Review of its decision.

57. In ***R v Director of Public Prosecutions & 2 Others Ex Parte Praxidis Nomoni Saisi [2016] eKLR*** Justice Odunga delineated circumstances in which it is proper for the Court to exercise its Judicial Review jurisdiction in the following words:

> *It is now clear that even in the exercise of what may appear to be prima facie absolute discretion conferred on the executive, the Court may interfere. The Court can only intervene in the following situations:*
>
> *1) Where there is an abuse of discretion;*
>
> *2) Where the decision-maker exercises discretion for an improper purpose;*
>
> *3) Where the decision-maker is in breach of the duty to act fairly;*
>
> *4) Where the decision-maker has failed to exercise statutory discretion reasonably;*
>
> *5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power;*
>
> *6) where the decision-maker fetters the discretion given;*
>
> *7) where the decision-maker fails to exercise discretion;*
>
> 8) *where the decision-maker is irrational and unreasonable.*

58. Can the decision of the Respondent be impugned on any of these grounds? I have come to the conclusion that it cannot. As analyzed above, the decision-maker was not irrational or unreasonable. There was no demonstration that it failed to exercise discretion or that it acted in a manner to frustrate the purpose of the statute. Neither was there demonstration that the Respondent failed to exercise statutory discretion reasonably.

59. Perhaps the Applicant pegged its arguments on the first three elements in Judge Odunga's list:

> *a. Was there an abuse of discretion?*
>
> *b. Was the discretion exercised for an improper purpose?*
>
> c. *Was the Respondent in breach of the duty to act fairly?*

60. I have carefully considered all the material presented to the Court and analyzed the articulate and erudite arguments by counsels of all the three parties. The only question I have been anxious about is whether the Applicant has been given a fair hearing or a fair opportunity to contest the finding of the Respondent. The answer is that it has not happened yet because the Applicant did not utilize any of the available modes of engagement open to them to engage the Respondent and explain why its factual findings are incorrect. Instead, the Applicant filed the present suit. The statutory regime envisages that in the first place the Applicant would respond to the tax demand with an explanation why no tax was due. If the Respondent remained steadfast in its factual findings and demand, then, the statutory scheme envisages that the Applicant would give notice to the Commissioner and file an appeal at the Tax Tribunal. An appeal at the Tax Tribunal could conceivably include a challenge on the merits and factual correctness of the findings of the Respondent. In the last instance, the Applicant could approach the Court.

61. In the present case, we have documentation showing the Respondent was, in good faith, engaged in investigations to find out who the consignee and proper tax entity was. Hence, it wrote to Luqman Petroleum South Sudan and Kenol Kobil first in a bid to establish the real owners of the consignment who was due to pay taxes. It was only when Kenol Kobil confirmed that the Applicant was the owner of the petroleum goods that the Respondent made a direct demand to it. Throughout this process, there has been no demonstration that the Respondent acted with any improper purpose or for extraneous reasons. There has also been no demonstration that the Respondent intended to deny the Applicant administrative fairness in its decision-making. Based on this, I am unable to conclude that any of the usual grounds for Judicial Review is available to aid the Applicant in challenging the decision by the Respondent in this case.

e) Did the Respondent Violate the Applicant's Legitimate Expectations?

62. The Applicant argues that the demand for tax violates the Applicant's legitimate expectation. The argument is that the two trucks ferrying the petroleum products proceeded to Malaba border point and the Respondent's officers carried out a new inspection and approved that the products were intact and that the seals were not interfered with. The Respondent then issued a Certificate of Export (COE). This document ordinarily proves that the vehicles had been verified and that the details in the Simba Information System are correct.

63. The Applicant argues further that these documents and the verification process by the Respondent at the Malaba border point confirms and proves that the petroleum products left the Kenyan market for the destined export market and were not dumped in the Kenyan market as alleged by the Respondent later. Further, the Applicant argues that the fact that the Respondent duly cancelled the security bonds after the documents were verified and upon the Respondent's satisfaction that the products were not diverted to the local market created a legitimate expectation that the Respondent would not turn around in a "strange and inexplicable turn of events to demand tax/duty for the very goods they verified and issued certificates as having left the country without diversion to the local market."

64. The Applicant relied on Judge Odunga's rendition of the doctrine of legitimate expectations in ***Republic v KNEC Ex Parte Echesa***

Abubakar Busalire, Chairman Parents Association of Chebuyusi High School & 190 Others [2018] eKLR thus:

> *It is therefore my view and I hold that in acting as it did, the 1st Respondent thwarted the applicants' legitimate expectations and acted unfairly. Whereas the 1st Respondent could still lawfully cancel the applicants' results, it had to be done in a fair and lawful manner. In my view a situation where the 1st Respondent releases the results first and then afterwards purports to conduct investigations thereon and proceeds to cancel the same without affording the affected parties an opportunity of challenging the intended decision cannot pass the test of reasonableness. Such a decision in my view amounts to irrationality. The 1st Respondent is expected to carry out the verification and investigations of the irregularities and complete them before releasing the results. It cannot release half-baked results and purport to have withdrawn them at the same time pending further investigations, particularly where there is no compelling reason for such a hurry and here no reason has been given why the 1st Respondent was in a hurry to release the results before fully verifying the same. Whereas there is no conclusive evidence that the 1st Respondent's decision was informed by the alleged anonymous letter, the manner in which the 1st Respondent conducted itself may well have justified the ex parte applicant's that the 1st Respondent's decision was in fact informed by the said letter.*

65. The Respondent's response to this line of argument is that it has not breached any legitimate expectation of the Applicant. This is because, it argues, for legitimate expectation to hold, it must be claimed within the law. Here, the Respondent insists, the Applicant failed to pay customs fees as required under EACCMA and the Respondent was justified to act within the law to demand the taxes as it did. There can be no legitimate expectation, the Respondent argues, when it is clear that taxes which were due were not paid and the actions taken by a party are patently illegal.

66. The Respondent relied on ***Republic v Kenya Revenue Authority ex parte Krones LCS Centre East Africa Limited [2012] eKLR*** where the Court held that:

> *The Applicant has argued that the fact that the goods were released meant that the Applicant was entitled to conclude that the Respondents were satisfied that taxes had been paid for the goods. It has not emerged that taxes were not paid. Legitimate expectations can only operate inside and not outside the law. One can only rely on legitimate expectations when the law has been complied with. Where taxes have not been paid then the Applicant cannot rely on the principle of legitimate expectations to avoid payment of taxes*

67. The authoritative De Smith, Woolf & Jowell, ***Judicial Review of Administrative Action*** 6th Edn. Sweet & Maxwell at page 609 defines legitimate expectation thus:

> *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 of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public*.

68. This concise definition outlines the *four* core pre-conditions for the doctrine of legitimate expectations to apply:

a. *First*, the Public Authority must have made a representation through words or conduct amount to a promise as to how it will act in respect to an identifiable area of activity;

b. *Second*, the Public Authority must have made the representation either directly or indirectly to an identifiable individual or group of persons;

c. *Third*, the individual or group must have acted on the faith of the representation or on its reliance; and

d. *Fourth*, the representation must be such that it would be unjust or unconscionable to permit the Public Authority to resile from the representation.

69. A glance at these four pre-conditions easily explain the oft-quoted legal position that "there can be no breach of legitimate expectation or estoppel in the face of express statutory provisions." (***Republic v KRA ex parte Aberdare Freight Services Ltd (Nairobi Civil App. No. 946 of 2004***)). The last two pre-conditions speak to the reasonableness of the expectation and the just-ness and equity of the situation. Where there is an express statutory provision, it would be unreasonable for a party to have expectations that a Public Authority would act contrary to the express statutory provisions. Similarly, in the face of an express statutory provision, it is not unjust for a Public Authority to resile from a contrary position it had taken.

70. In the present case, we can logically take the position that the conduct of the Respondent in bonding the consigned petroleum goods and then issuing the Certificate of Export (COE) at the border after inspection and verification amounted to representation to an identifiable individual (the Applicant). Hence, the first two pre-conditions for the operation of the doctrine of legitimate expectations are met.

71. However, in my view, the final two pre-conditions are not met. It cannot have been reasonable for the Applicant to have relied on the representation by the Respondent that it would not demand duty or tax in the face of express tax provisions that goods sold in the Kenyan market would attract the duty or tax. Additionally, it cannot have been reasonable for the Applicant to rely on any such representation by the Respondent if it was, as the factual findings of the Respondent claim, based on fraud. Fraud cannot be a proper basis for reasonable reliance on a representation for purposes of the operation of the doctrine of reasonable expectations.

72. Lastly, if indeed the factual findings of the Respondent are correct and that the Applicant diverted and dumped the petroleum goods in

the Kenyan market after representing that it was for export, then even if the Respondent had incompetently or slovenly proffered representations that it would not demand the tax or duty, it is not unjust or unconscionable to resile from that position upon establishing the truth: that the petroleum goods were, in fact, not exported to the destined market but were, instead, diverted to the Kenyan market.

73. Consequently, the operation of the doctrine of legitimate expectations does not save the actions of the Applicant from further scrutiny by the Respondent in the circumstances of this case.

f) Does the Interested Party Have any Interests in the Matter and Should it Have Been Made a Party?

74. The Interested Party, Kenol Kobil, filed a Replying Affidavit sworn by Charles Odida and Written Submissions. Its position is essentially that it has no interest in this matter and it should never have been enjoined as a party or Interested Party. Its affidavit and submission detail the transactions between itself and the Applicant. The Interested Party demonstrated that in the normal course of its business it sold Free on Board to the Applicant the petroleum products that are the subject of this suit.

75. After the sale, the Interested Party demonstrated that it loaded the products to the Applicant's nominated trucks and the Applicant took possession of the product immediately. Thereafter, the Interested Party had no control or interest over the trucks' movements as the property in the product had already passed to the Applicant.

76. The Interested Party's position, therefore, is that any liability on exportation lies wholly on the Applicant and/or the Respondent. It submitted that it had no interest in the matter and is not responsible or liable for any alleged dumping or taxes and should not have been made a party to the proceedings. It therefore sought for costs for defending the proceedings.

77. Given the questions delineated by the Court for determination and the answers the Court has given to those questions, it follows that the Interested Party is eminently correct in the two positions it has taken: it has no interest in the matter; and it should not have been made a party to the proceedings. It is, therefore, entitled to costs for defending the proceedings.

g) Are the Reliefs Sought Merited?

78. Given the analysis of the Court on all the issues presented, it follows that the Applicant cannot succeed in any of the reliefs it sought. First, the Court has found that the Applicant acted prematurely in filing this suit in Court before exhausting statutory remedies. Second, the Court has concluded that the Respondent acted within its powers and mandate; did not act unreasonably or irrationally; and did not violate the legitimate expectations of the Applicant. Consequently, the Applicant is not entitled to the reliefs sought.

79. In the premises, the Applicant's Notice of Motion dated 15/01/2018 is devoid of merit, and it accordingly fails. It is hereby dismissed with costs. For avoidance of doubt, the Applicant shall be responsible for paying the costs of both the Respondent and the Interested Party.

80. Orders accordingly.

Dated and delivered in Nakuru this 7th day of March 2019

……

JOEL NGUGI

JUDGE