REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 45 OF 2019

In the matter of Articles 21(1), 23 (1) (3) (f), 40 (2) (a) and 47 (1) of the Constitution

and

In the matter of sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules

And

In the matter of the East African Community Customs Management Act, section 122(2)

And

In the matter of an application for Judicial Review Orders of Certiorari and Prohibition

Between

REPUBLIC.....APPLICANT

versus

KENYA REVENUE AUTHORITY.....RESPONDENT

and

STYLE INDUSTRIES LIMITED.....EX PARTE APPLICANT

JUDGMENT

The Parties

1. The *ex parte* applicant, **Style Industries Limited** is limited liability Company duly incorporated in Kenya under the provisions of the companies Act.[1]

2. The 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.[2] Pursuant to section 5 of the act, KRA under the general supervision of the Minister, is an agency of the Government for the collection and receipt of all revenue. Under sub-section (2) of the said section, in the performance of its functions under subsection (1), the Authority 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.

The factual Matrix

3. The *ex parte* applicant states that in November 2018, it imported goods described as "Synthetic Fibre ADM" with a Free on Board (FOB) value of US $ 104,640, which were properly entered and assessed for a tax amount of Ksh. 2,139,616/= which was duly paid.

4. The *ex parte* applicant states that the said amount was based on the transaction value of the goods in accordance with the provisions of the Fourth Schedule Part 2(1) of the East African Community Customs Management Act, 2004 herein after referred to EACCMA). In addition, the *ex parte* applicant states that in breach of both section 122 (2) of the EACCMA and international norms, the proper officer prompted an additional value over the commercial invoice of US $ 30,520 on the consignment under commercial invoice number GCPI/ST/19-063 thereby adding taxes due by an additional Ksh. 935,149.

5. The *ex parte* applicant further states that the officer failed to take into account the fact that the supplier of the goods had reduced the prices of the Synthetic Fibre ADM from USD 6.20 to USD 4.80 thereby reducing the transaction value from US $ 151,304 to US$ 104,640. It further stated that the change in price was not within the control of the importer.

6. In addition, the *ex parte* applicant states that the Respondent did not take the steps indicated in section 122(4) of EACCMA, nor did they provide any justification when adding value to the transaction value. Further, it states that no explanation was offered despite request and its entry number 20181CD64981 remained un passed. Lastly, the *ex parte* applicant states that the Respondent was holding its property worth millions of shillings, which was attracting demurrage costs.

Legal foundation of the application

7. The *ex parte* applicant states that:-

a. That the Respondent's officers acted arbitrary and ultra vires in increasing the said amount.

b. That the Respondent's officers failed to take into account relevant considerations, namely, the commercial value invoice attached to the said goods.

c. That the Respondent's officers abused its powers by arbitrarily applying a different value of goods without providing any explanation for the same.

d. That the Respondent's officers exercised its discretion for improper purposes.

e. Failing to make a tax assessment as guided by the provisions of the Fourth Schedule Part 2(1) of the East African Community Customs Management Act, 2004.

f. That the ex parte applicant's attempt to appeal the decision have been met with negative responses.

g. That the decision is unfair, was made in bad faith and no reasons were provided for the decision.

Reliefs sought

8. The *ex parte* applicant prays for the following reliefs:-

a. An order of prohibition to restrain the Respondent from arbitrarily increasing the taxable value on the applicant's imported goods, the subject matter of this application.

b. An order of prohibition to restrain the Respondent from arbitrarily increasing the taxable value on the applicant's future imported goods arising from similar transactions.

c. An order of prohibition to bar the Respondent from further inconveniencing the applicant by charging accruing storage and demurrage costs on the goods the subject matter of this application.

d. An order of Mandamus compelling the Respondent to pass the applicant's imported goods under entry No. 20181CD64981 held by the Respondent.

e. Further or in the alternative, an order of Mandamus compelling the Respondent to reimburse the extra duty paid to the Respondent held as security with all costs attendant thereto including demurrage costs and penalties should the Respondent through its proper Officer b found guilty of misconduct.

Respondent's Replying Affidavit

9. Patrick Omari, an officer at the Customs and Border Control Department of the Kenya Revenue Authority swore the Replying Affidavit dated 10th April 2019. He averred that regarding this case, the file was referred to the valuation office for guidance after the value declared was disputed at the release point where the agent objected to the suggested values. He deposed that the applicant through the agents availed documents to support the transaction value and further provided a certificate of analysis, which indicated the fibre ADM.

10. He deposed that the Respondent took into account the transaction value, which is the amount paid or payable, and, that, the price payable in the Respondents view was US$ 6.20/ Kg basing on identical goods from the same supplier. He averred that at that time there was no reason presented as to the temporary reduction in price of goods.

11. Mr. Omari averred that an identical importation at the same period on entry number 2018MSA6999562 declared a value of US$ 6.2/kg of fibre ADM, which arrived after the price reduction as stated by the importer that was given to them on 1st August 2018. He averred that the applicant presented a letter dated 1st August 2018 indicating change in prices effective from September 2018, but it was noted that the price change had preceded the said letter as evidenced by goods cleared vide entry 20181CD49716 with invoice dated 31st July 2018.

12. Mr Omari averred that the Respondent could not verify whether the said letter was meant to justify the reduction in declared value, hence, its appeal was rejected online on the basis of insufficiency of transaction documents to support the reduction in transaction value.

13. He averred that the imposition of the adjusted value of US$ 6.2/kg was guided by section 122 of the EACCMA, as read with the Fourth Schedule to the Act. He also deposed that the importer was given a value ruling based on a previous ruling on entry number 20181CD 53077 of US$6.2/kg of the same fibre within the same time period where the values were uplifted and complied with. He deposed that the payment was done vide F147 20181CD13376 and that the importer paid with no objection.

14. In addition, he deposed that the entry was not passed because the applicant failed to comply with the requirements of Customs Laws. He stated that the transaction value was declined because the value was at variance with the previous declarations and in accordance with section 122 (4) of EACCMA, the importer did not explain to the satisfaction of customs.

15. Mr. Omari also averred that section 230 of EACCMA provides for the appeal mechanism to the Tax Appeals Tribunal, hence, the *ex parte* applicant has not exhausted the statutory avenues under the act, hence, this suit offends section 9 (2) of the Fair Administrative Action Act[3] (herein after referred to as the FAA Act).

***Ex parte* applicant's further Affidavit**

16. Cyllus Onyango swore the further Affidavit dated 7th May 2019 essentially reiterating the contents of the supporting affidavit, and, averred that the Tax Appeals Tribunal does not sit consistently, hence, the matter could drug for long as opposed to the High Court. He deposed that section 9(4) of the FAA Act provides for exceptions if the same is in the interests of justice. He cited the delays in the Tax Appeals Tribunal, the non-refundable fee of twenty thousand shillings payable at the Tribunal, and, the failure to be provided with reasons as constituting exceptional circumstances. In addition, he averred that the applicant never raised the objection at the leave stage.

Issues for determination

17. I find that the following issues distil themselves for determination:-

a. Whether this suit offends the doctrine of exhaustion of statutory dispute resolution mechanism.

b. Whether the applicant has established any grounds for the court to grant the Judicial Review orders sought

a. Whether this suit offends the doctrine of exhaustion of statutory provided dispute resolution mechanism.

18. The *ex parte* applicant's counsel argued the Respondent failed to provide reasons for the decision despite numerous requests in violation of Article 47 of the Constitution and section 4 of the Fair Administrative Action Act. [4] He also argued that that the Tribunal sittings are not consistent, unlike the High Court; hence, the matter may suffer unnecessary delay. It was his submission that the foregoing reasons constitute exceptional circumstances as provided under section 9(4) of the FAA Act. Counsel placed reliance on *Republic v Public Procurement Administrative Review Board & 2 Others*[5] which described the proper function of Judicial Review and argued that this court has jurisdiction to hear this matter.

19. The Respondent's counsel submitted that the *ex parte* applicant moved the court pre-maturely. She cited section 12 of the Tax Appeals Tribunal Act,[6] which provides that any person who disputes the decision of the Commissioner in 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 Tax Appeals Tribunal. She argued that sections 51, 52 and 53 of the Tax Procedures Act[7] envisage that a taxpayer may at times not agree with a tax assessment made by the Respondent, and, that, such disputes are dealt with at the Tax Appeals Tribunal and appeals therefrom lie in the High Court. She argued that the Tax Appeals Tribunal Act[8] establishes the Tax Appeals Tribunal to hear such disputes, and, that, section 230 of the EACCMA requires a person who is dissatisfied by the decision of the Commissioner to appeal to the Tax Appeals Tribunal. She also referred to section 9 (3) of the FAA Act which prohibits the High Court from entertaining such disputes unless it satisfies itself that the appeal mechanisms under the act have been exhausted. To fortify her argument, she relied on *Cortec Mining Kenya Limited v Cabinet Secretary, Mining & 9 Others*[9] and argued that the remedy under the act is efficacious. She also relied on *Diana Kethi Kilonzo v IEBC & 2 Others*[10] for the proposition that where the Constitution has allocated certain powers and functions to various bodies and tribunals, it is important that these bodies and tribunals be given leeway to discharge their mandate.

20. In addition, counsel cited *Jimbise Ltd v KRA*[11]in which the court held that under section 2 of the Tax Appeals Tribunal Act,[12]the

tribunal's wide powers are not restricted to disputes relating to facts only. She also placed reliance on *Centrica Investments Ltd v Kenya Revenue Authority*[13] where the court up held a similar objection stating that the dispute before it fell within the ambit of the Tax Procedures Act[14] and that no amount of coloring could change the pith and substance of the case.

21. 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.*

22. 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.*

23. 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.*

24. Section 3 of the Tax Appeals Tribunal Act[15] 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;[16] (b) the Customs and Excise Act;[17] or (c) the Value Added Tax;[18] (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.

25. The preamble to the Tax Procedures Act[19] 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.

26. Section 2 (3) of the Tax Procedures Act 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.[20] 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.

27. Section 3 of the Tax Appeals Tribunal act[21] 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.

28. 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.

29. 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.[22] The doctrine was felicitously stated by the Court of Appeal[23] in *Speaker of National Assembly vs Karume,*[24] ***a pre-2010 decision*** in the following words:-

> *"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*."

30. However, many Post-2010 court decisions have found the reasoning sound and have provided justification and rationale for the doctrine under the 2010 Constitution.[25] The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*.[26] It stated that:-

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

31. The High Court in the *Matter of the Mui Coal Basin Local Community,*[27] stated 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..."*

32. From the above jurisprudence, at least two principles are clear. *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.[28] 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.

33. From the statutory definitions stated above, I find that the decision under challenge is an appealable decision under the Tax Procedures Act.[29] Section **9(2)** of the FAA Act[30] 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).**

34. 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.[31]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[32] 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.

35. 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.

36. 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.[33] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is

legally mandatory.[34] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

37. 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.

38. What constitutes exceptional circumstances depends on the facts of each case[35] 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[36] 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:-[37]

> *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.*

39. Additionally, 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.[38] I should perhaps add that there is no definition of 'exceptional circumstances' in the FAA Act,[39] 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.[40]

40. 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. As stated above, what constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. I am unable to discern any exceptional circumstances in this case, nor, was it demonstrated that there are exceptional circumstances in this case. The reasons given cannot constitute exceptional circumstances.

41. 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 jurisdiction of the Tribunal and the facts of this case suggests otherwise. The provisions are very clear on the jurisdiction of the Tribunal. 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 Tribunal.

42. 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.[41] 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. [42] Section **9(4)** of the FAA Act[43] 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.

43. The law is that Section **9(4)** of the FAA Act[44] 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.

44. 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.[45] Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional

circumstances to exempt him from this requirement.[46] 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.[47] An internal remedy is adequate if it is capable of redressing the complaint.[48]

45. 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.

46. 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.

47. 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.

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

49. 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. This case offends section **9 (2)** of the FAA Act.[49] The applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the FAA Act.[50] In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail. On this ground alone, this case is dismissed.

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

b. Whether the applicant has established any grounds for the court to grant the Judicial Review orders sought

51. The *ex parte* applicant's counsel argued that the Respondent failed to follow the law and or acted outside its mandate. He argued that the Respondent failed to take into account the fact that international business prices do fluctuate which is not within the control of the importer. He further argued that the Respondent failed to follow steps stipulated in section 122(4) of the EACCMA. He argued that the application fits the grounds for judicial review as set out in section 7(2) of the Fair Administrative Action Act.

52. Citing *Republic v Kenya Revenue Authority ex parte Tom Odhiambo Ojienda SC t/a Prof. Tom Ojienda & Associates*[51] he argued that judicial review is concerned with reviewing the decision but not merits of a decision. He argued that this case meets the tests of judicial review, which are legality, rationality and procedural propriety.[52]

53. The Respondent's counsel cited *Pili Management Consultants Ltd v Commissioner of Income Tax, Kenya Revenue Authority*[53] and argued that the court is not best suited to determine the tax due. She also cited *Republic v The Retirement Benefits Appeals Tribunal ex parte Augustine Juma & 8 Others*[54] for the proposition that judicial review is not an appeal. She submitted that the writs of *certiorari* and *prohibition* are not available since the Respondent did not act illegally. She submitted that the Respondent did not act outside its powers and cited *KAPA Oil v KRA & 2 Others*[55] for the proposition that if the court were to delve into how the assessments are done or the methods applied, it would be usurping the statutory mandate of the Respondents.

54. Lastly, counsel argued that the court will only interfere where the decision is unreasonable and that the Respondent acted within its mandate under section 5(1) of the Kenya Revenue Authority Act[56] and the applicable schedule to the act.

55. Judicial review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere.***[57]***

56. It is convenient to start by examining the Respondent's mandate pursuant to the enabling statute. It is common ground that the Respondent is established under the provisions of the Kenya Revenue Authority Act.[58] Section **11** thereof establishes the office of the Commissioner General of KRA and sets out its responsibilities. 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.

57. **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."*

58. Section 122 (1) of the EACCMA provides that where imported goods are liable to import duty *ad valorem*, then the value of such goods shall be determined in accordance with the Fourth Schedule and import duty shall be paid on that value. The Fourth Schedule provides in detail the determination of value of imported goods liable to *ad valorem* import duty. The Schedule has a detailed interpretation, defines transactional value, transactional value of identical goods and similar goods among other applicable methods. The Schedule comes complete with interpretative notes.

59. The *ex parte* applicant's contention is that there was a price decline. It blames the Respondent for not being realistic to the fact that prices do decline. This argument is appealing. However, it fails to appreciate that judicial review does not deal with contested matters of fact, which require evidence to be established. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji*[59]:-

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

60. Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue. The question whether there was a price decline is a matter of fact, which requires evidence. Such a determination falls outside the scope of judicial review jurisdiction. In any event, section 120 (1) of ECMMA provides that subject to subsection (3) of the said section, and section 94, import duty shall be paid at the rate in force at the time when the goods liable to such duty are entered for home consumption. There was no attempt to address the court on the implication of this provision if any.

61. In addition, the *ex parte* applicant reliance on the alleged price decline and the Respondents alleged failure to be persuaded by the said argument must be understood within the enabling statute. In this regard, section 122 (4) of EACCMA is relevant. It provides that:-

> *(4)Nothing in the Fourth Schedule shall be construed as restricting or calling into question the rights of the proper officer to satisfy himself or herself as to the truth or accuracy of any statement, document or declaration presented for customs valuation purposes.*

62. The *ex parte* applicant's argument amounts to questioning the rights of the proper officer. The only way this court can interrogate such a complaint is where there is a clear abuse of the proper officer's legal duty, which has not been established. Differently put, the proper officer's refusal to be satisfied by the truth or accuracy of the information given by the ex parte applicant is consistent with the above section.

63. 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. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved.

64. In *Council of Civil Service Unions v. Minister for the Civil Service*[60] Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality.*[61]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it to *"unreasonableness"* in Wednesbury Case.[62] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

65. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[63]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.

66. 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. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

67. 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.

68. Illegality is divided into two categories: 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.

69. 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.

70. 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.

71. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle, which, is inextricably linked to the Rule of Law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council and another* where the court held as follows:-

> "*(t)he doctrine of legality which 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"* ***[64]***

72. Whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[65] 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 constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.

73. 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* its statutory mandate. Simply put, the applicant has not demonstrated *illegality*. Instead, the applicant moved to court in an attempt to evade the verification or payment of taxes, which to me is a lawful process. The impugned decision has not been shown to be *ultra vires* or outside the functions of the Respondents. 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 statutory mandate.

74. There is no argument before me suggesting that the decision is either unreasonable or irrational which grounds are for Judicial Review. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of FAA Act which provides that:-

"*A court or tribunal under subsection (1) may review an administrative action or decision, if-*

> *i. the administrative action or decision is not rationally connected to-*
>
> *a) the purpose for which it was taken;*
>
> *b) the purpose of the empowering provision;*
>
> *c) the information before the administrator; or*
>
> *d) the reasons given for it by the administrator*."

75. The test for rationality was stated as follows:-***[66]***

"*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

76. In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at."[67]

77. 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.

78. 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[68] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.' Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.[69]

79. 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*[70] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[71]This stringent test has been applied in Australia. In *Prasad v Minister for Immigration*,[72] the Federal Court of Australia considered the ground. The Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached (at 167) and to prove such a case required "something overwhelming" (at 168). It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt (page 168.3), and when "looked at objectively… so devoid of any plausible justification that no reasonable body of persons could have reached them" (at 168).

80. 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;*

81. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. 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.

82. 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.[73]

83. 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.

84. I have carefully examined the impugned decision. 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, applying the above tests of unreasonableness and irrationality, I find that the applicant has not demonstrated that the decision tainted with unreasonableness or irrationality. The decision is rationally connected to a lawful process that is, enforcing a statutory requirement.

85. Judicial intervention in Judicial Review matters is limited to cases where- the decision was arrived at arbitrarily, capriciously or *mala fide, or,* where there is unwarranted adherence to a fixed principle, or, where the decision was made to further an ulterior or improper purpose. The court can also intervene where- the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones. It is also allowed where the decision is so grossly unreasonable that the decision maker failed to apply his mind to the matter or the law. None of the above tests have been proved.

Disposition

86. The decision has not been shown to be illegal or *ultra vires* or outside the functions of the Respondents. The Respondent is vested with powers to undertake the decision in question. No abuse of such powers has been alleged or proved. It has not been proved that the Respondent acted outside its powers. The decision falls into the category of areas, which are not disturbed by the courts unless the decision under challenge is illegal, irrational, or un-procedural.

87. An order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[74] *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed. Originally, a common law writ, *Mandamus* has been used by courts to review administrative action.[75]

88. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either**.[76] The tests for *Mandamus* to issue have not been proved.

89. The discretionary nature of the Judicial Review remedies are such that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples may include- where the applicant's own conduct has been unmeritorious, or, unreasonable, or, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or perform its duties, or where the judge considers that an alternative remedy could have been pursued. *First,* there is an available dispute resolution mechanisms under the tax laws. *Second*, the orders sought, if granted in the circumstances of this case would impeding the respondent from performing its duties.

90. The *ex parte* applicant seeks orders of *prohibition.*The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation. No basis has been established for the orders of prohibition to issue.

91. In view of my analysis and conclusions herein discussed above, the conclusion becomes irresistible that the *ex parte* applicant has not established any grounds for the court to grant the Judicial Review orders sought. Further, the application is very misconceived and lacks basis both on merits and in substance. Consequently, I dismiss the applicant's application dated on **25th** March 2019 with costs to the Respondent.

Orders accordingly.

Dated, Signed and Delivered and Dated at Nairobi this **5th** day of **November** 2019

John M. Mativo

Judge