REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 646 OF 2017

In the matter of the Constitution of Kenya Articles 40, 47 and 157

and

In the matter of the Customs and Excise Act, Cap 472 of the Laws of Kenya (Repealed), The Kenya Revenue Authority Act and the East African Customs Management Act, 2004

and

In the matter of an application for by the applicant Konton Trading Limited for Judicial Review by way of *Certiorari, Mandamus* and *Prohibition* directed to the Kenya Revenue Authority

and .

In the matter of the Fair Administrative Action Act No. 4 of 2015

and

In the matter of the illegal, unlawful and unprocedural and unconstitutional seizure of container No. CAXU9366653 (1x40) on the 23 of June 2017

Konton Trading Limited..Applicant

and

Kenya Revenue Authority...1st Respondent

Commissioner of Customs Duty..............................2nd Respondent

Commissioner Intelligence Strategy Operations....3rd Respondent

Commissioner of Investigation and Enforcement....4th Respondent

JUDGMENT

Introduction.

1. By way of a Chamber Summons dated **8th** November 2017, the applicant sought leave to institute Judicial Review proceedings to apply for orders of certiorari and mandamus. The leave sought was granted on **9th** November 2017 and the applicant was ordered to file the substantive application within **7** days from the said date.

2. Subsequently, the court gave directions on filing of Responses and submissions. On **8th** May 2018, when the matter came up before me for the first time I noticed that the substantive motion had not been filed despite the order that it be filed within **7** days from the date of the order.

Counsel for the applicant asked for extension of time to comply. The Respondents counsel did not object to the request for extension, hence, the applicant was filed on **11th** June 2018. I will later address the question whether the application is properly before the court.

The ex parte applicant's case

3. The applicant seeks the following orders:-

> *a. An Order of Certiorari quashing the decision of the 1st, 2nd, 3rd, and 4th Respondents to seize and detain the Container No. CAXU9366653 (1X40) together with goods therein belonging to the Applicant.*
>
> *b. An Order of Mandamus compelling the 1st, 2nd, 3rd, and 4th Respondents to release Container No. CAXU9366653 (1X40) together with goods therein.*
>
> *c. An Order of Mandamus to issue compelling the Respondents to pay container demurrage charges and from the date of seizure until the release of the Container No. CAXU9366653 (1X40).*
>
> *d. Costs incidental to this suit be awarded to the Applicant.*

4. The crux of the applicant's case is that on **23rd** June 2017 at 5.00pm, the Respondents unlawfully seized a container carrying its goods; and, that the Respondents did not notify the applicant the reason(s) for seizure contrary to Section **214** of East African Community Customs Management Act, 2004 (herein after referred to **EACCMA**). The applicant states that the Respondent's officials failed to identify themselves, and, instead, demanded that the transporter return the container back into the Pepe inland container Depot. The applicant also complains that there was no written communication stating the reasons for the seizure nor has the applicant been accused of any impropriety and that the decision is arbitrary and unlawful.

5. **Mohamed Osman Hamud** in the verifying affidavit averred that the applicant imported assorted goods in June 2017 and customs duty was assessed at **Ksh. 1,068,714** which the applicant paid. He also states that a further assessment of **Ksh 296,709/=** was paid paving way for the containers clearance and it's collection on **23rd** June 2017. Further, he averred that some goods were collected, but as the container was intercepted on its way out of the Depot.

First and second Respondent's Replying Affidavit.

6. **John Maingi Kiilu** an officer appointed pursuant to section **13** of the Kenya Revenue Authority Act[1]working at the Internal Affairs Division within the Department of Intelligence and Strategic Operation (I & S O) of the Kenya Revenue Authority swore the Replying Affidavit dated **16th** January 2018. He averred that sometimes on **23rd** June 2017, they received intelligence that importers and clearing agents with connivance or collusion with some corrupt officers of the Respondent and employees of Pepe Inland Container Depot were evading payment of the right amount of taxes through wrong declaration of consignments and importation of illegal and prohibited merchandise into the country. He averred that they commenced investigations targeting selected entries in the system. Further, he averred that in the process of investigations, they noted that some two entries were being accorded undue preference and clearance was being fast tracked. He averred that they initiated a process to stop its physical removal and directed 100% verification. He also stated that he gave instructions for an online message to be posted in the system to stop physical release of the containers from the Depot, but, by the time they arrived at the Depot, the containers had already been cleared for release online, but had not been cleared at the gate. He averred that they were taken round the yard, only to be notified that the truck carrying the containers was circling the yard ready to leave and that he intercepted it at the gate. He averred that he noted that the rear container number had been concealed. Further, he averred that he directed that the containers be offloaded from the track and sealed it with customs seal(s) and took several photographs.

7. **Mr. Kiilu** averred that upon going for verification on **29th** June 2017, he noted that the container had been tampered with, and, that, he reported the incident to the police. Further, he averred that they could not open the computer in absence of the owner, hence, it was rescheduled verification for **5th** July 2017, but on that day it could not proceed because the owner had stated that he was unavailable, and after that, efforts to summon him have been futile. He also averred that the container was escorted to Athi River Weigh Bridge and upon weighing, it was found to be 7,200kg as opposed to 19,000/= declared weight. Further, he averred that verification revealed that it had been tempered with, and initial investigations revealed an offence under section **205** of **EACCMA**. He also averred that section **213** of **EACCMA** authorizes a public officer to seize and detain any vehicle liable to forfeiture.

8. **Mr. Kiilu** also averred that under section **210 (c)** of **EACCMA**, uncustomed goods are liable to forfeiture and cannot be released in the circumstances. Further, he averred that pursuant to section **214 (3)** of **EACCMA**, in the event of prosecution, the forfeited items are detained until the determination of the case, hence, the container cannot be released contrary to express provision of the law, and, that the Respondent acted within the confines of the law.

9. He also averred that the application is bad in law for want of compliance with Order **53 (1)** of the Civil Procedure in the main motion was filed without leave.

Applicant's further Affidavit.

10. The applicant filed a further affidavit dated **9th** February 2018 the crux of which was a denial that the container tempered with and insisted that it was seized outside the Depot after it had been released.

Issues for determination.

11. Upon analyzing the opposing facts presented by the parties and their respective submissions, I find that the following issues fall for determination, namely:-

a. Whether the applicant's application is incurably defective.

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

a. Whether the applicant's application is incurably defective.

12. The Respondents' counsel argued that the applicant's application is incompetent in that it was filed without leave. The applicant's counsel did not address this issue.

13. The record shows that the applicant moved this court on **8th** November 2017 seeking leave to institute these proceedings. Contemporaneous with the application seeking leave, the applicant filed the substantive application the same day. The application is dated the same day as the application seeking leave. The matter was placed before the duty judge on **9th** November 2017. The court granted the leave sought and directed the applicant to file the substantive motion within seven days. However, the applicant did not file it as directed. Instead they served their application seeking leave and the substantive application filed without leave upon the Respondents who raised the issue in their Replying Affidavit.

14. Curiously, the matter came up for mention several times and parties were given directions on filing responses and submissions. The matter came before me first on **16th** April 2018, but on the said date the Respondents had not been served. On **8th** May 2018, I pointed out to the parties that the substantive application had never been filed, hence, there was no application before me. Counsel for the applicant asked for extension of time to file the application. The Respondent's counsel did not oppose the application. I granted the applicant extension of time as sought and the application was filed on **11th** June 2018.

15. The question that arises is whether this court can extent time in a Judicial Review proceeding. Our jurisprudence is awash with superior court decisions holding that courts have no discretion to extent time in Judicial Review proceedings. The impugned decision was made on **23rd** June 2017. The applicant moved to court on **8th** November 2017 and was directed to file the application within **7** days but did not comply. By the time the court drew the parties attention to this omission, six months had long lapsed.

16. Section **9 (3)** of the Law reform Act[2] provides as follows:-

*"In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave **shall** not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."*

17. The above provision is replicated in Order **53** Rule **2** of the Civil Procedure Rules, 2010 in the following words:-

[Order 53, rule 2.] Time for applying for certiorari certain cases.

*"Leave **shall** not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired."*

18. The word shall in the above provisions bestows a mandatory obligation. In Ako vs Special District Commissioner, Kisumu & Another[3] it was held that the above prohibition is absolute and any other interpretation or view of the particular provision would be doing violence to the very clear provisions of sub-section **(3)** of Section **9** of the Law Reform Act.[4] In Re an application by Gideon Waweru Gthunguri**[5]** the colonial Supreme Court held that the said section imposes an absolute period of limitation.

19. Further, the provisions of Order **50** Rule **6** of the Civil Procedure Rules, 2010 have severally been held by the Courts to be inconsistent with the provisions of Section **9 (3)** of the Law Reform Act.[6]In Raila Odinga & Others vs Nairobi City Council,[7] it was held that:- **(i)** the Rules under the Act cannot override the clear provisions of Section **9 (2)** of the Act; **(ii)** an act of Parliament cannot be amended by subsidiary legislation; **(iii)** Parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it.

20. Also, in Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai,[8]it was held that the provisions of a subsidiary legislation can under no circumstances override or be inconsistent with any act of Parliament be it the one under which they are made or otherwise. Section **31 (b)** of the Interpretation and General Provisions Act[9] provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.

21. **Odunga J**. in *Republic vs Mwangi Nguyai & **3** Others*[10] observed that it was high time section **9** of the Law Reform Act[11] was amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice and gave the example of situations whereby a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the limitation period.

22. In *Ako vs Special District Commissioner, Kisumu & Another*[12] referred to above, the Court of Appeal was emphatic that "it is plain that under sub-section **(3)** of section **9** of the Law Reform Act[13] leave shall not be granted unless application for leave is made inside six months after the date of the judgment." The Court of Appeal proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, which permits for enlargement of time.

23. Similarly, the Court of Appeal in *Wilson* ***Osolo -Vs- John Ojiambo Ochola & Another******[14]*** the Court of Appeal expressed itself thus:-

> ***"It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act". There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.''***

24. The above decisions were rendered before the promulgation of the 2010 Constitution. All law must conform to the constitutional edifice. It follows that the provisions of sections **8** and **9** of the Law Reform Act[15] and Order **53** of the Civil Procedure Rules must be conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution.

25. As the Supreme Court of Appeal of South Africa observed[16] *"All statutes must be interpreted through the prism of the Bill of Rights."* Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others****[17]*** that *"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."*The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

26. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First,* parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second*, the right to access the Court is now constitutionally guaranteed. This to me makes it imperative for a court to extent time where there is good reason for a party to be afforded an opportunity to exercise his right to have his or her dispute determined by a competent court. To deny extension of time on grounds of the common law principles of Judicial Review which require a litigant to move to court within a certain period, where there are grounds to demonstrate the delay or failure, would in my view be in consistent with the constitutionally guaranteed right to access justice.

27. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes.[18] The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.[19]

28. No matter how noble and worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail.[20] It is against this backdrop that I granted the applicant extension of time to file his Judicial Review application.

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

29. The applicant's counsel submitted that the impugned decision violated its right to property, and, that, it was undertaken without due process in violation of the right to a fair administrative action. To buttress his argument, counsel cited Kenya Data Network Limited vs Kenya Revenue Authority.[21]Counsel submitted that the governing law was not followed and violated natural justice.[22]

30. Further, the applicant's counsel also questioned the legality of the first, second and third Respondents' action of seizing and detaining its goods, arguing that, they are required to issue a seizure notice. He submitted that the Respondents erred in relying on **Section 210(c)**of **EACCMA** to claim the goods cannot be released and are liable to forfeiture. Counsel premised his argument on Section **2** of **EACCMA** which defines uncustomed goods as those which full duties have not been paid. He argued that the Applicant's goods had been verified and assessed and the demanded amount duly paid.

31. Further, though not challenging the power to seize and detain goods under Section **213** of **EACCMA**, counsel argued that **Section 213(1)** of **EACCMA** as read together with Section **214** of **EACCMA** provides that seizure shall be done lawfully by issuing a seizure notice.[23] He also submitted that the Respondents continue to act *ultra vires* and are advancing an illegality, as the Applicant had complied with requisite tax and fees requirements. He argued that the Applicant had been treated unfairly and that the Respondent's actions are draconian and have contravened Articles 47(1), 2(2) &(4), 40(2) (a) and 28 of the Constitution.[24]

32. The crux of the Respondent's counsel's argument is that the Respondent's acted in conformity with the law. To buttress this argument, counsel cited sections **211 (1)** and **213** of **EACCMA**.

33. 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.***[25]***

34. The grant of the orders or Certiorari, Mandamus and Prohibition is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

35. The Respondents' contention is that the action complained of is anchored in the provisions of the law. It is convenient to start by examining the first Respondent's mandate pursuant to **the EACCMA under whose provisions the respondents based their actions. It is common ground that the first Respondent, the Kenya Revenue Authority, is established under the provisions of the Kenya Revenue Authority Act.**[26] **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.**

36. **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.*"*

37. The Respondents contend that the container in question had been tampered with and parts of the packages removed. The Applicant argues that **Section 2** of EACCMA defines uncustomed goods as those on which full duties have not been paid and that the Applicant's goods had been verified and assessed and the demanded amount duly paid. However a reading of Section **2** depicts a wider definition of uncustomed goods, and includes 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.

38. Differently stated, the above definition is wide enough to cover the circumstances of this case. The last part of the definition is telling. It covers goods dealt with contrary to the provisions of the customs laws. There is an allegation in this case of tempering with the goods. Judicial Review does not deal with contested matters of fact. If the applicant desired to contest the allegation of tempering, then it ought to have filed plaint and challenge the said evidence.

39. Further, section **205** of the EACCMA makes it an offence to interfere with customs gear in the following terms;*"A person who cuts away, casts adrift, destroys, damages, defaces, or in any way interferes with, any aircraft, vessel, vehicle, buoy, anchor, chain, rope, mark, or other thing used for the purposes of the Customs commits an offence and shall be liable on conviction to a fine not exceeding two thousand five hundred dollars."*

40. The Respondents' position is that section **210** of **EACCMA**, uncustomed goods are liable to forfeiture and cannot be released. The said section provides that:-

> *210. In addition to any other circumstances in which goods are liable to forfeiture under this Act, the following goods shall be liable to forfeiture—*
>
> > *a) any prohibited goods;*
> >
> > *b) any restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise;*
> >
> > *c) any uncustomed goods;*
> >
> > *d) any goods which are imported, exported or transferred, concealed in any manner, or packed in any package, whether with or without other goods in a manner appearing to be intended to deceive any officer;*
> >
> > *e) any goods which are imported, exported or transferred contained in any package of which the entry, application for shipment, or application to unload does not correspond with such goods;*
> >
> > *f) any goods subject to Customs control which are moved, altered, or in any way interfered with, except with the authority of any officer;*
> >
> > *g) any goods in respect of which, in any matter relating to the Customs, any entry, declaration, certificate, application or other document, answer, statement or representation, which is knowingly false or knowingly incorrect in any particular has been delivered, made or produced; and*
> >
> > *h) any goods in respect of which any drawback, rebate, remission or refund of duty has been unlawfully obtained.*

41. Additionally, s**ection 211(1) of EACCMA** provides that a vessel (in this context the container) used in the conveyance of goods liable to forfeiture is also itself liable to forfeiture in the following terms:-

“(1) A vessel of less than two hundred and fifty tons register, and any vehicle, animal, or other thing, made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall itself be liable to forfeiture.

42. Section **212(1)** further provides that *where any goods are liable to forfeiture under this Act, then the package in which such goods are, and all the contents of such package, shall also be liable to forfeiture.*

43. **Section 213** of the Act gives a police officer the power to seize and detain any vessel, vehicle, goods or other things liable to forfeiture under the Act. Section **213(1)** provides; *“An officer or a police officer or an authorized public officer may seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.”*

44. From the foregoing provisions of the law, it is not in doubt that the power to seize and detain the impounded Container was effected under the law. There is evidence that the applicant was invited for verification. There is nothing to show that they availed themselves. There are allegations that the container was tempered with. This case was filed on **8th** November 2017, four months after the applicant was invited for the verification.

45. The question before me as I understand it is whether the Respondent acted within their powers. Section **213** of the act which provides that:-

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

(2) Where an aircraft, vessel, vehicle, goods, animal or other thing is seized and detained under this Act by a person other than a proper officer, the aircraft, vessel, vehicle, goods, animal or other thing seized and detained under this Act shall be delivered with full written particulars to the nearest Customs office or to such other place of security as the proper officer may consider appropriate;

(3) Where delivery of an aircraft, vessel, vehicle, goods, animal or other thing is not practical under subsection (2), notice in writing shall be given to the Commissioner at the nearest Customs office, of the seizure and detention, with full particulars of the aircraft, vessel, vehicle, goods, animal or thing seized and detained.

(4) Where a person seizing and detaining a thing liable to forfeiture under this Act is a police officer and that thing is or may be required for use in connection with any court proceedings to be brought otherwise than under this Act, the police officer may, subject to subsection (5) keep that thing in the custody of the police until those proceedings are completed or until it is decided that no proceedings shall be instituted.

(5) Where a thing seized is retained in the custody of the police under subsection (4) the following provisions shall apply-

a) *the police officer shall give notice in writing of the seizure and detention, and the intention to retain the thing in the custody of the police, together with full particulars of the thing, to the nearest Customs office;*

b) *an officer shall be permitted to examine that thing and take account at any time while it remains in the custody of the police;*

c) *where the court orders the release of that thing the Commissioner shall assess and collect any duty payable on that thing prior to restoration of the thing to the owner.*

(6) Where a person, not being a proper officer, seizes and detains or has custody of the thing seized and detained, fails to comply with the requirements of this section or with any direction of the Commissioner, he or she commits an offence and shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding two thousand dollars or to both.

(7) The Commissioner may, at any time prior to the commencement of any proceedings relating to any aircraft, vessel, vehicle, goods, animal or other thing which had been seized under this Act, if he or she is satisfied that it was not liable to seizure, release and return it to the person from whom it was seized.

46. 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. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[27]

47. In *Council of Civil Service Unions v. Minister for the Civil Service* ***[28]*** 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.*[29]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.[30] 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.

48. The role of the court in Judicial Review proceedings was well sated in *Republic vs National Water Conservation & Pipeline Corporation & 11 Others*[31]*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.*

49. 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.

50. No convincing argument has been presented in this case to show that the Respondents 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. In Judicial Review proceedings, the court can only determine the process not the merits of the decision. It is common ground that the container was impounded as it left the premises. It is on record that investigations had commenced that led to a stoppage order issued leading to its interception. There is evidence that the applicant was asked to present its representative for verification. All these actions, as I understand them, they anchored on the provisions discussed above.

51. 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.

52. 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.

53. 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. The Courts have a duty to ensure citizens respect and observe the Constitution. In my view, failure or refusal by the court to exercise this duty would be treason to the Constitution.

54. 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"**[32]***

55. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[33] 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.

56. 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 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.

57. There is no argument before me suggesting that the decision is either unreasonable or irrational which are grounds for Judicial Review. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action[34] 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."

58. The test for rationality was stated as follows*:-**[35]***

> "*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."*

59. 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."[36]

60. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[37] 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.

61. 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[38] 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.[39]

62. In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.***[40]***

63. 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**[41]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[42]This stringent test has been applied in Australia. In *Prasad v Minister for Immigration*,[43] 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).

64. 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;*

65. 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.

66. 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.[44]

67. 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.

68. 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. The container is said to have been tempered with. There is evidence the applicant was invited for verification. The impounding has a statutory underpinning. Even before we address of seizure, the statutory powers to impound, verify and detain have not been shown to be illegal.

69. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter. There is nothing to show that the Respondents abused their powers.

Disposition and final orders.

70. The decision has not been shown to be illegal or *ultra vires* or outside the functions of the Respondents. A decision can only be quashed if the body acted without jurisdiction or in excess of its powers or if the decision is so perverse or unreasonable that it would be against the sense of justice to allow it to stand.

71. As discussed above, the Respondents are vested with powers to undertake the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that the power was not exercised as provided for under the law. It has not been proved or even alleged that the Respondents acted outside their powers. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the Courts unless the decision under challenge is illegal, irrational, or un-procedural.

72. It is common ground that 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.[45] *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.[46]

73. *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**.[47]

74. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, for example where the applicant has unreasonably delayed in applying for Judicial Review, where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or perform its duties, or where the judge considers that an alternative remedy could have been pursued. In this case, there are allegations of on payment of duty, there are allegations of tempering with the contents of the consignment, and generally breach of the law. Also, there are available dispute resolution mechanisms under the relevant statutes. The court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

75. In view of my analysis and conclusions herein discussed above, the conclusion becomes irresistible that this applicant has not established any grounds for the court to grant the Judicial Review orders sought. Further, the application is totally misconceived and lacks basis both on merit and substance. Consequently, I dismiss the applicant's application filed on **11th** June 2018 with no orders as to costs.

Orders accordingly.

Dated, Signed and Delivered and Dated at Nairobi this 13th day of November 2018

John M. Mativo

Judge

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[1] Act No. 2 of 1995.

[2] Cap 26, Laws of Kenya.

[3] Civil Appeal No. 27 of 1989, Nyarangi JA., Gachuhi JA., Kwach Ag. JA.

[4] Supra.

[5] {1962} 1 EA 520.

[6] Supra.

[7] {1990- 1994} 1 E.A 482.

[8] {2017} eKLR.

[9] Cap 2, Laws of Kenya.

[10] High Court Constitutional Petition No. 89 of 2008.

[11] Cap 26, Laws of Kenya.

[12] Civil Appeal No. 27 of 1989, Nyarangi JA., Gachuhi JA., Kwach Ag. JA.

[13] Cap 26, Laws of Kenya.

[14] **{1995} eKLR.**

[15] Cap 26, Laws of Kenya.

[16]*Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and* [2000]

[17] *2000 (2) SA 674 (CC) at 33.*

[18] *Republic v Speaker of the Senate & another ex parte Afrison Export Import Limited & Another* {2018}eKLR.

[19] Ibid.

[20] Ibid.

[21] {2013}eKLR.

[22] Citing *Kenya Country Bus v Cabinet Secretary for Transport.*

[23] Counsel cited the case of *Kenya Revenue Authority v Habimana Sued Hemed & Another* [2015] eKLR and *Kenya Revenue Authority v Rejendra Sangeni* [2006] eKLR.

[24] Counsel cited *Real Deals Limited & Others v Kenya National Highways Authority & Another* {2015} eKLR.

[25] See *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* {2014} eKLR.

[26] Act No. 2 of 1995.

[27] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29

[28] {1985} AC 374.

[29] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[30] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[31] {2015} eKLR.

[32] *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC).

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

[34] Act No. 4 of 2015.

[35] By Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (4) SA 674 (CC)* at page 708; paragraph 86.

[36] In *Trinity Broadcasting (Ciskei) v ICA of* SA, 2004(3) SA 346 (SCA) at 354H- 355A, Howie P

[37] Act No. 4 of 2015.

[38] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[39]Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd,* {1995} 1 All ER 129 (HL) at 157.

[40] See *Carephone (Pty) Ltd v Marcus NO 1999 (3) SA 304 (LAC)* at 316, para 36, per Froneman JA.

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

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

[43] {1985} 6 FCR 155

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

[45] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[46]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[47] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review,* 53 GEO. IJ. 19, 25-26 (1964).