



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

PETITION NO. 342 OF 2016

**IN THE MATTER OF ARTICLE 22(1), 165, 258 AND 259 OF THE CONSTITUTION OF KENYA,
2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL
FREEDOMS UNDER ARTICLES 10,27,35(2),40 ,47,50(1) AND 73 (1)
OF THE CONSTITUTION OF KENYA , 2010.**

AND

IN THE MATTER OF COMMISSIONER OF CUSTOMS & BORDER CONTROLS

AND

IN THE MATTER OF THE WRONGFUL IMPOUNDMENT AND DETENTION

OF IMPORTED GOODS UNDER ENTRY NO. 2016 MSA 6030784

AND

IN THE MATTER OF THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT

ACT, 2009 AND THE EAST AFRICAN CUSTOMS REGULATIONS, 2010

BETWEEN

STANDARD RESOURCE GROUP LTD.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

COMMISSIONER GENERAL

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

COMMISSIONER FOR CUSTOMS & BORDER CONTROLS...3RD RESPONDENT

RULING

1. This ruling determines the Notice of Motion dated 10th August 2016 brought under certificate of urgency, simultaneous with the constitutional Petition dated the same day by the petitioner Standard Resource Group Limited against the respondents who are the Honourable Attorney General, The Commissioner General of Kenya Revenue Authority and The Commissioner of Customs and Border Controls.

2. The Notice of Motion is expressly brought pursuant to the provisions of Rules 4,23,24 of the Constitution of Kenya(Protection of Rights and Fundamental Freedom Practice Procedure Rules, 2013 Section 122(3) of the East African Community Customs Management Act and Rule 3 of the High Court Practice and Procedure Rules).

3. The notice of motion seeks for the following orders:-

1. Spent

2. Spent

3. Spent

4. That this Honourable court be pleased to order the 3rd respondent to release the petitioner/applicant's wrongfully impounded goods under Entry No. 2016, MSA 6030784 to the petitioner free of any warehousing **demurrage**, port plus VAT and storage charges that would have accrued on the petitioner depositing kshs 7,587,604 as security pending the hearing and determination of this petition.

5. That cost of this application be provided for.

4. The application is predicated on 10 grounds namely:

1. That this court has the power to protect fundamental rights both during the pendency of a suit and after the fact; the interest of justice will be served by an immediate release of the petitioner/applicant's cargo upon its furnishing security, which it is ready and willing to do;

2. Without the court's intervention, the 2nd and 3rd respondents have the power under Section 122(3) of East Africa Community Customs Management Act to release to the owner imported goods, where a security is furnished;

3. That as it had, on previous occasions of importation of its steel products from China, the petitioner's duly licensed clearing agent supplied the 3rd respondent with the necessary documentation, customs duty and VAT payable was assessed based on those documents; the petitioner paid the customs duty and VAT payable and it also paid the assessed amounts and its goods were released.

4. That on 11th January 2016, the petitioner entered into a contract of supply of the impounded imported goods under Entry No. 2016 MSA (Hong Kong) Ltd at CF price of US\$ 783,750; the imported goods arrived at Mombasa on 26th May 2016 and customs duty was assessed at shs 37,503,713; which the petitioner duly paid but that the 3rd respondent declined to release the said goods unless the petitioner paid additional customs duty and VAT in the sum of kshs 31,845,047 without giving the petitioner the reasons for this demand and declined, which act was in contravention of Article 47 and 50 of the Constitution, and therefore violating the petitioner's right to a chance to correct any misleading information whose effect was adverse to it under Article 35(2) of the Constitution and a breach of its right to its property under Article 40 of the Constitution;

5. That the petitioner wrote a letter dated 1st July 2016 appealing against that verbal demand by the 3rd respondent for an additional custom duty and VAT and on 15th July 2016 two weeks later purporting to claim that the 3rd respondent had calculated the customs value based on a transaction value under part 1(3) of the Fourth Schedule to the East Africa Community Customs Management Act instead of part 1(2) of the Fourth Schedule as it had previously done; but that it never gave reasons why this particular transaction was now being considered under Part 1(3) of the Fourth Schedule and the reasons were only tendered after the adverse decision had been taken.

6. That the 2nd respondent's valuation team had found that the custom value payable was USA \$313 per metric ton for deformed steel bars and despite the fact that the petitioner believed that it had lawfully paid the correct customs duty and VAT, it agreed to pay additional custom duty and VAT in the sum of shs 7,587,604 under Section 122(3) of the East Africa Community Customs Management Act, 2009 since the 3rd respondent is empowered under the Act to deliver the imported goods to the petitioner pending the resolution of the dispute value of those goods upon the provision of sufficient guarantee of surety, a deposit or some security which secures the ultimate payment of customs duties for which the goods may be liable;

7. That despite the petitioner's advocates letter dated 19th July 2016 and email reminder of 29th July 2016 the 3rd respondent has failed to respond. Further, that on 18th July 2016 the petitioner requested the 3rd respondent to invoke its powers under Section 122(3) to deliver the goods upon deposit of the said sums of money to the tune of shs 7,587,604 as security pending the determination of the custom value that was applicable to it.

8. That the petitioner/applicant has a prima facie case with a probability of success.

9. That the petitioner/applicant stands to suffer gravely as it has to pay the entire contract sum as per the contract dated 11th January 2016 and it stands to be sued for breach of contract.

10. That steel is highly perishable goods through rusting thereby losing its value by the time a decision is taken on the determination of the custom value payable. That it is in the interest of justice that the conservatory orders sought be granted and that the categories of conservatory orders are not closed.

5. The above grounds are further supported by the supporting affidavit of Mr Wu Jun, the petitioner's director, provisions of the law as cited and several annexures to the application and the petition. The supporting affidavit of Wu Jun seeks to rely heavily on the petition and affidavit in support of the petition, and also reiterates the grounds as replicated in this ruling, while also annexing exhibit WJ-1 a letter dated 15th July 2016 from Kenya Revenue Authority demanding for taxes on appeal for steel imported under Entry No. 2016 MSA 6030784; a pro forma invoice dated 8th August 2016 for shs 28,020,115.00 and a letter dated 18th July 2016....

6. The Notice of Motion was first brought during the recess on 10th August 2016 upon which the court certified the matter as urgent and directed the petitioner to serve the respondents for interpartes consideration. The petitioner complied with the directives of the court and on 15th August 2016, its advocate effected service of the petition and the application upon the respondents who have to date not filed any response to the application, although they are ably represented in court by their counsel Mr Lemiso who was granted leave to file a response on 18th August 2016 within 10 days but as at the time of hearing the application on 31st August 2016, no such responses had been filed.

7. The petitioner avers that it is a limited liability company duly incorporated in Kenya under the repealed Cap 486 Laws of Kenya and in the business of importing hot rolled deformed steel bars and steel plates from the Republic of China for sale in Kenya and intending to open a steel plant in Kenya. That its main customers are building contractors, hardware shops and other parties in the construction

industry thereby necessitating frequent importation of steel as the few steel plants in Kenya cannot meet the great demand in the said booming construction industry.

8. Further, that it obtains from its suppliers deformed steel bars under a 180 days credit and that in order for it to meet the 180 days deadline, its goods must be released by the respondents soon after the customs duty is paid so that they are sold and the purchase price be paid.

9. In addition, that it imports the steel bars depending on the orders received from its customers and that this is not the first importation that it has had as the subject consignment is the 6th one which arrived at the port of Mombasa on 26th May 2016. It is contended that the East Africa Community Customs Management Act gives the petitioner only 21 days within which to pay customs duty and secure a release of the imported goods without incurring any demurrage and storage charges and that only compliance with the law makes its goods competitive in the Kenyan market.

10. The petitioner/applicant further avers in the petition that after the 21st day of free storage, the following extra charges are payable:

a. Demurrage @ \$ 2 per ton per day for cargo of 2,667-88 tones; total daily charges payable are $2,667.88 \times \$ 2 = \$ 5,335,76$ per day.

b. Port charges at the rate of shs 27 per ton per day for same cargo plus VAT. Total daily charge is $2,667.88 \times 27 + \text{VAT } (16\% \times 2,667.88 \times 27 = 83, 558. 0016$ per day.

c. Customs warehouse rent.

d. Interest on a,b, and c

11. It is further averred that the petitioner/applicant also risks paying damages to foreign suppliers as well as domestic customers besides the risk of further losses arising from the damage of the deformed steel bars whose quality will be lowered thereby creating cash flow problems. In addition, the petitioner averred that the 3rd respondent's refusal to invoke Section 122(3) of East Africa Community Customs Management Act has denied him the right to fair administrative action as espoused in Article 47 of the Constitution and that it has also deprived the petitioner of the right to be protected from arbitrary deprivation of property as enshrined in Article 40 of the Constitution.

12. Dr Gibson Kamau Kuria, counsel for the petitioner/applicant submitted, in addition to the averments and deposition made by the petitioner/applicant's director Mr Wu Jun, urging the court to apply the test set out in the case of **Gatirau Peter Munya Vs Dickson Mwenda Kithinji & IEBC, Supreme court of Kenya App No. 5/2014** on the principles upon which conservatory orders will be granted and that in this case, prayer No. 4 is for a conservatory order, pending the hearing and determination of the petition.

13. On behalf of his clients, Dr Kamau Kuria submitted that his client denied ever understating the value of the imported goods (steel bars). He maintained that the petitioner was not involved in the process that led to the raising of the duty on the allegations that it had understated the value of the goods, which act is in violation of Article 47 of the Constitution. Further, that Article 47(2) of the Constitution mandates a public authority to give reasons as to why the enjoyment of a fundamental right has been interfered with adversely by an administrative action. That the petitioner having paid duty of over 37 million as assessed, it had a right to be involved in the subsequent process of assessing additional duty if any, since the decision by the 3rd respondent was to affect the petitioner/applicant's fundamental right of enjoyment of its property in the imported goods.

14. Further, it was submitted that even assuming that there was an understatement, the petitioner was entitled to reasons that it had understated the value of the goods. Counsel relied on the decision by Majanja J in **Geothermal Development Company Ltd Vs Attorney General & Others (2012) e**

KLR where the court interpreted the right under Article 47 of the Constitution following an agency notice being sent to the bank to stop operations of the petitioner by Kenya Revenue Authority, in breach of Article 47 of the Constitution. Counsel further submitted that the petitioner was entitled to the right to be furnished with public documents which affected its enjoyment of the fundamental right and a right to the correction of erroneous decision or information. That the petitioner was confronted with an oral demand and decision that it had understated the value of the goods and even after it wrote denying the allegations, the 3rd respondent took two weeks to reply by which time the goods had been detained and losses incurred which in the petitioner's view, is arbitrary deprivation of the right to property which right is guaranteed under Article 40 of the Constitution.

15. The petitioner further took great exception to the 3rd respondent's refusal to invoke Section 122(3) of East African Community Customs Management Act which was enacted to ensure that economic commerce and performance of East African Community member countries do not suffer where there is a dispute over the customs duty due and payable, by empowering the Commissioner of Customs to release the goods upon a security being provided for the payment of the duty in dispute.

16. It was submitted that in this case, the petitioner offered to give security on realization of the commercial disaster in the offing but the 3rd respondent declined silently and that is why the petitioner approached this court for a remedy. Further, that the petitioner is still committed to providing security since the loss which is being incurred daily is about 500,000 besides steel being a perishable good once it rusts thereby losing its value. Further, that creditors who had given the petitioner grace period of 180 days to pay, and the local customers to whom the supplies were intended will sue for breach of contract.

17. On what security to give, reliance was placed on the case of **African Safari Club Ltd V Safe Rental, Ltd [2010] e KLR** where the Court of Appeal considered the overriding objectives of the law, to ensure that the petitioner gets substantive justice both at the interlocutory stage and at the full trial.

18. Further, it was submitted that the court must therefore be flexible and balance the relative hardships of each party. It was submitted that in the instant case, the petitioner has already parted with over 37 million yet it continues to suffer losses. It was also submitted that conditions for stay must be such as to allow parties to access justice hence the conditions must be fair. That the court has the power to order for deposit of security in cash, bank guarantee or title deed into court.

19. Counsel for the petitioner further submitted that in a case like this one where the respondents have been served with the necessary documentation, petition and interlocutory application but that they have deliberately refused to file any response, the court must take the view that the facts presented are not disputed as was held in the Nigerian case of **Punch Nigeria Ltd & Another Vs Attorney General & Others CHRD P.46-47**. It was submitted that the petitioner had filed a 51 paragraph affidavit in support of its petition and the 22 paragraph affidavit in support of this application but that none of those paragraphs have been controverted.

20. Reliance was further placed on the case of **Kariuki Gathitu Vs Attorney General Petition No. 1188/2003 O.S. (2013) e KLR** at paragraph 9 and 10 of the decision by Honourable Lenaola J.

21. On what orders this court can make under Article 23 of the Constitution, the petitioner's counsel submitted that Article 23 of the Constitution sets orders such as injunction, damages and conservatory order.

22. It was further submitted that the petitioner settled the customs duty of over 37 million within 12 days of the 21 days allowed from the date of importation therefore all the expenses incurred are due to the arbitrary acts of the 3rd respondent and that therefore without a conservatory order, this suit is an academic exercise which is a commercial disaster hence the court should consider rendering its decision expeditiously in order to salvage the dire situation.

23. In opposition to the application, on behalf of the 2nd and 3rd respondents Mr Lemiso submitted that his clients have issues with prayer 4 in terms of monies which are payable to other persons and not the 3rd respondent and that the 3rd respondent had no power to order 3rd parties to release goods free of charge. Further, that under Regulations 85 of the East Africa Community Customs Management Act, a tax payer can apply for waiver of the amount for warehousing for consideration by the Commissioner.

24. Further that under Section 122 (3) of the East Africa Community Customs Management Act, security once declared to be deposited has to be sufficient to secure the ultimate taxes payable, unlike in the present case where the security offered is not sufficient.

25. Counsel for the respondents also submitted that the respondents were willing to release the petitioner's goods if the petitioner pays to third parties their demurrage and port handling charges and that it should enhance security offered to cover the disputed taxes. Mr Lemiso urged the court not to disentitle his clients the benefit of reliance on oral submissions and instead invoke Article 159(2) (d) of the Constitution since Petition 1188/2003 relied on by the applicant's counsel was a judgment unlike in this case where the respondents still have a chance to file a response to the petition.

26. In a brief rejoinder, Dr Kamau Kuria for the applicant/petitioner submitted that the 3rd respondent has the discretion to ask for security but it has not and that it had been completely insensitive to the commercial urgency of the matter. Further, that this court being the guardian of the Constitution must ensure that each person's constitutional rights are protected. Counsel urged the court to adopt the approach taken by Honourable Majanja J in the Geothermal (supra) case that the respondent had new obligations under the Constitution and that all public officers are required under Article 10 of the Constitution to abide by the Rule of Law and not to arbitrarily exercise power against the petitioner.

Determination.

27. I have carefully considered the petitioner/applicant's application by way of Notice of Motion dated 10th August 2016 together with all the supporting documents. I have also considered the submissions by both counsels for the parties and the authorities relied on.

28. The High court has jurisdiction, in accordance with Article 165 of the Constitution, to hear and determine applications for redress of a denial, violation of infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. Pursuant to Article 22 of the Constitution, every person, including a non natural person like the petitioner/applicant herein, has an unfettered right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

29. And in determining proceedings wherein a person is seeking to enforce their rights under Article 22 of the Constitution, Clause 3(d) thereof is emphatic that the court, while observing the rules of natural justice shall not be unreasonably restricted by procedural technicalities.

30. In the application before hand, which is supported by the applicant's petition, affidavits and documents as exhibits, the petitioner / applicant claims that its right to fair administrative action has been violated , and that the applicant has also been denied the right not to be arbitrarily deprived of property in the goods described as Hot Deformed Steel imported from China , contrary to the provisions of Article 47 and 40 of the Constitution respectively.

31. Article 47 of the Constitution as implemented by Fair Administrative Action Act No. 4 of 2015 is clear that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair(Section 4(1)). Under Section 4(2) thereof every person has the right to be given written reasons for any administrative action that is taken against him. 3) where an administrative action is likely to adversely affect the right or fundamental freedoms of any person , the administrator shall give the person affected by the decision.

32. The Act further lists other essentials as follows:

- a. Prior adequate notice of the nature and reasons for the proposed administrative action;
- b. An opportunity to be heard and to make representations in that regard;
- c. Notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. A statement of reasons.
- e. A notice of the right to legal representation, where applicable;
- f. Notice of the right to cross examine, or where applicable;
- g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

33. A person aggrieved by an administrative action which adversely affects or is likely to affect the legal rights and interests of that person may challenge that action, as provided for in Section 5 of the Act, which challenge includes instituting such legal proceedings for such remedies as may be available under any written law.

34. This matter, I must emphasize, is not for Judicial Review application but a petition complaining that the petitioner's rights and fundamental freedom, as stipulated in Articles 40, 47,35 of the Constitution have been violated or infringed.

35. The dispute that necessitated these proceedings arose from the complaint by the petitioner/applicant that whereas it had imported Hot Rolled deformed bars with full description and declaration of their value to the Customs and Boarder Control as required by the East African Community Customs Management Act, after which, customs duty and other charges were duly assessed and which charges it settled in full, in a record time of 12 days from the date the consignment arrived at the port of Mombasa, that the 3rd respondent had nonetheless detained the said imported goods and demanded extra charges.

36. The applicant complains that the reasons for such detention were only communicated to the petitioner/applicant in writing on 15th July 2016, in response to a letter of inquiry written to the 3rd respondent by the petitioner/applicant on 1st July 2016, appealing against an oral adjusted customs value of the goods. The 3rd respondent's letter clearly reads in part

“The transaction value was not accepted on the basis that the accuracy of your declaration was doubtful. The goods description declared was in tandem with what was physically verified. The goods description in the transaction documents and the entry declaration particularly differed with what was physically verified. The goods are described in the documents as “Hot rolled deformed bars” without specifying the standard and the grade of the product. The marks and numbers found on the product indicted the description BS 4449-2005 and steel grade -B 500B.” The sticker found in the shipment indicted that the manufacturer as “Hebei Jinxi Iron Sheet Group Co. Ltd while your documents indicated a different manufacturer details.

The aforementioned inconsistencies raised doubt on the accuracy of your transaction value. The transaction value was consequently rejected in accordance with Section 12(4) of East African Community Management Act. The support documents did not satisfactorily demonstrate the transaction value. The transaction value did not satisfy the conditions stipulated in East African Community Management Act 4th Schedule Part 12(1) and (2). The goods customs value was therefore determined in accordance with the provision of in East

African Community Management Act 4th Schedule Part 1(3) - Transaction Value of Identical Goods, which reads “ where the customs value of the imported goods cannot be determined under the provisions of paragraph 2, the customs value shall be the transaction value of the identical goods sold for export to the partner state and exported at or about the same time as goods being valued.

The declared value was adjusted upwards to FOB-\$ 434 per metric ton. The extra taxes payable were as follows:

Import duty : kshs 16,009,614

VAT: Kshs 12,807,691

RDL : Kshs 960,377

IDF : Kshs 624,413

Total extra taxes payable kshs 31,845,047

Kindly make arrangements to pay the above extra charges promptly to avoid further escalation of penalties /interest in accordance with Section 135(2) of East African Community Management Act. At the same time present yourself for compounding of the case as provided for under Section 219 of East African Community Management Act.

Yours faithfully

P. BOIYWO

For Chief Manager- customs & Boarder Control MSA Regional HQS

Copy:

Commissioner- Customs & Boarder control Regional Coordinator –Southern Region

Deputy Commissions-Trade Facilitation

Chief Manager- Valuation & Tarriff HQS”

37. In its rebuttal to the above contents, the petitioner/ applicant by its detailed grounds and supporting affidavit to the petition and to this interlocutory application annexes documents showing the origin, and destination and description of the imported goods, together with the transaction documents and value of the goods.

38. I find it essential to make some comparisons between the documentation annexed to this application and petition and the allegations in the above reproduced letter in order for me to determine whether the applicant herein has established that it has a prima facie case against the respondents and whether the balance of convenience tilts in its favour as per the test set out in the Supreme Court Petition in the Gatirau Peter Munya case (supra).

39. Paragraph 36(b) of the petitioner’s affidavit in support of the petition annexes a bundle of tags which are said to be on the petitioner’s imported goods, giving the product name, standard, size, weight, Furnace No. rolling date, steel grade, length, quantity, Heat No. and Team. What is common on those tags is the standard which is BS 4449: 2005 and steel grade B 500B.

40. According to the respondents, the goods as described in the transaction documents and the Entry Declaration partially differed with what was physically verified. They allege that the goods are

described in the “**document**” as Hot rolled deformed bars” **without specifying the standard and the grade of the product.**

41. Comparing the above stickers/tags with annexures WJ 8 which is the contract dated 8th January 2016 between Manton Trading (Hong Kong) Limited and Avic International Minerals and Resources Company Ltd and wherein the manufacturer of the steel is stated as Hebei Jinxi Iron and Steel Group Co. Ltd, it shows that the commodity was Alloy Deformed Steel Bar, and the quality is given as BS 4449: 2005 B 500B. Other descriptions on diameter, length, quantity and price (FOB) are given, including weight tolerance.

42. Although the respondent claims that the transaction documents and Entry Declarations partially differed with what was physically verified and that the goods are described in the document as “*Hot rolled Deformed bars*” *without specifying the standard and the grade of the product*, no doubt, this court, in the absence of any forensic examiner’s report, is unable to accept that allegation for reasons that the annexures WJ 8 and WJ -9 being contract documents showing the origin of the product and how it reached the applicant and the port of Mombasa clearly spells out the standard – quality of the product as well as the grade, which is similar to what is contained on the tags found on the actual product.

43. Again, the Entry Pass annexure WJ 10 which is an East African Community document at paragraph 40(b) provides the description of goods as “218 bundles of Hot rolled Steel Deformed Bar, B4449B DLA 12mm x 12 mm” with a custom value given as well as VAT value and that is where shs 37,503,713 being grand totals of duties, taxes and other charges were arrived at. The same information is at paragraph 41 (b) of the same document, which gives the description of the goods as 224 Bundles of Hot Rolled Steel Deformed Bar B4449 500B and the document on page 95 paragraph 41(b) for 270 bundles of Hot Rolled Steel Deformed Bar.

44. The transaction documents accompany the Entry Declaration Form.

45. The burden of proof lies on the respondents to prove that there was misdescription of the goods in the transactions document, or in the documents found on the verified goods and the Entry Declaration documents.

46. At this interlocutory stage of these proceedings, the respondents have not supplied this court with any affidavit or other evidence to show such variance or partial differences between the physical verification and the documentation supplied by the petitioner/applicant.

47. At page 96 of the petition is a Commercial Invoice by Avic International Minerals and Resources Company Ltd to Manton Trading (Hong Kong) Ltd dated 16th March 2016 showing the description of the Alloy Deformed Steel Bars quality BS 4449: 2005 B500B, the unit price, total amount, diameter, length, number of bundles, gross weight, and quantity.

48. If those descriptions of standard and grade are the one which are found in the transaction documents examined above, and are in fact the same as what the respondent says “***The marks and numbers found on the product indicated the description as Hot rolled Deformed Bars, Standard BS 4449: 2005 and steel grade B500B,***” this court does not comprehend the rationality for the respondent’s claim that “***The goods are described in the documents as “Hot rolled deformed bars” without specifying the standard and grade of the product.***”

49. The other accusation leveled against the Petitioner/applicant is that the “***sticker found in the shipment indicated the manufacturer as “Hebei Jinxi Iron & Steel Group Co. Ltd” while your documents indicated a different manufacturer details.***”

50. The question is, what are the particular details that are given in the applicant/petitioner’s documents concerning who the manufacturers of the imported products are, compared to what was found on the sticker found in the shipment? The respondent does not disclose who that different manufacturer is. However, I have meticulously examined the documentation annexed to the petition. Annexure WJ 13

is a bundle of tags/stickers which are said to be affixed to the petitioner's imported goods, and which were physically verified by the 3rd respondent. Those tags or stickers do not show the manufacturer's name. The manufacturer's name is found on annexures WJ9 as Hebei Jinxi Iron & Steel Group Co. Ltd. Those annexures are contract or transaction documents between the seller of the goods being Manton Trading (Hong Kong) Limited and Standard Resource Group Limited the petitioner/applicant herein. It is dated 11th January 2016 and it gives the full description of the goods, including the standard BS4449: 2005 and grade B500B. It is the same goods and description which are contained in the annexure WJ-8 at page 85, being a contract between Avic International Minerals and Resources Co. Ltd as seller and Manton Trading (Hong Kong) Limited as buyer. The Manufacturer's name is given at page 86 as Hebei Jinxi Iron and Steel Group Co. Ltd.

51. As of necessity, I must pose the question as to- who is this different manufacturer indicated and which particular document was submitted by the petitioner/applicant herein to the 3rd respondent that created a cloud of doubt in the mind of the officials of the 3rd respondent herein that the declarations were doubtful? The objective view of this court is that on the material placed before me, prima facie, there is a line of consistency in the transaction documents descriptive of the imported goods, the tags on the goods and the Entry declaration.

52. Accordingly, there is in my view, absolutely no reason why the transaction value of the imported documents was rejected by the 3rd respondent in accordance with Section 122(4) of the East African Community Customs Management Act. Furthermore, the Commercial Invoice clearly shows the CIF and FOB values which were used as the transaction value, and which has not been disputed by the respondents.

53. In the premise, there is absolutely no justification for the 3rd respondent to purport to recalculate the taxes payable based on a different provision applicable to different goods since the transaction value in this case could overtly be determined under the provisions of Part 1(2) of the Fourth Schedule of East African Community Customs Management Act.

54. In my humble view, the action by the 3rd respondent's officials to detain the petitioner/applicant's imported goods cannot be justified even at this interlocutory stage in view of the above revelations which are uncontested facts and which facts are documented. It is an action that is calculated to deliberately and arbitrarily deprive the petitioner of its property described in the transaction documents for ulterior motives.

55. The petitioner/applicant paid all the Duty calculated as within 12 days of the arrival of its goods when the goods were detained by the 3rd respondent on the premise that it entertained doubts on the transaction value. However, nothing prevented the respondent from acting within the 21 days of arrival of the goods or the remainder number of days after the twelfth day when the applicant paid all duty as assessed, to carry out further verifications to establish any discrepancy if any all, between the import documents and the actual goods.

56. Under Article 23 of the Constitution, this court has the jurisdiction to grant orders of injunction, declaration, Judicial Review remedies as well as damages. The petitioner/applicant is questioning the respondent's exercise of statutory power arbitrarily and unreasonably with a view to denying it the rights to fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair, in contravention of Article 47 of the Constitution. **In Republic Vs Commissioner of Income Tax Exparte SDV Transami (K) Ltd [2005] A 346**, the court was clear that an aggrieved tax payer has every right to seek judicial intervention where he or she is questioning an exercise of public power by a public body.

57. Further, the court in **Mount Kenya Bottlers Ltd & 3 Others Vs Attorney General[2012] e KLR** Lenaola J citing Article 210(1) of the Constitution stated that a tax payer is not to be taxed unless the word of the taxing statute unambiguously imposes a tax on him. The Learned Judge adopted the holding in **R V Devon Council exparte Baker [1999] [1995] 1 ALL R 73,88-89** where Simon L.J of

the Court of Appeal stated that:

“ These authorities show that the claimant’s right will only be found to be established where there is clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how the power would be exercised in inconsistent with the statutory duties imposed on it. The doctrine employed in this sense is akin to an estoppel.”

58. In the instant case, the respondents, after assessing the import/customs duty and VAT payable, they doubted the petitioner’s documents so they proceeded to review the tax. They however did not call upon the applicant to participate in the process of carrying out that review expeditiously, efficiently and reasonably or even lawfully. They took their time as the 21 days free storage period was running out. And when the petitioner inquired, the 3rd respondent provided verbal reasons and demands for payment of over 31 million as additional tax. It took the respondents another 14 days to provide reasons in writing. Those reasons, from my own analysis of the documents in support of the petition, are in my view, and in the absence of any other evidence, absurd. They are vague and ambiguous. They do not reflect the factual situation. This court does not exist to aid any person to escape payment of accurate taxes to the tax collection agency. However, from the facts of this case which are uncontroverted, I have no doubt in my mind that the respondents officials are abusing their statutory powers for ulterior motives.

59. Even when the respondent’s counsel appeared in court at the hearing of this application, he submitted that his clients were willing to release the goods but that they had no powers over third parties who are owed money by the petitioner/applicant. He also submitted that the applicant can apply for waiver of charges. He did not submit on whether or not his clients were justified in detaining the goods for the petitioner and or whether the petitioner was guilty of any misfeasance or false declaration by way of misdescription of imported products as alleged in the impugned letter of 15th July, 2016. The question is, why would the applicant apply for waiver of charges which it is not even supposed to pay and which are occasioned by the respondent’s arbitrary action?

60. In my humble view, the respondents deliberately avoided to respond to this application and I can infer the reason to be that they had nothing to rebut. In the persuasive authority by the **Federal High Court in Lagos, Nigeria in Punch Nigeria Ltd & Another V Attorney General & Others reported in [1996] 1 Commonwealth Human Rights Division**, the Court in allowing an application and awarding damages held that:

”Where facts have been proven which prima facie showed an infringement, it was for the person alleged to have infringed that right to justify such infringement and in the absence of a counter affidavit, the averments contained in the supporting affidavit must be taken as true.”

61. In the instant case, the petitioner/applicant has demonstrated, prima facie, that no notice to show cause was issued to it as the importer, enumerating the reasons for the stand being taken by the customs, soon after paying the duty, to enable it make representation along with corroborative evidence upon which the adjudicative/administrative authority would be expected to follow the principle of natural justice or fair administrative action as stipulated in Article 47 of the Constitution and give a reasonable opportunity to the petitioner/applicant of being heard before the decision is made to charge additional taxes in accordance with the provisions of the East African Community Customs Management Act and other enabling provisions of the law.

62. Furthermore, that process must have some internal appeal mechanisms. In the instant case, I find that the respondents are using the law for wrongful purposes, to exert economic pressure and hardship to the petitioner/applicant so as to achieve an end which is improper. The court does not see any rationality connected to either the claim that there was partial differences in the documents in the description of imported goods as to standard and grade or to the allegations that the name of the

manufacturer of the imported goods was different and in what sense.

63. In my humble view, therefore, there is prima facie evidence that the respondents have trampled on the petitioner/applicant's fundamental right to fair administrative action and the right not to be arbitrarily deprived of its property described in the transactions documents and as declared in the import documents. There is also a further threat to infringe on that latter right by demanding additional tax based on an arbitrary assessment under a different paragraph of the EACCMA. The above infringements and threats to infringement, in my view, cannot be reasonably justified in the interests of justice and economic sense or well being of the petitioner/applicant.

64. The fact that the respondents have avoided the court at this interlocutory stage to challenge the detailed averments and depositions made by the petitioner/applicant is in my view is also suspect. A case is as important at every stage whether at its initiation, especially where mandatory orders are being sought pending the hearing and determination of the main claim or petition or at the full trial. In this case, I have no difficulty in finding that the respondents' avoidance of filing any opposing averments to the application herein is prima facie evidence that they had no legal authority for their actions of detaining the petitioner/applicant's goods and or for demanding for more taxes on the same goods as described in the transactions documents, tags, commercial invoice and declaration forms on entry.

65. The Constitution of Kenya, 2010, indeed, does not tolerate any arbitrary state action against any person unless such action is in conformity with the law. I am also in agreement with the persuasive decision of Lenaola J in **Petition No. 1188 of 2003(OS) Kariuki Gathitu V The Attorney General** that:

“ It is now trite that although a party alleging a fact has the onus of proof of that fact, the opposing party is at the very least expected to file a response to those allegations of fact. Where such a party actually appears in the proceedings but neither in pleadings nor in oral evidence does he answer to those facts – then the court can only but take it that those facts are actually uncontested.....”

66. The Learned Judge in the above case was persuaded by the decision in **HCC No. 1408/2004 Rumba Kinuthia Vs Attorney General** where the court stated that:

“Unfortunately, the respondent did not treat this case with the seriousness that it deserves. Despite the fact that the applicant made very serious allegations against the respondent

No affidavit was filed in reply so that all the facts deposed to by the applicant in his affidavit are what the court will take as representing the factual position.”

67. In the instant application, the respondents are well aware that in Constitutional Petitions, where a party seeks for a mandatory injunction or conservatory order, that party only needs to establish that they have a prima facie arguable case against the respondent to warrant grant of such orders. The tests applicable is that set out in **the Locabail International Finance Ltd V Agro Export and Others[1986] ALL ER 901** and **Shepherd Homes Ltd V Shadahu [1971] 1 ch D 34** and as adopted in **Belle Maison Limited Vs Yaya Towers Ltd HCC 2225/92** and **Ripples Limited Vs Kamau Mucuha HCC 4522/92** and more so in **Kenya Breweries Ltd & 2 Others Vs Washington Okeyo[2002] e KLR** where the Court of Appeal pronounced that:

“ the test whether to grant a mandatory injunctions or not is correctly stated in VOL 24 Halsbury's Laws of England 4th Edition paragraph 948 which reads:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances it will not normally be granted.

However, it the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the

defendant attempted to steal a match on the plaintiff.....a mandatory injunction will be granted on an interlocutory application”

68. In the Supreme Court Petition No. 2 of 2013 **Gatirau Peter Munya Vs Dickson Mwenda Githinji & 2 Others** the Supreme Court of Kenya set a threshold for the issuance of conservatory interim orders in a Constitutional Petition as follows:

“.....the test for the grant of conservatory orders under the constitutional applications must be qualified to take into account the premium that the Constitution places upon the enjoyment of fundamental rights. Such premium is to be seen in the easy access to the court that is granted to the applicants in terms of locus standi and the formality of documentation (see Article 22 of the Constitution).

In such circumstances the balance of convenience test upon an arguable case being demonstrated by the applicant is more appropriate to preserve the enjoyment of rights pending hearing and determination of the petition for breach of fundamental human rights and freedoms.

Needless to state in terms of Article 24 of the Constitution, the balance of convenience must involve balancing the rights of the applicant against the rights of others whose enjoyment of those or other rights may be jeopardized or affected by the enjoyment by the applicant of the rights in question”

1. This ruling determines an interlocutory application for conservatory mandatory orders, hence it does not make a definitive finding of the merits or demerits of the main petition. However, I am satisfied that on the material placed before me, the petitioner/applicant has satisfied the tests and thresholds set out in the **Gatirau Peter Munya** (supra) and in the decision by Mureithi J in **Mombasa Branch Vs Mombasa County Council Constitution Petition No. 3/2014** where the learned Judge held that:

“ With respect, although the counsel for respondents submitted on the basis of the standard of prima facie case with regard to temporary injunctions in civil cases as established by the decision on Giella Vs Cassman Brown [1973] EA 358, the test for the grant of conservatory orders under constitutional applications must be qualified to take into account the premium that the constitution places upon the enjoyment of fundamental rights. such premium is to be seen in the easy access to the court that is granted to the applicants in terms of locus standi and the formality of documentation (See Article 22 of the Constitution). In such circumstances the balance of convenience test upon an arguable case being demonstrated by the applicant is more appropriate to preserve the enjoyment of rights pending hearing and determination of the petition for breach of fundamental human rights and freedoms. Needless to state, in terms of Article 24 of the Constitution the balance of convenience must involve balancing the rights of the applicant against the rights of others whose enjoyment of those or other rights may be jeopardized or affected by the enjoyment by the applicant of the rights in question.”

69. The court notes that although the rights complained of are private individual rights, this court must not lose sight of the investor contribution to the economic growth and economic development of Kenya through massive job creation and general infrastructure growth. It therefore follows that any unlawful, unreasonable and arbitrary or oppressive actions of the state and its machinery amounting to abuse of power geared towards killing investor confidence is prejudicial to the public good of this country. The laws of any country and their implementation must be with a view to boosting and inspiring investor confidence by creating or facilitating the creation of an enabling environment for ease of doing business with the outside world as well.

70. It does not make any economic sense for one to import goods and pay premiums which have the effect of destroying their business ventures. Furthermore, verbal demands for such high amounts of taxes are a panacea for arbitrariness and leeway for engagement in corrupt practices since no record would

show that such sums were demanded and or paid. It is the taxes that lubricate or sustain the economy of this country and from which all citizens enjoy the public good provided by the state. Therefore, a court of law cannot be seen to be blocking the way of tax collection. However, the respondents have not come to court to explain the bare minimum of, for example, what evidence they have of what those “identical goods” were used to get the new transaction value imposed on the petitioner/applicant’s goods are.

71. The function of this court is indeed to consider whether the process leading to detention of the goods was done within the respondent’s mandate under the East African Community Customs Management Act; whether it was reasonable and or complied with Rules of natural justice.

72. The court acknowledges that the 3rd respondent is the state’s gate keeper on matters of import and export tax. It is expected to be vigilant to avoid tax evasion and economic sabotage but it must not lose site of the constitutional imperatives and the fact that economic ventures leave an indelible marks to our economy.

73. In my humble view, it is the arbitrary, oppressive and unreasonable actions of the respondents who are the agents of the state that have caused delay of the petitioner/applicant’s goods at the port of Mombasa, since it had settled duty assessed within the 21 days of free storage period. Any expenses incurred after the 21st day are due to the exercise of arbitrary power by the officials of the 3rd respondent, who have even refused to exercise discretion under Section 122(3) of East African Community Customs Management Act to demand for sufficient security to be deposited by the petitioner/ applicant, upon which the goods would be released to avoid unnecessary expenses that would render the importation of the goods, which in any case, have not been said to be counterfeits, uneconomical.

74. As was held in **Keroche Industries V Kenya Revenue Authority & 5 Others**, if a decision is oppressive or unreasonable it amounts to an abuse of power. The respondents did not stand to suffer any prejudice if they exercised their discretion under Section 122(3) of the EACCM Act. Economic sabotage to a bonafide investor is equivalent to terrorizing them and discouraging other intending investors. But this is not to say that where tax is due then it should be avoided or at all. Under Article 210 (1) (b),(e), of the Constitution, no tax or licensing fee may be imposed, waived or varied except as provided by legislation and each waiver, and the reason for it, shall be reported to the Auditor General. In the instant case, what the court deciphers from the petitioner’s complaint is that the additional tax which it is being asked to settle is unlawful since it has not been shown that it has breached any import regulations under the East African Community Customs Management Act. The officials of the respondents, it must not be forgotten, are public officers and are bound by the national values and principles espoused in Articles 10 and 232 of the Constitution which include the rule of law, good governance, transparency and accountability for administrative acts, efficient, economic use of resources, responsive, prompt, effective , impartial and equitable provision of services, transparency and provision to the public of timely accurate information.

75. In my humble view, if this court were to wait until the petition which has not been responded to is heard and determined before granting any conservatory orders, in my humble view, even where damages are pleaded and can be quantified, such damages would be too much an expense to the tax payer to compensate an individual, the petitioner/applicant and therefore the court would not have contributed to the promotion of those national values and principles espoused in Article 10 and 232 especially on efficient, effective and economic use of resources.

76. I find that this is a case where on the material presented before the court, a tribunal properly directing itself will conclude that prima facie there exists a right which has apparently been infringed or threatened to be infringed by the opposite party as to call for an explanation or rebuttal from the latter(see **Mrao V First American Limited & 2 Others [2003] KLR**).

77. As seen from the transaction documents which include contracts with the sellers of the goods in China, the petitioner/applicant was expected to settle the entire CIF value of \$ 783,750 within 180

days after 26th May 2016 when the cargo was received.. That period is quickly coming to an end while the goods are arbitrarily being detained by the 3rd respondent.

78. It is also not denied that the steel material imported are perishable with attendant risk of damage by human intervention and elements may so deteriorate by rusting thereby rendering them worthless or of little value by the time the dispute herein is heard and determined on its merits.

79. That being the case, it would be extremely oppressive if the petitioner/applicant were to eventually succeed in its claim only to lose the whole value of its goods on account of their long detention and attendant deterioration as was held in **Republic Vs Commissioner of Customs and Excise Exparte Abdi Gulet Olus [2014] eKLR.**

80. Albeit the 3rd respondent's counsel claimed that it has no powers to waive charges owed to third parties, this court has not been shown who those third parties are and or whether or not they are the agents of the respondents. Further, as the detention of the goods is prima facie unjustified, arbitrary and unreasonable on the part of the third respondent which is a public authority, any damages loss would be attributed to the actions of the 3rd respondent.

81. Accordingly, I allow the petitioner/ applicant's application dated 10th August 2016 and make orders as prayed for in prayer No. 4 save that the security deposit which the 3rd respondent prayed that it be enhanced shall be so enhanced to the sum of kshs 20,000,000 twenty million Kenya shillings in the form of a reputable Bank Guarantee deposited with the court and the 3rd respondent within 7 days of this ruling.

82. This order does not foreclose the parties' earlier intentions and efforts to have this dispute resolved amicably. The parties are implored to explore possible alternative dispute resolution mechanisms as espoused in Article 159 of the Constitution.

83. As there is no agreement as to costs, the 3rd respondent shall bear the costs of this application.

Dated, signed and delivered in open court at Nairobi this 2nd Day of September 2016.

R.E. ABURILI

JUDGE.

In the presence of:

Dr Kamau Kuria Counsel for the Petitioner/Applicant

Miss Amadi Counsel h/b for Lemiso advocate for the 2nd and 3rd Respondents

Court Assistant: Adline