REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 167 OF 2016

IN THE MATER OF AN APPLICATION BY CIMBRIA EAST AFRICA LIMITED, THE APPLICANT FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF A DEMAND DATED 31ST MARCH 2016 BY THE COMMISSIONER INVESTIGATION AND ENFORCEMENT, THE KENYA REVENUE AUTHORITY.

CIMBRIA EAST AFRICA LIMITED …….....APPLICANT

VERSUS

THE COMMISSIONER OF INVESTIGATION

AND ENFORCEMENT……..…….1ST RESPONDENT

THE COMMISSIONER OF CUSTOMS SERVICES…...2ND RESPONDENT

JUDGMENT

1.By a notice of motion dated 22nd April 2016, pursuant to leave to apply issued on 12th April 2016,the exparte applicant herein Cimbria East Africa Limited seeks the following Judicial Review Orders:

> ***1) An order of certiorari to remove into the High Court for purposes of it being quashed the demand of the Commissioner of Investigations and Enforcement dated 31st March 2016 claiming for payment of customs duty from the applicant in the amount of Kshs 99,934,908 to the Commissioner of Customs Services.***
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> ***2) An order of prohibition to prohibit the Commissioner of Investigations and Enforcement from demanding customs duty from the applicant in terms of the demand dated 31st March 2016.***
>
> ***3) An order that the respondents do pay the costs of the proceedings.***

2.The exparte applicant's case is premised on the statement filed on 12th April 2012 and the verifying affidavit sworn by Joseph Mwangi Mburu, the applicant's Finance Manager sworn on 11th April 2016.

3.According to the deponent, the applicant is a company dealing substantially in selling post- harvest equipment for the cleaning, storage, milling and grading of grain. It sells the equipment to both private and Government entities which include the National Cereals and Produce Board.

4.That on 31st March 2016, the 1st respondent who is the Commissioner of Investigations and Enforcement made a demand for Customs Duty in the sum of Kshs 99,934,908 without giving any explanation for the said demand.

5.That although the applicant requested for reasons for the basis of the demand for Customs Duty, none were forthcoming from the respondents herein, and that the 1st respondent alleged that the said customs duty is due to the 2nd respondent, the commissioner of Customs Services between 2010 and 2013.

6.That after conducting a tax audit at the exparte applicant's premises the 1st respondent herein issued a letter of findings dated 17th February 2015 claiming for Corporation Tax, Withholding Tax and Value Added Tax allegedly owing, but that no reference was made to Customs Duty Tax.

7.That later, on 8th May 2015, the 1st respondent issued a second demand letter, demanding for Corporation Tax, Withholding Tax, Value Added Tax and Customs Duty of shs 86,619,537.

8.That on 28th May 2015 through its tax advisors, the applicant responded to the demand by the 1st respondent and indicating that the applicant was unaware of any previous claim raised on customs duty, while asking for the basis upon which customs duty was being demanded.

9.That on 11th June 2015 the applicant's tax advisors wrote back to the 1st respondent explaining that they had not raised objections to the demand for Customs Duty but that they had sought an explanation and time to study the documentation and confer with the applicant before reverting.

10.That on 22nd October 2015 the 1st respondent wrote another letter attaching some documents and demanding for payment of Customs Duty.

11.That the applicant confirmed from its records that Customs Duty claimed was paid and that the meetings between the 1st respondent and the applicant confirmed that position.

12.That even thought, the vast majority of the claimed outstanding Customs Duty as paid was evidenced by the payment receipts submitted to the 1st respondent as shown by bank slips.

13.That after holding a meeting with the 1st respondent, the applicant wrote to the 1st respondent on 23rd November 2015 setting out a raft of issues challenging the documentation supplied by the 1st respondent namely:

> ***a)That several entries cited by the 1st respondent showed that the importers of the goods sought to be taxed as third parties and not the applicant herein; that some of the entries did not bear Kenya Revenue Stamp.***
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> ***b)That in the description of some of the goods cited by the 1st respondent, the goods were motor vehicles which were never imported by the applicant. The applicant specifically stated that it imported only plant and machinery and spare parts for the same and that the applicable taxes had been paid.***
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> ***c)That some of the clearing agents referred to in the documents relied on by the 1st respondent, namely, Agility Logistics Limited, Freight Care Logistics and Logistics Three Sixty Five Limited, were never contracted by the applicant as alleged or at all; hence; the 1st respondent's information on the Customs Duty claimed was false.***

14.That the respondent totally refused to address the above issues raised by the applicant and only

persisted in demanding for the customs duty vide its letter dated 31st March 2016 without laying any basis for the demand and without addressing the anomalies. That therefore the applicant was compelled to seek the court's intervention because the demand for payment of customs duty is unlawful, unreasonable, unjust and without basis.

15.That the 1st respondent in demanding for customs duty without providing any reasons, they are acting unfairly, unprocedural, unreasonably and in gross violation of the applicant's constitutional right to fair administrative action that is lawful, fair, reasonable and procedural.

16.That as the sums demanded are considerably substantial, the applicant will suffer substantial financial loss and damage to its business including shutting down thereby impacting negatively on third party businesses including farmers who benefit greatly from the applicant's services.

17.That the applicant being a major supplier of critical equipment to the National Cereals and Produce Board, the activities of the applicant have a direct impact on food security within the country and that if the orders herein sought are not granted and the applicant's business is grounded, this will have drastic ramification across the entire country.

18.The applicant further avers that it will suffer substantial loss if the demand dated 31st March 2016 is not quashed.

19. Both respondents filed notice of appointment of advocates and on 26th July 2016 they filed a notice of preliminary objection dated 25th July 2016 contending that:

> ***a)The application offends the mandatory provisions of Sections 229 and 230 of the East African Community Customs Management Act and the Provisions of Section 2 and 13 of the Tax Appeals Tribunal Act, 2013 hence the same should be struck out with costs to the respondents.***

20.The exparte applicant filed skeletal submissions on 22nd April 2016 and a bundle of authorities dated 22nd April 2016. The application was canvassed orally on 5th October 2016 with Miss Malik Advocate appearing for and submitting on behalf of the applicant. There was no appearance by the respondents.

21.In the exparte applicant's written submissions dated 22nd April 2016 which were highlighted by Miss Malik, it was submitted that the respondent's demand for Customs Duty payment by the applicant in the letter dated 31st March 2016 was not supported by any reasons or explanation for the demand since there had been no previous demand for Customs Duty.

22.That when the applicant through its tax advisor sought for an explanation of the basis of the demand, the respondent simply submitted a list of customs items which has been paid for and that despite the applicant pointing out that some entries were of goods which it never imported such as motor vehicles; and that some clearing agents listed on the entries were not appointed by the applicant, the respondents refused to give any explanation for the demanded Customs Duty Tax and simply asked for payment. Counsel relied on the decision in **PZ Cussons EA Ltd vs. Kenya Revenue Authority Petitioner No. 309 of 2012** where **Majanja J** held that reasons for demanding taxes must be given, explaining how the sums claimed were arrived at. It was submitted that it was unreasonable to demand for duty which was not due and fail to give reasons for the demand, which is in contravention of Article 47 (2) of the Constitution.

23.Further reliance was placed on **HC Miscellaneous Application No. 1768/2004 Republic Vs Kenya Revenue Authority exparte Fintel Limited** where the court held that the respondent was under a duty to give reasons and that giving reasons is " one of the fundamentals of administration." Further, that the duty to give reasons is now calcified in Article 47(2) of the Constitution.

24.Further reliance was also placed on Republic V Commissioner of Domestic Taxes Exparte Barclays

Bank of Kenya Limited HC Miscellaneous Application 46/2013 contained in the applicant's further bundle of authorities filed on 4th October 2016 on the principles applicable in applications for Judicial Review orders.

25.On the unprosecuted preliminary objection filed by the respondent's counsel on 26th July 2016, the applicant's counsel submitted that the facts placed before the court were uncontroverted . Further, that Sections 229 and 230 of the East African Community Customs Management Act would only come into play if reasons had been given to enable the applicant go for an appeal and or review before the Tax Revenue Tribunal.

26.Counsel also relied on Article 47(2) of the Constitution on Fair Administrative Action and **Republic Vs Commissioner of Domestic Taxes Exparte Barclays Bank of Kenya Limited, HC Miscellaneous Application 46/2013** where the court held that availability of other remedies is not a bar to granting Judicial Review reliefs.

27. In addition, counsel for the applicant submitted that the preliminary objection is a technical objection since no reasons for the demand for the taxes were given to the applicant. She urged the court to grant the Judicial Review orders sought in the application.

Determination

28.Judicial Review can be characterized as the rule of law in action. In **Regina (Alcobury) Developments Ltd and Others) v Secretary of State Environment, Transport and the Regions [2003] 2. AC 295 paragraph 75**, **Lord Hoffman** stated:

> **" There is however another relevant principle which must exist in a democratic society that is the rule of law…..The principles of Judicial Review give effect to the Rule of Law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by parliament……."**
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> **"……..the rule of law enforces minimum standards of fairness, both substantive and procedural" per Lord Steyn in Regina Vs Secretary of State for the Home Department Exparte Pierson [1998] A.C. 539, 591F.**
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> **Lord Bingham in the same decision of Regina V Secretary of State for the Home Department Exparte Pierson (supra) stated that :**
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> **Ministers and Public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably."**

29.In Mombasa Municipal Council V Republic & Umoja Consultants Ltd CA 185/2001, the Court of Appeal held:

> " **Judicial review is concerned with the decision making process, not with the merits of the decision itself: The court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matter……The court should not act as an appellate court over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision."**

30.Further, in **Republic vs. Kenya Revenue Authority exparte Yaya Towers Limited [2008] e KLR** the court held:

"The remedy of Judicial Review is concerned with reviewing not the merits of the decision of which the application for Judicial Review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority consulted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself , guilty of usurpation of power. See Halsbury's Laws of England 4th Edition VOL 1(1) paragraph 60.

As was further held in Chief Constable of North Wales Police V Evans [1982] 1 WLR 115 " Judicial Review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court."

31.Where there is an alternative remedy, except in exceptional circumstances, the Judicial Review jurisdiction would not be exercised and the court must not exercise it where there exist alternative remedy, or the Judicial Review is a last resort where there is an alternative remedy. (See **Regina V Dud sheath exparte Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C.J)**

32.In this case, the exparte applicant seeks for Judicial Review orders of certiorari to bring into this court for purposes of quashing the decision of the 1st respondent to demand payment of Customs Duty in the sum of shs 99,934,908 payable to the 2nd respondent. That decision was communicated to the exparte applicant vide letter dated 31st March 2016.

33.The exparte applicant further seeks for Judicial Review order of prohibition to prohibit the 1st respondent from demanding Customs Duty from the exparte applicant in terms of the demand letter dated 31st March 2016.

34.According to the exparte applicant, upon receiving the demand for Customs Duty, it wrote to the 1st respondent asking for an explanation for the demand since there had been no such demand before and more so, that no such amount of money could be due and owing by it to the respondents since the applicant had paid all the Customs Duty due as shown by banking slips.

35.Further, that some of the goods for which Customs Duty was demanded were not imported by the exparte applicant; and that some of the clearing agents who cleared the goods for which duty was being demanded are not the exparte applicant's agents.

36.In the exparte applicant's view, the demand for Customs Duty by the respondents is therefore illegal, irrational, and unreasonable and is made in bad faith.

37. In determining whether or not judicial review orders sought herein are available to the exparte applicant, it is important to appreciate the scope of judicial review remedies. The scope of Judicial Review remedies of certiorari, mandamus and prohibition as was well captured by the Court of Appeal in **Kenya National Examinations Council Vs Republic Exparte Geoffrey Gathenji Njoroge & Others CA 266/1996** where the Court of Appeal held inter alia:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue

proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way… These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done…Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter."

38.Therefore, with regard to the prayer for certiorari, it will issue if the decision is without jurisdiction or in excess of jurisdiction or unreasonable, illegal, or irrational or made with procedural impropriety. In such a case, certiorari, can quash a decision already made. Certiorari will also issue where the rules of natural justice and the right to a fair hearing are violated. Section 4 of the Fair Administrative Action Act No4 of 2015 spells out the scope of judicial review remedies as stipulated in Article 47 of the Constitution.

39.In the instant case, and as submitted by the exparte applicant's counsel, upon receipt of the demand notice for the payment of Customs Duty, the exparte applicant made efforts, to get an explanation from the 1st respondent the basis for the demand for the Customs Duty but that the 1st respondent kept demanding for payment and threatening to enforce payment and that later, the 1st respondent availed to the applicant details of the basis for the said Customs Duty which the applicant disputed , giving reasons but that the 1st respondent kept silent and instead demanded for payment.

40.Whereas this court does appreciate the need to collect taxes to lubricate the economy. In carrying out statutory mandates, the tax authorities must of necessity adhere to the law. As was held in **Keroche Industries Ltd V. Kenya Revenue Authority & 5 Others**:

" It is no good answer for the tax man to proclaim that shs 1 billion (approx) is intended to swell the public treasury because due to the application of the above principles that money is not lawfully due. Applying the same reasoning, to the matter before this court, it does not matter that the respondents say and think they are owed over a billion Kenya shillings. What matter is whether the amount is lawfully due and whether the law allows its recovery? It is not a question of impression or perception of what is owed, instead, it is what is anything is owed under the relevant law and whether its assessment and recovery is permitted by the applicable law. If rightly due, the huge amount notwithstanding the court

must uphold the right of recovery regardless of its consequences to the applicant and if not due under the law it must not hesitate to disallow it and must disallow it to among other things, to uphold both the law and the integrity of the Rule of Law."

41.From the above decision, it is noted that the tax collector is under a duty not only to collect taxes due but to give an explanation laying the basis upon which tax is demanded, and not just throwing figures at the tax payers.

42.However, the exparte applicant in this case does not stop at stating that the 1st respondent did not explain the basis of the tax Customs Duty. It goes further to state that when the 1st respondent finally provided the details of the Customs Duty as demanded, some of the imported goods were not the type of goods that the exparte applicant dealt in such as motor vehicles, since the exparte applicant only dealt in plant and machinery and its spares. Secondly, that the exparte applicant provided a list of clearing agents, some of whom were not agents of the exparte applicant and thirdly, that the exparte applicant had already paid Customs Duty for the imported goods.

43.In my humble view, for the court to determine that the Customs Duty demanded was not owed because it related to goods which the exparte applicant never dealt with, or for this court to determine that the named clearing agents were not the agents for the exparte applicant, or that the exparte applicant had paid all the Customs Duty for the goods that it imported during that period claimed by the respondents, the court will be delving into the merits or demerits of the demanded Customs Duty and not in the process by which that tax as demanded was arrived at. It is not within the province of this court to determine how much Customs Duty was due, and or whether or not the exparte applicant had paid all the Customs Duty due for the goods imported during the period and that therefore the 1st respondent had no basis upon which it was demanding for the nearly shs 100,000,000 as being the Customs Duty due on the listed items.

44.For this court to determine that the exparte applicant was not the importer of the items listed in the list provided by the 1st respondent, the court has to call for evidence to be adduced, showing what the exparte applicant is licensed to import. It must also call for evidence on who are the clearing agents for the applicant and eliminate all others who are strangers to the applicant. The court must also listen to the evidence of what items were imported by the applicant during the period in question and demand for proof of whether the Customs Duty assessed on those items was settled by the exparte applicant. In other words, the court will be hearing the merits and demerits of whether or not any Customs Duty is due to the 2nd respondent as demanded by the 1st respondent. And for this court to find that the demand for Customs Duty from the applicant by the respondents is illegal, it must be shown what specific provision (s) of the law was breached or violated by the respondents and or that the applicant was in the first place not and importer of any goods or at all and therefore no Customs Duty could be demanded of it under any circumstances.

45.In view of the above, I find that in this case, the court is being called upon to resolve a dispute on conflicting issues of fact. Such a dispute is not a suitable case for Judicial Review remedies since Judicial Review jurisdiction is a special jurisdiction which is neither civil not criminal. It is governed by Section 8 and 9 of the Law Reform Act, Cap 26 Laws of Kenya, the Fair Administrative Action Act No. 4 of 2015 and Order 53 of the Civil Procedure Rules.

46.Under section 4 of the Fair Administrative Action Act, 2015, the Act sets out situations that would warrant judicial review orders to issue. None of those situations outlined under the Act have been established to exist in the circumstances of this case.

47.In the instant case, for this court to determine the many questions in the dispute, the court will have to make certain declarations in the matter such as a declaration that no Customs Duty as claimed was due and owing by the applicant to the respondents, yet the exparte applicant has not sought any declaration orders as a Judicial Review remedy, as contemplated in Section 11 of the Fair Administrative Action Act No. 4 of 2015.

48.In addition, the exparte applicant has not sought for any directory orders for this court to compel the 1st respondent to provide the applicant with any other explanatory reasons for demanding the Customs Duty. It was not shown to the satisfaction of the court that the 1st respondent had no basis for demanding for Customs Duty since as conceded by the applicant, it had previously paid the Customs Duty that had been due. The fact that the 1st respondent had not, in its previous demands for VAT and Withholding Taxes not included Customs Duty does not on its own and prima facie preclude the 1st respondent from demanding for Customs Duty which may be due.

49.The exparte applicant failed to demonstrate to this court that it was not in any way liable to pay any Customs Duty or at all, and that therefore the demand thereof by the 1st respondent was illegal, irrational, unreasonable or with procedural impropriety or motivated by an ulterior motive. It was not shown what factors the 1st respondent ought to have taken into account but which it never took into account in demanding for the Customs Duty Tax and therefore calling for the intervention of the court by way of Judicial Review orders. Neither did the exparte applicant demonstrate to the court that the respondents in demanding for the Customs Duty were in breach of a specific statutory duty imposed upon them under the law.

50.The purpose of Judicial Review, as was earlier stated in Chief Constable of North Wales Police V Evans (supra) is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorized by law to decide of itself a conclusion which is correct in the eyes of the court.

51.In **Republic vs. Ministry of Planning & Another, Exparte Professor Mwangi HCC Miscellaneous Application 1769/2003**. The court quashed a decision of a statutory body for failing to comply with the legislative purpose and stated:

> **" so where a body uses its powers in a manifestly unreasonable manner, acts in bad faith, refuses to take relevant factors into account in reaching its decision or based on irrelevant factors, the court would intervene on that ground that the body has in each case abused its powers. The reason why the court has to intervene is because there is a presumption that where Parliament gave a body statutory power to act, it would be implied that Parliament intended it to act in a particular way."**

52.In the instant case, it has not been shown that the respondents failed to act in a particular way stipulated by statute or that the respondents abused their powers in a manifestly unreasonable way or acted in bad faith. In my humble view, anomalies relating to the entries concerning importation of goods, the types of goods imported and the names of clearing agents are not matters which relate to procedure but call for evidence to be adduced to determine the merits of the decision of the respondent to demand for Customs Duty.

53.Furthermore, where the Customs Duty is demanded in error, the exparte applicant has a remedy. It can object to such demand as stipulated in Sections 229 and 230 of East African Community Customs Management Act (EACCMA) or to appeal to the Tax Appeals Tribunal stipulated in the TAT Act of 2013 to challenge the correctness of the demanded tax since determination of taxes due involves calculations and verification of what was imported, and their value as declared by the importer.

54. This court does not buy the argument by the exparte applicant that the objection or appeal would only lie if reasons had been given to enable the applicant apply for review under sections 229 and 230 of the EACCMA or on appeal before the Tax Appeals Tribunal and that it has invoked Article 47(2) of the Constitution. In my humble view, the applicant can still challenge the demanded taxes through the statutory available channels by stating that it was not given reasons for the demand, or that the applicant did not import the goods for which Customs Duty was being demanded or that some of the clearing agents named were not contracted by the applicant and provide evidence to that effect.

55. Nonetheless, on the issue of whether or not reasons for the demand were provided by the 1st respondent, as I have stated above, the applicant clearly states that when the 1st respondent persisted

in its demand for Customs Duty and the applicant kept asking for reasons, there were meetings held and as shown by annexture JMN9, the applicant sets out a raft of issues referring to the 1st respondent's letter dated 22nd October 2015 which had attachments of Samba System entry numbers in respect of which the 1st respondent claimed that taxes had not been paid as shown by annextures JMN 10, JMN 11 and JMN-12.

56.In addition, although the exparte applicant invoked Article 47(2) of the Constitution on fair administrative action which is in order, the said Article is implemented through the Fair Administrative Action Act No. 4 of 2015. Section 9(2) of the Fair Administrative Action Act makes provision that:

> " **The High Court or a subordinate court under Subsection Shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **The High Court -- -- shall if not satisfied that the remedies referred to in Subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under Sub Section (1)**
>
> **Notwithstanding Subsection(3)the High Court…..may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."**

57.From the above provisions it is clear that the existence of alternative or internal mechanisms for appeal or review and all other remedies available under any other written law ousts the jurisdiction of the court from entertaining Judicial Review proceedings in the first instance, and the court is empowered to refuse to make Judicial Review orders or to direct that such mechanisms be exhausted first or on application, and upon being satisfied that there are exceptional circumstances, exempt the applicant from obligation to exhaust any remedy, if the court considers such exemption to be in the interest of justice.

58.In the instant, case, however, it is not the availability of alternative mechanisms for challenging the 1st respondent's decision to demand for Customs Duty alone that has characterized my findings. And even so, there was no application by the applicant for consideration as to whether or not there are exceptional circumstances warranting exemption from obligations to exhaust the objection to the demand for Customs Duty under the provisions of Sections 229 and 230 of the(EACCMA) and or the Appeal process under Section 2 of the Tax Appeals Tribunal Act, 2013.

59.From the reading of Section 9 (2) of the Fair Administrative Action Act, 2015, there is no discretion for the applicant to chose whether to exhaust or not to exhaust internal mechanisms or appeal process and it is only the court that can grant an exemption to exhaustion of other processes. In this case, the applicant never applied for grant of any orders of exemption as contemplated in Section 9(4) of the Fair Administrative Action Act No. 4 of 2015.

60.From the reading of the above Act, it is clear that Judicial Review remedies being discretionary it follows that they are of the last resort as the court is not bound to grant them as a matter of course. The applicant must satisfy the court that the provisions of Article 47 of the Constitution have been violated and/or that the conditions under section 4 of the Fair Administrative Action Act have not been complied with by the respondent to the letter in decision making processes. In **Republic Vs Judicial Service Commission exparte Pareno [2004] 1KLR 203-** it was held:

" The court may thus refuse to issue Judicial Review orders even where the requisite grounds exist, since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court

would not issue orders in vain even where it has jurisdiction to issue the prayed orders. And since the court exercises a discretionary jurisdiction in granting Judicial Review orders, it can withhold the gravity of the order where, among other reasons, the remedy is not necessary, not efficacious or where the path of the remedy is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which the application is made has already been realized."

61. By the Fair Administrative Action Act prohibiting the High Court from hearing and granting Judicial Review orders where there are other mechanisms for review or appeal, no doubt, the applicant was expected to exhaust those other available mechanisms or show that those other mechanisms are not efficient and or that following those other procedures would impede on its right to a fair trial., which, in this case, was not shown.

62.In **Samson Chembe Vuko V Nelson Kilumo & 2 Others [2016] e KLR**, the Court of Appeal citing several other decisions with approval among them:

> **i.Speaker of the National Assembly vs Karume [2008] 1 KLR 425 where the Court of Appeal held inter alia:**
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> **"……..where there is a clear procedure for the redress of any particular grievances s prescribe by the Constitution or the Act of Parliament, that procedure should be strictly followed…."**
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> **ii.And in Mutanga Tea & Coffee Company Ltd Vs Shikara Limited & Another [2015] e KLR the Court of Appeal reiterated the foregoing as follows:**
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> **"…….This court has in the past emphasized the need for aggrieved parties to strictly follow any procedures that are specifically prescribed for resolution of particular disputes (Speaker of the National Assembly V Karume)(supra), was a 5(2) (b) applicant for stay of execution of an order of the High Court issued in Judicial Review proceedings rather than in a petition as required by the Constitution. In granting the order, the court made the often –quoted statement that:**
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> **"[W] here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. (see also Kones v Republic & Another exparte Kimani Wa Nyoike & 4 Others [2008] e KLR (ER) 296)**
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> **"It is readily apparent that in those cases the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.**
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> **The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.**

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner.…

…..We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2) (c) and the very raison d'etre of the mechanisms provided under the two Acts……"

63.In **International Centre for Policy and Conflict & 5 others v. The Attorney General & 4 others** it was held:-

"An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant bodies or state organs to deal with the dispute under the relevant provision of the relevant statute...."

64.It is now settled law and judicial opinion that where the Constitution or any law provides a procedure for settlement of disputes, that procedure shall be followed before resort to the High Court or any other procedure provided by law. That is the effect of Articles 50(1) and 159(2) of the Constitution which stipulate that :

"50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body."

65. In Article 159(2) of the Constitution stipulates that –

"159(1) ……....

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) Justice shall be done to all, irrespective of status;

(b) Justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) Justice shall be administered without undue regard to procedural technicalities; and

(e) The purpose and principles of this Constitution shall be protected and promoted."

66.From the above decisions and provisions of the statute and the Constitution, it is clear that as recent as 27th day of May 2016 when the Court of Appeal rendered the decision in **Samson Chembe Vuko V Nelson Kilumo (supra)**, parties ought not to invoke the jurisdiction of the High Court in Judicial Review matters where there is an alternative dispute resolution mechanism established by an Act of Parliament and which is efficacious. In this case, it was not shown that the application of sections 229 and 230 of the EACCMA and the appeal process under The Tax Appeals Tribunal Act are not efficacious in the circumstances of this case.

67.Albeit the authorities, relied on by counsel for the applicant are relevant, they are however, not in pari

materia with this case, which raises serious unresolved conflicting issues of fact and which issues are likely to be a source of serious future conflicts since as earlier stated, Judicial Review applications do not deal with the merits of the cases but only with the process of decision making.

68.In other words, in Judicial Review applications, the court has jurisdiction to determine whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard or given an opportunity to be heard before the decision was made and whether in making the decision the decision maker took into account relevant matters or did not take into account relevant matters.

69.This court notes that the letter dated 31st March 2016 demanding for customs duty did refer to earlier communication, and meetings between the 1st respondent and the applicant's directors and it specifically mentioned that the Customs Duty as claimed was due and payable as a result of the imports claimed by the applicant that do not exist in the Simba System and others declared with lower CIF values between 2010 and 2013 years.

70.Although the applicant claimed that it was not responsible for the Simba System, it never raised any issue regarding the lower CIF values, which in my humble view, are serious matters which can only be determined either through internal appeal mechanisms or through the ordinary claims under the Civil Procedure Act or through claims of a declaratory nature, not by way of certiorari or prohibition, which the applicant herein has sought by its Notice of motion. The applicant had the option of filing a Constitutional petition to challenge the 1st respondent's decision and seeking for declarations since in a court faced with a constitutional petition would consider the evidence and merits of a decision.

71. I find that unlike in the decision by **Majanja J** in **PZ Cussons V Kenya Revenue Authority Petition 309 of 2012**, this is not a Constitutional Petition. There is a difference between a Constitutional Petition and a Judicial Review proceeding. In Constitutional Petitions, the court is bound to examine the merits of the decision of the public body and make a final determination on the merits thereof, unlike in the Judicial Review proceedings where the court's jurisdiction as earlier stated is confined to the legality, rationality, reasonableness and propriety of the process by which the decision maker arrived at its decision and as stipulated in section 4 of the Fair Administrative Action Act No. 4 of 2015.

72.Therefore, albeit **Majanja J** in the **PZ Cussons (supra)** case did, in determining the Constitutional Petition refer to Article 47(2) of the Constitution and held that there was the duty to give reasons on how Kenya Revenue Authority had arrived at the amount it claimed as tax and that the failure to give reasons was unreasonable, in the instant case, the letter dated 31st March 2016 gives reasons for the demand and the details are contained in annextures 10,11 and 12 to exparte applicant's sworn verifying affidavit sworn, and however inadequate the reasons may have been, it was upon the applicant to formally engage the 1st respondent further through the established statutory mechanisms to challenge the decision to demand for the Customs Duty as claimed and not just through letters since, in my humble view, an internal review mechanism or appeal mechanism would be presided over by more than one individual unlike in the case of correspondence letters shown which involved communication between a Mr O. Kwalia for Commissioner for Investigations and Enforcement, and the applicant herein or its tax advisors.

73.The court further notes that the decision in **JR 1768/2004 Republic Vs Kenya Revenue Authority exparte Intel Limited** was a Judicial Review proceeding challenging a letter " rejecting the applicant's objection to assessment of withholding tax……" and seeking that that order be quashed. In that case, therefore, unlike in the instant case, the exparte applicant sought to quash an order or decision that rejected the objection to assessment of Withholding Tax claimed. In the instant case, however, the exparte applicant has made it clear that the 1st respondent did misapprehend the applicant's letters seeking further information and mistook those letters for objection to assessment of Customs Duty and that the 1st respondent instead wrote on 6th July 2015 reiterating its earlier demand for the Customs Duty. According to the applicant, its letters to the 1st respondent through the applicant's tax advisors were not objections but merely seeking particulars with regard to the claim as well as time within which to confer and consider the demand.

74.It is from the foregoing analyses that I find that although this matter was not defended as such, but that the burden of proving the entitlement to the Judicial Review remedies sought in the Notice of Motion herein lay on the exparte applicant and not on the respondents. That burden was not discharged to the standard required, on a balance of probabilities. Accordingly, I find that the prayers sought in the Notice of Motion dated 22nd April 2016 are not merited and I proceed to dismiss it.

75. On the issue of costs, as the court has not been engaged in the determination of the merits of the impugned decision of the 1st respondent and as the respondents did not put up any useful fight to challenge these proceedings, I order that each party shall bear their own costs of these Judicial Review proceedings.

Dated, signed and delivered in open court at Nairobi this 16th day of November, 2016.

R.E. ABURILI

JUDGE

In the presence of:

Miss Malik for the Exparte applicant

N/A for the Respondents

CA: Adline