



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 235 OF 2012**

**TORNADO CARRIERS LIMITED.....PETITIONER**

**VERSUS**

**KENYA REVENUE AUTHORITY.....1<sup>ST</sup> RESPONDENT**

**COMMISSIONER OF CUSTOMS AND EXCISE**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**COMMISSIONER GENERAL**

**KENYA REVENUE AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This petition relates to the powers of the respondents under the East African Community Customs Management Act, 2004 (hereafter “EACCMA”) with regard to the seizure and detention of vehicles belonging to transporters who are suspected of for dumping transit goods into the country.

2. The petitioner is a limited liability company engaged in transport business in the East Africa region. It has in operation a fleet of sixty three trucks. The 1<sup>st</sup> respondent is a statutory body established under the Kenya Revenue Authority Act and is responsible for the collection of taxes in the country. The 2<sup>nd</sup> respondent is the Commissioner of Customs and Excise of the 1<sup>st</sup> respondent responsible for the collection of customs duty under the East African Community Customs Management Act, 2004 (EACCMA). The 3<sup>rd</sup> respondent is the Commissioner General Kenya Revenue Authority whose office is created by the Kenya Revenue Authority Act.

**Procedural History**

3. On 5<sup>th</sup> June 2012, the petitioner, approached the Court under Certificate of Urgency and an application by way of Notice of Motion dated 4<sup>th</sup> June 2012 seeking the release of 8 of its trucks which had been detained at the Gilgil weighbridge by the respondents.

4. The Court certified the matter urgent and directed that the application and petition be served on the respondents for hearing on 11<sup>th</sup> June 2012. It was not listed on that day though Counsel for the petitioner did appear. The Court therefore directed that the file be listed again on 13<sup>th</sup> June 2012. On that day, the respondent did not appear, and the Court issued an order that a Mr. Yusuf Adan, the respondent’s officer said to be in charge of Gilgil Station, or the appropriate officer from the respondents, should appear in Court on 15<sup>th</sup> June 2012 to show cause why the petitioner’s motor vehicles should not be released forthwith.

5. Learned Counsel, Mr. Nyangweso then appeared for the respondent and informed the Court that the respondents had requested its officer, Mr. Adan to go to their offices but he had not done so. The respondents stated through Mr Nyagweso that the petitioner had been given an opportunity to come before the Commissioner for Customs through a letter which he had not gone to collect from the station.

6. Counsel conceded that the eight vehicles had been held by the respondent since the 23<sup>rd</sup> of May 2012 in lieu of goods allegedly dumped

into the country for which taxes had not been paid. Counsel further submitted that the Commissioner had detained the petitioner's vehicles under powers vested in him by Section 219 of the East African Community Customs Management Act, 2004 (EACCMA). The respondent argued that if the petitioner explained the whereabouts of two other vehicles which were destined for Uganda, his vehicles will be released.

7. After considering the arguments of the parties, particularly the concession of the respondent that the respondent had been holding the petitioner's eight vehicles since the 23<sup>rd</sup> of May 2012 because two other lorries had dumped goods into the country, the Court ordered the 1<sup>st</sup> respondent to release the petitioner's motor vehicles as prayed in its application dated 4<sup>th</sup> June 2012. The substantive petition was argued before me 4<sup>th</sup> November 2014.

### **Factual Background**

8. The facts forming the basis of this petition are that on 24<sup>th</sup> May 2012, the respondents through their agents arrested and seized two (2) lorries, Registration Numbers: KBN 687X – ZC 9385 and KBH 295R – ZD 0892 at Gilgil on alleged contraventions of certain provisions of law, namely; **Regulation 104 (5) (b) of the East African Community Customs Management Act, 2004 (EACCMA)** and the **East African Community Customs Management Regulations, 2006**. It also seized another 6 on 29<sup>th</sup> May 2012. Following these actions by the respondents, the petitioner grounded its other trucks allegedly because it was apprehensive that the respondents would seize them as well.

9. By its Amended Petition dated 18<sup>th</sup> March 2014, the petitioner seeks the following orders from the Court:

a. *A Declaration that the decision by the respondents to impound and detain the petitioner's motor vehicles/trailers registration numbers KBN 687X-ZC 9385, KBH 295R-ZD 0892, KAS 966P-ZB8767, KBD 238Y-ZD3023, KAZ 835Z-ZD3025, KBD 096Y-ZD3024, KBD 097Y-ZD3027 and KBD 149U-ZD3076 from 24<sup>th</sup> May 2012 to the 17<sup>th</sup> June, 2012 was unconstitutional, null and void.*

b. *A Declaration that the respondent's decision to put an all alert warrant of detention of the petitioner's entire fleet of sixty one for the period between the 24<sup>th</sup> May, 2012 to the 17<sup>th</sup> June, 2012 trucks was unlawful, unconstitutional, null and void.*

c. *Judicial Review Order of prohibition prohibiting the respondents from arbitrarily impounding and/or detaining the applicant's motor vehicles/trailers registration numbers: KBN 687X-ZC 9385, KBH 295R-ZD 0892, KAS 966P-ZB8767, KBD 238Y-ZD3023, KAZ 835Z-ZD3025, KBD 096Y-ZD3024, KBD 097Y-ZD3027 and KBD 149U-ZD3076 or any other vehicles/trailers of the petitioner.*

d. *The respondents be ordered to compensate the petitioner under Article 23 (3) (e) of the Constitution for the loss of Kenya Shillings twelve million sixty three thousand four hundred and forty five (12,063,445)*

e. *General damages for violation of fundamental rights and freedoms of the applicant.*

f. *Costs of this Petition.*

### **The Petitioner's Case**

10. The petitioner's case is contained in its Amended Petition dated 18<sup>th</sup> March 2014 and two affidavits both sworn by Mr. Ayub Sherali on 18<sup>th</sup> March 2014. The petitioner also filed submissions dated 21<sup>st</sup> April 2014, and a reply to the respondents' submissions dated 13<sup>th</sup> June 2014. It was presented by their Learned Counsel, Mr. Eshuchi.

11. According to the petitioner, on 23<sup>rd</sup> May 2012, their trucks, registration numbers KBN 687X – ZC 9385 and KBH 295R – ZD 0892 returned to the country from Uganda through the border at Malaba. They were empty having delivered transit goods in the form of galvanized steel and clinker to Uganda. Upon reaching Gilgil en route to Mombasa, the respondent's officers impounded and detained the vehicles allegedly on instructions from a Mr. Yusuf Adan, the respondents' officer in charge of Gilgil. At the time the motor vehicles registration numbers KBN 687X-ZC 9385 and KBH 295R-ZD 0892 were detained on the 24<sup>th</sup> May 2012, they were not ferrying any transit cargo and were therefore not obliged to follow any pre-marked transit route.

12. The petitioner alleges that there is no evidence that its trucks dumping goods into the local market, and that the drivers of the said vehicles refused to be blackmailed into accepting that they were dumping export cargo into the country.

13. The petitioner alleges that the respondents never informed it of the reasons for the detention of its trucks. It claims that Mr. Yusuf Adan refused to inform it of the reasons for the detention of the vehicles, only telling its drivers "to do what it needs to do or forget about the vehicles". The petitioner avers that on being pressured to justify the continuing detention of the petitioner's vehicles without due process, Mr. Adan claimed that the vehicles had dumped the goods into the country. The petitioner claims that this is strange as the vehicles were confirmed empty at Malaba on re-entry into the country.

14. The petitioner alleges that the respondents have not charged its vehicles with any offence before the courts and that instead, the vehicles continued to be detained. It contends that Mr. Adan threatened that he would not permit any of the petitioner's vehicles to pass through Gilgil unless the petitioner "does what it needs to do".

15. The petitioner avers that in furtherance of this threat, on 29<sup>th</sup> May 2012, the respondents' officers at Gilgil, acting on Mr. Adan's instructions, impounded its motor vehicles registration numbers; KAS 966P- ZB8767, KBD 238Y-ZD3023, KAZ 835Z-ZD3025, KBD

096Y-ZD3024, KBD 097Y-ZD3027 and KBD 149U-ZD3076 together with the vehicles' documents. The vehicles were allegedly detained with the goods they were carrying and were only released on the 17<sup>th</sup> June 2012. The petitioner avers that the detention rendered it incapable of discharging its carriage obligations to the owners of the goods and also exposed the goods carried to waste. It contends that sixty one of its trucks were grounded from the 24<sup>th</sup> May 2012 to the 17<sup>th</sup> June 2012 as the respondents had vowed to detain any of the petitioner's trucks found on Kenyan roads.

16. In his Supplementary Affidavit sworn on 18<sup>th</sup> March 2014 on behalf of the petitioner in response to the affidavits sworn on behalf of the respondents, Mr. Ayub Sherali denies that he ever discussed the detention of the trucks with Mr. Dennis Anyoka Moturi, or that Mr. Moturi tried to serve him with an F89 Notice. He avers further that the petitioner's trucks never carried any local goods and challenges the respondents to produce the local goods that the trucks carried.

17. Mr Sherali accuses the deponents of the other affidavits in support of the respondents' case of manufacturing facts so that their responses can meet a certain objective to fix the petitioner. It is also his averment that neither the petitioner nor its drivers committed any crime and to date none has been charged by the respondents, and the argument by the respondents that the orders of the Court issued on 17<sup>th</sup> June 2012 hampered investigations is scandalous as the Court never ordered the respondents to cease whatever investigations they were carrying out, and no notice of intended prosecution has ever been served on the petitioner or its drivers.

18. The petitioner submits that there is no law that permits the respondents to detain vehicles or goods without giving reasons in the manner the respondents' officers have done. Their actions therefore amount to arbitrary deprivation of property without due process and is a flagrant affront to its right to property. It further argues that the actions of the respondents amount to a violation of its right to administrative action that is fair and lawful, as well as its right to written reasons for the decisions of the respondents, and is therefore arbitrary and unlawful.

19. The petitioner argues further that the actions of the respondents are a violation of its right to be informed of offences committed, if any, and of its right to due process including the right to be arraigned in Court within twenty four hours. It therefore terms the acts of the respondents arbitrary and without any lawful basis and therefore null and void.

20. It is its further contention that the respondents' said officers threatened to detain other vehicles belonging to it thereby grounding its business and causing it serious losses and damage. It alleges that it was forced to resume operations after an intervention by this Court vide an order of 15<sup>th</sup> June 2012.

21. The petitioner argues that though the respondents allege that they have police powers, they have not presented to the Court any evidence of the scene of crime that convicts the petitioner of the offence of dumping, nor have the petitioner's two drivers been taken to Court if indeed they were found dumping transit goods in the country. It is also the petitioner's contention that none of the goods allegedly dumped in the country have been produced, nor has the owner of the alleged unlawful garage where the goods were allegedly dumped prosecuted. The petitioner also questions the convenient fact relied on by the respondents that the custom/police officer who allegedly took photographs of the dumping being done informed the Court that the pictures were erased when his children were playing with his phone.

22. It is its contention that the respondents have failed to specify the legal basis for their actions despite demand. It asserts that this is contrary to the Constitution and other relevant law. It is its case further that the respondents' actions rendered the petitioner unable to perform its obligations under the contracts of carriage it had entered into, thus exposing it to grave financial losses. The petitioner alleges that it lost Kshs 50,000/= daily on each vehicle that was detained; business income to the tune of 7,000,000.00 in the month of June 2012 due to disruption of its business by the respondents; and a further sum of Kshs 6,063,445/=.

### **The Case for the respondents**

23. The respondents have filed six affidavits in opposition to the Amended Petition, as well as submissions in support of their position on the matter. The first three affidavits were sworn by Mr. Yusuf Adan, Mr. Dennis Anyoka Moturi, and Mr. Robert Sure on 21<sup>st</sup> June 2012. The respondents also filed affidavits sworn by Sergeant Ezra Mworion on 19<sup>th</sup> September 2012, Mr. Kenneth Nganga Kamengere on 12<sup>th</sup> October 2012, and a second affidavit sworn by Mr. Yusuf Adan in response to the Amended Petition on 9<sup>th</sup> June 2014. Their case was presented by their Learned Counsel, Ms. Lavuna.

24. The purpose of filing the six affidavits, according to Ms. Lavuna, was to produce eye witness evidence by each deponent to corroborate that of the 1<sup>st</sup> deponent, Mr. Yusuf Adan, who was the officer-in-charge of Gilgil Station, where the petitioner's trucks were detained. It was also to controvert the accusations made directly against Mr. Yusuf Adan.

25. In his affidavit, Mr. Yusuf Adan deposes that the customs document that the Kenya Revenue Authority uses to detain customs goods or trucks is the F89 customs form as prescribed under the Customs Act. He avers that the respondents did not seize the petitioner's 61 trucks as alleged, and if the vehicles were indeed seized, the petitioners should produce the F89 notices that were issued for such detention.

26. Mr. Adan states that on or about 17<sup>th</sup> June 2014 (sic), the respondents received a court order for the release of the petitioner's trucks even before they could conclude investigations and verification of the petitioner's offences with the trucks. He states that several of the respondents' officers and a police officer witnessed the dumping of transit goods done by the petitioner, and photographs were taken. He notes that the petitioner does not deny that it dumped goods, but alleges at paragraph 7 of its Supplementary Affidavit that there was no evidence that it was dumping or irregularly depositing goods at an illegal depot.

27. Mr. Adan further deposes that the amendments made in the Petition to change the nature of the goods that the trucks were carrying and their destination at the time when they were found dumping goods outside the transit routes present inconsistencies that show that the petitioner is not being forthright with the facts of the case. He also observed that if the trucks were empty, it is curious that they were found at the illegal depot, off the designated transit route.

28. Mr. Dennis Anyoka Moturi, then serving as a Revenue Officer in the Customs Services Department – Enforcement, based in Nakuru, states that their mandate as Customs Officers in the Enforcement Unit is to conduct transit monitoring.
29. Mr. Moturi avers that the petitioner was involved in a case of diversion of goods as defined under the East African Community Customs Management Act, 2004 (EACCMA). According to Mr. Moturi, he met Mr. Ayub Sherali, the petitioner’s Operations Manager, at the Gilgil Transit Monitoring Unit check point. He states that Mr. Sherali was aware of the reasons why the petitioner’s vehicles were detained, and that he tried to give Mr. Sherali a copy of the F89 Notice but that Mr. Sherali declined to accept it. Mr. Moturi avers that he and Mr. Sherali had discussed the reasons for the detention of their trucks at length, and at no point did Mr Shirali ever deny that the petitioners trucks were caught diverting Bitumen at an illegal depot that was outside the authorized transit route.
30. Mr. Moturi avers further that the Customs Officer who prepared and signed the F89 notice **Kenneth Kamengene**, an Assistant Revenue Officer, also attempted to serve it on both the petitioner’s drivers as well as Mr. Ayub Sherali but they all declined to sign the notice.
31. It is also Mr. Moturi deposition that he had been involved in the ongoing investigations into the matter and had considered the exhibits relied on by the petitioner. It was his averment that from Folio 80 to 127, the T8 Road Manifest produced do not relate at all to the vehicles which were detained by the respondents.
32. Mr. Moturi states further that under Regulation 104 of the EACCMA 2006, the petitioner was required to comply with certain conditions set out in its licence, Licenee C 28, which provided, among other things, that **“The licensed vehicle shall be used exclusively for the carriage of goods in transit and for no other purpose, unless otherwise authorized by the Commissioner.”** It was also his averment that the licence specifically prohibited, in its special condition, the carrying of local goods. He averred that the petitioner’s trucks were impounded and detained by the respondents because they had contravened various Customs laws and regulations by diverting transit goods from the authorized transit routes, thereby evading the payment of duty on the goods.
33. Mr. Kenneth Nganga Kamengere, who was at the material time working at the National Cargo Monitoring Unit in Gilgil, deponed that he and another officer met Mr. Adan in Gilgil town and they went to a depot where they found transit trucks belonging to the petitioner. He states further that he was instructed to take photographs of the trucks but he was only able to take one as he encountered violence from the people who were in the depot. He was not, however, able to produce this photograph as he depones that it was unfortunately deleted by his children who were playing with his phone.
34. He maintains, however, that there were about 56 drums of Bitumen in the depot, and that he personally saw the petitioner’s trucks committing the offence of dumping.
35. Sergeant Ezra Mworira, who was at the material time working with the Highway Patrol Unit in Naivasha, deponed that he had been sent by the officer-in-charge, Highway Patrol Unit Naivasha to go and assist the Kenya Revenue Authority officers to seize transit trucks which had been found dumping transit goods around Gilgil town. He avers that he went to the scene and asked the drivers to take the vehicles and the four containers to Gilgil Customs Holding Yard, but the drivers were reluctant and he forced them to do so. It is his further deposition that he is aware that the petitioner was made aware of the reasons for the detention of the trucks and at no point did the petitioner deny that its trucks were caught diverting Bitumen at an illegal depot. He further avers that the petitioner’s agents refused to produce the relevant customs clearance documents to the Kenya Revenue Authority officers at Gilgil.
36. The respondents contend that the petitioner has produced documents in support of its case which have no relation to the petitioner’s goods and trucks in issue. They maintain that the petitioner’s transit trucks were found discharging transit goods around Gilgil town, They state that they proceeded to the site and upon arrival and inspection they confirmed the presence of the trucks numbers KBN 687 ZC9385 and KBH 295R ZD0892. It is also their case that the illegal depot was not licenced by the Energy Regulation Commission to receive petroleum products such as the Bitumen that the petitioners were offloading and further that the depot was also not named and it was not on a transit route for transit goods which are at all times under customs control.
37. The respondents term as untrue the petitioner’s averment that it had no knowledge of the reasons why the trucks were detained. They maintain that through F89 notices, the petitioner was indeed informed both orally and in writing of the reasons why the trucks were detained.
38. It is the respondents’ case that the petitioner having refused to present any document, the container numbers were used to trace entries used to clear them through the Kenya Ports Authority and Customs Simba System. They state that it was established that the containers were cleared using customs entry No. 2012 MSA3363516 which was a transit entry. They further state that, based on their analysis, the company has to pay full taxes for the four containers together with fines as prescribed in the regulations, because the Bitumen they were carrying was converted to home use through diversion.
39. In their written submissions, the respondents contended that there are contradictions in the petitioner’s case. They cited paragraph 6 in which the petitioner states that its trucks had just delivered goods in Uganda and were confirmed empty at Malaba on re-entry, while at paragraph 9 the petitioner states that when its trucks were seized, there were goods on board on transit to Uganda. The respondents submitted that trucks are only allowed to ferry goods which are on transit from port to another country and for transit trucks to ferry local goods at any time, they must apply for permission from the Commissioner.
40. The respondents submitted further that in performance of their functions, they license and monitor movement of motor vehicles which transport transit cargo imported through the port of Kilindini or which pass through Kenya to other destinations such as Uganda, Rwanda and the Democratic Republic of Congo. They state that the petitioner, as a licensed transporter of transit goods, is expected to follow the Transit Regulations and the conditions of the licenses for various motor vehicles to transport transit cargo contained in the East African Community Customs Management Act, 2004 (EACCMA) and the East African Community Customs Management Regulations, 2006. It is their case that the petitioner was found to have violated the conditions of the transit license under **Regulation 104 (5) (b)** and **Conditions 1, 2, 4 and 6** of the East African Community Customs Management Regulations.

41. The respondents submit therefore that they did not, in light of the foregoing, violate the constitutional rights of the petitioner as alleged. The respondents have relied on various decisions of this Court which I shall revert to later in this judgment. They pray that the Amended Petition be dismissed with costs.

### **Determination**

42. The gist of the petitioner's case is that its constitutional rights were violated by the respondents' action of seizing its trucks. Its case is that the actions of the respondents amount to arbitrary deprivation of property without due process and is an infringement of the right to property, violate its right to administrative action that is fair and lawful, as well as its right to written reasons for adverse decision. The petitioner also alleges violation of its right to be informed of offences committed, if any, and its right to due process including to be arraigned in court within twenty four hours.

43. The response by the respondents is that they did not in any way violate the petitioner's rights, but were only executing their mandate under the provisions of the East African Community Customs Management Act, 2004 (EACCMA). They allege that the petitioner was involved in dumping transit goods into the country, and they would have carried out investigations and prosecutions had they not been stopped by the orders of the Court issued on 17<sup>th</sup> June 2012 which directed the release of the petitioner's trucks.

44. The sole issue for determination that emerges from the respective cases of the parties as contained in their pleadings and submissions set out above is whether the actions of the respondents amounted to a violation of the petitioner's constitutional rights. Should the Court find that they did, then it shall address itself to the question of whether the petitioner is entitled to the reliefs that it seeks.

### **Whether the Seizure and Detention of the Petitioner's Trucks was Constitutional Unlawful and Unreasonable and a Violation of the Petitioner's rights.**

45. In determining this issue, it is important to consider first the powers and mandate of the respondents under the Kenya Revenue Authority Act and the East African Community Customs Management Act, 2004(EACCMA) under whose provisions the respondents based their actions.

46. The 1<sup>st</sup> respondent, the Kenya Revenue Authority, is established under the provisions of the Kenya Revenue Authority Act. Section 11 thereof establishes the office of the Commissioner General of KRA and sets out the powers of the office as follows:

1. *There shall be a Commissioner-General of the Authority who shall be appointed upon the recommendation of the Board on such terms and conditions as are specified in his appointment.*

2. *The Commissioner-General shall be the chief executive of the Authority and general super-vision and control of the Board, shall be responsible.*

a. *for the day-to-day operations of the Authority;*

b. *for the management of funds, property and affairs of the Authority; and*

*(c) for the administration, organization and control of the staff of the Authority.*

47. Section 5 of the East African Community Customs Management Act, 2004 (EACCMA) creates the office of the Commissioner of Customs and Excise:

1. *There shall be appointed, in accordance with provisions relating to Partner States' legislation, a Commissioner responsible for staff. The management of Customs by each of the Partner States and such other staff as may be necessary for the administration of this Act and the efficient working of the Customs.*

2. *The Commissioner shall be responsible for the management and control of the Customs including the collection of, and accounting for, Customs revenue in the respective Partner State.*

*(3) The Commissioner may authorise any officer to exercise any of the powers conferred by this Act upon the Commissioner subject to such limitations as the Commissioner may impose.*

*(4)....*

48. The powers of the officers authorized by the Commissioner under Section 5 are set out in Section 7 of the Act, which states that:

*For the purpose of carrying out the provisions of this Act, every officer shall, in the performance of his or her duty, have all the powers, rights, privileges, and protection, of a police officer of the Partner State in which such officer performs his or her duty.*

49. Section 213 of the East African Community Customs Management Act, 2004 (EACCMA) makes provisions for seizure by officers authorized under the Act. It states as follows:

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

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

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

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

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

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

(6) ...

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

50. In this case, the petitioner does not challenge the power of the respondents to seize and detain its trucks. Indeed, Section 213(1) is clear that officers have the powers to act on reasonable grounds and seize and detain such property regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.

51. Section 214 further provides that:

(1) Where anything has been seized under this Act, then, unless such thing was seized in the presence of the owner of the thing, or, in the case of any aircraft or vessel, of Procedure on seizure the master thereof, the officer effecting the seizure shall, within one month of the seizure, give notice in writing of the seizure and of the reasons to the owner or, in the case of any aircraft or vessel, to the master:

*Provided that—*

(a) *notice of seizure shall not be given in any case where any person has, within a period of one month, been prosecuted for the offence by reason of which the thing has been seized, or the offence has been compounded under Part XVIII, and if, after any notice has been given but before condemnation of the thing in accordance with this Act—*

(i) *any such prosecution is brought, then such thing shall be dealt with in accordance with section 215 as if such notice had been given;*

(ii) *the offence is so compounded, then such thing shall be dealt with in accordance with Part XVIII as if no such notice had been given;*

(b) where any such thing has been seized in the presence of any person coming within the definition of owner for the purposes of this Act, then it shall not be necessary for the officer effecting the seizure to give notice to any other person coming within such definition;

(c) a notice given to any person coming within such definition of owner shall be deemed to be notice to all other persons coming within such definition;

(2) ...

(3) *Where any thing liable to forfeiture under this Act has been seized, then—*

(a) *if any person is being prosecuted for the offence by reason of which the thing was seized, the thing shall be detained until the determination of such prosecution and dealt with in accordance with section 215;*

(b) *in any other case, the thing shall be detained until one month after the date of the seizure, or the date of any notice given under subsection (1), as the case may be; and if a claim is not made as provided in subsection (4) within a period of one month, such thing shall be deemed to be condemned.*

(4) ...

**(5) Where any notice of claim has been given in accordance with subsection (4), then the thing seized shall be detained by the Commissioner to be dealt with in accordance with this Act.**

52. Section 2 of the Act defines the term “owner” in respect of an aircraft, vessel, or vehicle to include “every person acting as agent for the owner, or who receives freight or other charges payable in respect of, or **who is in possession or control of**, the aircraft, vessel, or vehicle”. The effect of this therefore is that, once the respondents impounded and detained the petitioner’s trucks and the drivers in whose possession the trucks were, they were under no obligation to issue any notice of seizure for impounding and detaining the aforesaid trucks. In any event, the evidence before me strongly suggests that an attempt was made to serve F89 notices on the petitioner.

53. The petitioner, as I understand it, does not challenge the powers of the respondent to detain its trucks, or to prosecute it or its drivers for violating the conditions of its licence. On their part, the respondents argue, first, that they were entitled to detain the petitioner’s trucks as the petitioner had breached regulation 104 (5)(b) of the East African Community Customs Management Regulations. This Regulation is in the following terms:

**“Goods in transit shall only be carried through the Community in sealed vehicles except in the case of exceptional loads as defined in sub-regulation (6) or any other special circumstances authorized by the Commissioner; and in the case of goods carried by road, the carrying vehicle shall bear the words “TRANSIT GOODS” printed boldly and clearly on both sides as specified in Form C. 32 and for the purpose of this paragraph, reference to a carrying vehicle means, in the case of an articulated vehicle, the semi-trailer and not the motive unit”.**

54. The respondents further submit that the petitioner’s licence contains the following requirements:

1. *The licence shall be permanently affixed to the licensed vehicle in a prominent position where it is visible at all times.*
2. *The licensed vehicle shall be used exclusively for the carriage of goods in transit and for no other purpose, unless otherwise authorised by the Commissioner.*
3. *The licensed vehicle shall travel through the Republic of Kenya only upon those routes appointed in accordance with the provisions of the Customs & Exercise Laws.*
4. *The licensed vehicle shall be distinguished by the following inscription in yellow painted letters, not less than 31 cm. high, on both sides of the vehicle: **TRANSIT GOODS***
5. *The licensed vehicle carrying goods in transit shall be sealed by the Proper Officer, except in the case of “exceptional loads” as defined in regulation 96, or in any particular case otherwise authorised by the Commissioner.*
6. *(any other special conditions) **Not to carry local goods.***

55. The respondents have argued that the petitioner was carrying goods in transit, but was found off the designated route, dumping the Bitumen that it was carrying into the local market. This led the respondent to impound two of the petitioner’s trucks, *KBN 687X – ZC 9385* and *KBH 295R – ZD 0892*

56. This is where the story gets murky, both on the part of the respondents and the petitioner.

57. The petitioner states at paragraph 3 of its original petition that it was carrying Bitumen to Bugiri, Uganda. In his affidavit sworn on behalf of the petitioner, Mr. Sherali also avers that the trucks were carrying Bitumen to Bugiri, Uganda.

58. However, in its Amended Petition dated 18<sup>th</sup> March 2014, filed almost two years after the petition, the petitioner states that the trucks were carrying galvanized steel and clinker to Uganda. These amendments were made two years after the respondents had filed their responses to the petition, and in the affidavit sworn by Mr. Adan on 21<sup>st</sup> June 2012, as well as that sworn by Mr. Moturi and Mr. Mworio, the respondents had alleged that the petitioner had been dumping the Bitumen that it had been carrying in transit to Uganda, into the local market.

59. It may be argued that since the petition has been amended, one should disregard the contents of the initial petition and the affidavit in support. However, in the present case, and bearing the circumstances in which the amendments were made, the Court is of the view that it is constrained to take into account the earlier pleadings and averments, at the very least with regard to the credibility of the parties. It appears to the Court that the contents of the Amended Petition with regard to the goods that the petitioner was carrying in the two trucks that were initially seized by the respondents are not credible.

60. It is doubtful that the petitioner and its Operations Manager, Mr. Ayub Sherali, did not know what goods they were carrying when they filed the petition and the application for conservatory orders in June 2012, and that they mistakenly indicated Bitumen as the goods carried, only to realize two years later, as strongly contended by Mr. Sherali in his Supplementary Affidavit dated 18<sup>th</sup> March 2014, that they were actually carrying ‘galvanized steel and clinker’. On balance, I find the respondents more credible on this point.

61. However, it is difficult to understand the seizure by the respondents of the additional trucks belonging to the petitioner. The petitioner stated at paragraph 9 of its petition that on 29<sup>th</sup> May 2012, the respondents’ officers at Gilgil, said to be acting on the instructions of Mr

Yusuf Adan, impounded another six of the petitioner's motor vehicles, namely motor vehicle/trailers Registration Numbers KAS 966P – ZB 8767, KBD 238Y – ZD 3023, KAZ 835Z –ZD3025, KBD 096Y –ZD 3024, KBD 097Y –ZD3027 and KBD 149U – ZD 3076. I have read the affidavit of Mr. Yusuf Adan dated 21 June 2012 as well as the other affidavits sworn in opposition to the petition, but I have not found any explanation or justification for the detention of the other vehicles.

62. The petitioner claims in its Amended Petition that it grounded its fleet of 61 trucks from the 24<sup>th</sup> of May 2012 to the 17<sup>th</sup> of June 2012 as it was apprehensive that they would be arrested and detained as the respondents had threatened that none of the petitioner's trucks would be permitted to pass through Gilgil. This, again, is a claim whose veracity and legal foundation is doubtful. First, this Court was seized of this matter from its inception. At no point was this issue raised before the Court, nor appropriate orders sought in regard thereto. I agree with the respondents that a claim cannot be maintained on the basis of apprehensions. Further, no evidence has been adduced to support the contention that the respondents had issued an alert on the rest of the petitioner's vehicles.

63. So much for the petitioner's conduct. How about the respondents? The respondents have explained their failure to prosecute the petitioner for alleged dumping of transit goods into the local market on the basis that the Court issued orders for the release of the petitioner's trucks, thus interrupting their investigations. Indeed, Mr. Yusuf Adan, at paragraph 5-11 of his affidavit sets out, in very aggrieved tones, the chronology of events leading to the order for release of the petitioner's trucks, the general tenor of which is that the Court was unfair and frustrated the respondents' effort at stopping the petitioner's criminal activities.

64. Two responses to the respondents' complaints will suffice. First, the Court record speaks for itself. It demonstrates the fact that the Court gave the respondents every opportunity, over a period of ten days, to appear before it and give its side of the story. The Court even summoned the deponent, Mr. Adan, to appear before it, but he did not. Mr. Nyangweso, the Advocate who was eventually despatched to represent the respondents, without filing any response to the petition or application for conservatory orders, conceded that the respondents had impounded eight trucks because two had allegedly been found dumping goods into the local market.

65. Secondly, this Court is not the final Court on matters such as this. The respondents have a right of appeal against decisions of this Court which it is aggrieved by. The respondents cannot therefore make the Court the scapegoat for their failure to execute their mandate and prosecute the petitioner for breaching the law on transit goods.

66. Further, the Court observes that the events complained of started on the 23<sup>rd</sup> and 24<sup>th</sup> of May 2012. Its orders were issued on 15<sup>th</sup> of June 2012, three weeks later. The respondents allege that a month, during which they are permitted to hold detained goods by the EACCMA, had not elapsed. It would, however, be expected that three weeks after the seizure and detention of the vehicles, they would have had sufficient evidence on which they could have proceeded with the prosecution of the petitioner had they so wished.

67. Which brings me to the respondents' explanation for the lack of evidence. Mr. Kamengere depones that he took a single photograph of the Bitumen that was being dumped into the country, but was unable to take others because of the hostility of the persons who were in the depot where the dumping of the Bitumen was taking place. That may well be true. However, he avers that this single photograph was deleted by his children who were playing with his phone.

68. I must in this case agree with the petitioner that the explanation is somewhat incredible. With all the enforcement and investigation powers vested in the respondents by EACCMA, the state's revenue collection and enforcement must be in a truly parlous state if the respondents depend for collection of photographic evidence of criminal activity on a single revenue or customs officer wielding his mobile phone's camera.

69. The Court has found itself in this matter dealing with a set of litigants whose credibility is truly wanting. From the evidence before me, the respondents did, in my view, have a basis for seizing and detaining the petitioner's vehicles which they allege they found to have been dumping transit goods into the country. The EACCMA authorizes them to do this, and as the Court found in **Petition No 297 OF 2012 Kenya Transporters Association vs KRA and 2 Others and Modern Coast Builders and Contractors Limited –vs- Kenya Revenue Authority Nakuru High Court Petition No 5 of 2012**, such powers have a sound legal basis. In the words of Majanja J in **Republic –vs- Kenya Revenue Authority ex parte Modern Coast Builders and Contractors Limited High Court JR. MIsc. Appli. No. 631 of 2009**:

*21. The regulations governing transit of goods are to be found in the East African Community Customs Management Regulation, 2006 ("EACCM Regulations"). Regulation 104 which set out how transit goods are to be treated for the protection of the revenue. These regulations provide inter alia, for the licensing of vehicles carrying transit goods by the Commissioners, the mode of identification of trucks licensed to carry transit goods and the manner in which transit goods are conveyed.*

*22. These regulations are made pursuant to section 251 of EACCMA, 2004 which empowers the Council of Ministers to make generally for giving effect to the provisions of the Act. Under section 251(2) any regulations made under subsection (1) may provide that any person contravening any of the provisions thereof commits an offence and may provide a penalty for the infraction. Such a penalty is enacted under Regulation 215 which provides that a person who commits an offence under the regulations is liable to a fine not exceeding five thousand dollars.*

23. ....

*24. It is now abundantly clear that the applicant misapprehended the Commissioner's powers under EACCMA, 2004. Contrary to the assertions by the applicant, the Commissioner's powers and offences for which it was accused have a firm legal foundation and there is no basis for impugning them. Specific violations of the Act and the regulations were disclosed to the applicant and the respondents were entitled to impound the vehicles. The vehicles could not be permitted to contravene the conditions of licence nor breach the regulations for the carriage of transit goods for the specific offences which I have set out at paragraph 12 above.*

70. However, the exercise of those powers must be reasonable and not arbitrary, and should they be exercised in an arbitrary or unreasonable

manner, then the Court should step in. In this case, while the seizure of the petitioner's trucks which were allegedly found dumping Bitumen may have been justifiable, the seizure of an additional six cannot be.

71. Having so found, is the petitioner entitled to any of the reliefs that it seeks? As I have already observed above, the Court takes the view that the petitioner cannot be entitled to compensation in respect of the 61 trucks it alleges that it grounded on the basis of apprehensions that they will be seized by the respondents.

72. Further, the Court is also concerned about the veracity of the petitioner's claim with regard to the cargo it was carrying in the two trucks that had been initially detained by the respondents given its averments on oath at the initial filing of this petition, which form part of the Court record and which the Court cannot ignore, and its subsequent averments.

73. The petitioner has invited the Court to examine various documents annexed to its Supplementary Affidavit sworn by Mr. Sherali and filed together with its Amended Petition to establish the nature of the cargo that it was carrying. The respondents, on their part, aver that the documentation relied on in the said affidavit does not relate to the trucks in question. Mr. Anyoka depones in particular at paragraph 9(a) of his affidavit that:

***“The following documents produced at exhibit “AS 2”, and at page 3, 6, 8, 9, 12, 13, 14, 16, 18, 20, 21, 24, 26, 28, 30, 31, 33, 34, 35, 38, 40-45, 48, 49, 51, 52, 54, 56, 58, 59-61 are not customs control documents and cannot be relied upon. Some are delivery notes which cannot be verified or authenticated because the Petitioners are the makers of the documents, and they are not at any time processed by the Respondents herein as transit documents. In any event, those documents can be created and signed anywhere with the goods in question having not left the country or moved anywhere.***

***The above documents have no relation to any of the detained motor vehicles in issue, and the alleged description of the goods correspond to road manifest entries that do not relate whatsoever with the trucks in issue.”***

74. It is not, I believe, within the mandate of this Court to enter into an examination of the said documentation, nor can it competently do so without the taking of evidence to explain the documentation. In the circumstances, while the Court takes the view that the respondents acted arbitrarily in seizing the six trucks belonging to the petitioner, it is not satisfied that the petitioner merits compensation in the circumstances of this case.

75. This petition therefore succeeds to the extent that the Court finds that the respondents acted arbitrarily in seizing the six trucks belonging to the petitioner. However, the evidence suggests that it was justified in seizing at least two of the trucks, and the Court takes the view further that given its findings with regard to the credibility of the petitioner, the petitioner is not deserving of any compensation. It shall, however, have the costs of the petition.

**Dated, Delivered and Signed at Nairobi this 12<sup>th</sup> day of March 2015.**

**MUMBI NGUGI**

**JUDGE**

**Mr. Eshuchi instructed by the firm of Otieno Okeyo & Co. Advocates for the Petitioners**

**Ms. Lavuna for the 1<sup>st</sup> to 3<sup>rd</sup> Respondents**