REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 450 OF 2012

IN THE MATTER OF: AN APPLICATION FOR JUDICIAL FOR REVIEW ORDERS OF MANDAMUS

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA, 2012

AND

IN THE MATTER OF: THE EAST AFRICAN CUSTOMS MANAGEMENT ACT, 2004

AND

IN THE MATTER OF: THE GENERAL RULES FOR THE INTERPRETATION OF THE HARMONIZED SYSTEM

BETWEEN

REPUBLIC .....APPLICANT

AND

THE COMMISSIONER OF CUSTOMS,

KENYA REVENUE AUTHORITY .....RESPONDENT

EXPARTE

GRAIN BULK HANDLERS LIMITED

JUDGEMENT

1. By a Notice of Motion dated 16th January, 2013, the *ex parte* applicant herein, **Grain Bulk Handlers Limited,** seeks the following orders:

1) This Honourable Court be pleased to grant an order of mandamus compelling the respondent to immediately release the ex-parte applicant's impounded consignments.

2) This Honourable Court be pleased to grant an order of mandamus compelling the respondent to apply a consistent classification in respect of its imported goods.

3) This Honourable Court be pleased to grant an order of mandamus compelling the respondent to classify the imported consignments of the ex-parte applicant under tariff heading 7308 and H Code 7398.29.00 having already accepted the ex-parte applicant's appeal under Section 229 (5) of the East African Community Customs Management Act, 2004.

4) This Honourable Court be pleased to grant an order of mandamus compelling the respondent to strictly adhere to the provision of the law particularly the East African Community Customs Management Act, 2004, Section 229.

5) This Honourable Court be pleased to grant an order of mandamus compelling the respondent to accept the decision it had made with regard to its application for review under Section 229(4) as read with Section 229 (5) and the respondent be compelled to accept the ex-parte applicant's appeal.

6) Costs of this application be provided.

<u>Ex Parte Applicant's Case</u>

2. The same application, according to the Statement filed on 20th December, 2012 was based on the following grounds:

a) On various dates being 23rd February 2012, 16th march 2012, 18th April 2012, 4th September 2012 and 18th September 2012, the applicant imported various machine components which were intended to construct an automated silo and for which a tariff classification of 7308 is applicable.

b) The respondent has cleared the components imported on the 23rd February 2012.

c) The respondent despite having applied the said classification declined to clear the consignments of 16th March 2012 when in fact the consignments were components of the same structures hence a violation of the law and the tax principle of certainty.

d) As a result of he said dispute on classification, the applicant executed a bond securing the custom duties in respect of that consignment pending the hearing and determination of the dispute on classification.

e) Following the issuance of bonds, the respondent released the consignment imported on 16th March 2012 and 18th April 2012 to the applicant.

f) The respondent has however unreasonably declined to release the goods imported on the 4th September 2012 and 18th September 2012 as a result of that dispute despite that a bond has been executed, accepted and approved securing the custom charges.

g) The applicant appealed against the decision of the respondent of applying a different classification and having failed to comply with the provisions of the law as regards

rendering a ruling on the appeal within 30 days, they are deemed to have accepted the appeal by the applicant.

h) The decision of the respondent of impounding the applicant's imported consignments is therefore unlawful, unreasonable and actuated by malice since the customs duty has been secured.

i) Having received, accepted and approved the bond, the 2nd respondent's decision of impounding the consignment imported on 4th September 2012 and 18th September 2012 is in bad faith.

j) The impounded consignments have been deposited at Makupa Transit Shed and Mitchell Cotts Freight and the attract colossal charges as demurrage; and

k) It is just and fair that leave be granted.

3. The application was supported by a verifying affidavit sworn by Jonathan Stokes the Applicant's Finance Director on 20th December, 2012.
4. According to the deponent, applicant owns and operates a specialized dry bulk discharge and handling terminal for grain imports, located in Shimanzi and linked by overhead conveyor directly to Berths No. 3 and 4, Kilindini Port, Mombasa and that the applicant's facility is the one of its kind with the ability to handle grains imported in bulk in Kenya and in the wider East African region. With a view of expanding its capacity to better serve Kenya and the wider East African region, the applicant sought to construct automated silos and for that reason entered into two contracts of manufacture and sale with Bentall Rowland Storage System, London to supply it with 32 automated storage silos.
5. According to him, the said components were to be shipped in instalments as they are manufactured. Based on the contract, said Bentall Rowland begun the manufacture of the components and the 1st shipment of the components arrived at the port of Mombasa composing of 12 X 29 ft containers on or about 23rd February, 2012 and in line with the requirements as to clearing of a consignment, the applicant through its clearing agent M/s Mentap Resources Freight Limited lodged the appropriate clearance forms (SIMBA) which upon assessment were assigned entry no. 3337320 on or about 3rd March, 2012 and upon verification of the said entry form based on the classification of tariff as No. 843710.00 the consignment was cleared and passed and released to the applicant.
6. Similarly when the 2nd shipment of components arrived on or about 16th March, 2012 consisting of 6 X 20 ft containers, the applicant through its clearing agent lodged the relevant application forms whereupon after assessment the goods were assigned clearance being entry No. 3364415. However, in a bewildering stance the authority declined to release the 2nd consignment on the grounds that previously used classification of 843710.00 was with respect to the machines and not silos and that the proper classification was instead 9406. According to the deponent, this change in classification of the consignment by the respondent was occasioned by a mistaken belief that the imported consignments were farm and commercial storage silos which would be classified under Chapter 9406.00.90. In his view, the consignment ought to have been classified under 843710.00 as machinery given that the storage facility was not only industrial but also automated.
7. Consequent to that dispute as to the classification of the consignments, the applicant through Jubilee Insurance Company executed a bond securing the payment of customs and the consignments were duly released.
8. When the 3rd shipment of the consignments containing 2 X 40 and 6 X20 ft containers arrived at the port of Mombasa on or about 18th April, 2012, the relevant entry forms were filed and after verification an entry No. 3498135 was assigned to them. However, following the dispute on tariff, the applicant once again caused to be executed a bond securing the payment of customs duty in respect of that 3rd consignment and the same was duly released. A similar issue arose when the 4th shipment containing 5 X 20 ft containers arrived at the port of Mombasa on or about 4th

September, 2012. However despite the relevant entry forms having been filled the consignment was not cleared and as a result, the applicant caused to be executed a bond securing the release of the consignments pending the hearing and determination of the dispute as to the applicable tariff which bond despite being duly received and approved by the respondent authority on the 24th October 2012 the consignment was not been released.

9. According to the deponent, the said consignment has been held at the Makupa Transit Shed where warehousing charges will have to be paid before they can be resealed and the consignment has so far attracted an estimated demurrage of approximately Kshs. 7,500,000.00. Similarly, the 5th consignment consisting of 2 X 40 containers arrived at the port of Mombasa on 18th September, 2012 and an entry clearance form was filed and assigned a number 3695430 which entry was passed on the 25th September, 2012. Similarly, the applicant once again caused to be executed a bond securing the taxes for the consignment pending the hearing and determination of the tariff dispute. However, despite having received and approved the bond securing the custom charges, the respondent authority has declined to release the goods and instead transferred them to Mitchell Cotts Freight where they have until now attracted an estimate demurrage of Kshs. 2,000,000.00
10. It was deposed that cconsequent to the tariff dispute, the applicant engaged the services of Sirro & Associates, experts and advisors in custom laws and practice to appeal against the decision of the respondent authority regarding the tariff to be applied to the consignments. However, the respondent issued a letter dated 17th July 2012 to the effect that its letter dated 7th May, 2012 pointing out the reason for the refusal to clear was indeed an appeal and that the appeal was unsuccessful. According to the deponent, the said letter from the respondent authority was in fact a reply to an entry by the entry station Kilindini Mombasa to Mess Mentap Freight Limited, who were the clearing agents and not to Sirro & Associates who had been instructed to pursue the appeal.
11. It was the applicant's position that in law, that appeal has not been determined in accordance with the provisions of Section 229 which requires that the respondent communicates its decision within 30 days to the appellant stating the reasons for his refusal. To date, the applicants Sirro & Associates have not been addressed by the respondent authority and it was not until 28th September, 2012 that the applicant was served with a letter copied to the said Sirro & Associates explaining the refusal and classification of 9406.99.90. It is therefore the Applicant's case since the appeal was filed and no response was received by Sirro & Associates, the appeal is presumed to have succeeded under the said Section 229 of the ***East African Community Customs Management Act, 2004*** (hereinafter referred to as the Act)
12. Apart from that the applicant believes that the proper tariff that was applicable was in fact no 9406.00.90 and the respondent authority would not have arrived at the decision of impounding the goods/refusing to clear them had it granted the applicant a fair opportunity of being heard in accordance with Section 229 of the Act. To the deponent, it is unlawful, unreasonable and malicious for the respondent authority to transfer the consignments to a transit shed, so that they can attract demurrage, when a bond securing the payment of the taxes has been presented, accepted and approved by itself. It was further contended that it is in fact unlawful for the respondent authority to introduce a new tariff having approved the 1st consignment in respect of the components of the same automated industrial silo when complete or finished articles presented unassembled or disassembled are classified in the same hearing as assembled articles.
13. As a result of the said decision of the respondent authority, it was contended that the applicant cannot continue with the construction of the silo for better service of Kenya and the East Africa region and instead the warehousing of the consignments at the transit shed continue to attract demurrage and as a result, the applicant will be compelled to pay colossal sums as demurrage.

<u>Respondent's Case</u>

14. In response to the application the Respondent filed a replying affidavit sworn by **Seraphine Anamanjia**, a Senior Revenue Officer, Customs Services Department of the Kenya Revenue Authority, the Respondent herein on 14th February, 2013.
15. According to the deponent, the respondent, the Commissioner of Customs Services is appointed under Section 11 of the ***Kenya Revenue Authority Act*** (Cap 469 of the Laws of Kenya) and is

under Section 5 of the said Act mandated to act as an agent of the Government for the assessment, collection, receipt and accounting of all Government revenue and in the execution of its said mandate, the respondent administers among others, the Act under which the instant dispute arose.

16. According to the deponent, sometime in March 2012, the applicant vide entry MSA 2012 3364415 imported and declared as partial shipment of grain storage silos and associated equipments and under HS 8437.10.00. On physical verification of the imported consignment, the respondent noted that the same had been declared under the wrong tariff (hereinafter referred to as "HS Code") as HS 8437.10.00 instead of the correct HS Code for the goods was HS 9406.00.90 which attracts customs duties and the respondent's decision was duly communicated to the applicant. However, the applicant through its tax agent M/s Sirro & Associates vide a letter of 4th April 2012 argued that the correct HS Code is that applied by the applicant thus disputing the respondent's decision while the respondent vide its letter of 23rd April 2012 informed the applicant that the correct HS Code for the consignment is HS 9406.00.90 and that the respondent should arrange to pay the taxes thereunder.

17. Being dissatisfied with the decision of the Commissioner, the applicant through its tax agent, M/s Sirro & Co Associates vide its letter of 28th April 2012 informed the respondent of its intention to appeal under Section 229 (6) of the Act and vide the same letter of 28th April 2012 the applicant through their tax agents also requested the respondent to allow release of their consignment pending resolution of the dispute subject to the applicant providing adequate security for the taxes. Following the said request by the applicant, the respondent allowed release of the consignment and the respondent executed a security bond as agreed.

18. The deponent deposed that the taxes payable in respect to the consignment in dispute is Kshs. 7,532,689 and that the respondent's position on the correct HS Code for classification of the goods the subject of these proceedings was further communicated to the applicant vide the respondent's letters of 17th July 2012 and 28th September 2012 which response was done in accordance with Section 229 of the Act. The respondent therefore denied that its response to the applicant's objection was not in compliance with the requirements of the Act.

19. However, despite the respondent's said advise, the applicant in September 2012 imported further consignments of the same item and failed to declare the consignment in line with the direction of the commissioner and in view of the dispute the respondent in line with the provisions of the Section 122 (3) and Section 107 (1) of the Act, which provides that to secure release of any goods under customs control, the commissioner may require that an importer furnishes appropriate security as the commissioner may determine, the commissioner in the instant case directed that the importer furnishes cash security to secure release of the goods hence the commissioner's said action was well within her powers. According to the deponent, it is obvious that there was absolutely nothing wrong or unfair with the commissioner requiring security for the taxes in form of cash as the same was demanded in line with the requirements of the law.

20. To her an order of mandamus cannot be issued against the respondent as prayed since the commissioner's decision complained about shall not have been quashed. It was therefore contended that the motion discloses no reasonable cause of action and is totally unfounded and ought to be dismissed. Further, the prayers sought are not capable of being issued by this Honourable Court as doing so would be in flagrant breach of the ***Law Reform Act***, Cap 26.

Applicant's Submissions

21. On behalf of the applicant it was submitted that under section 229 of the Act, it is clear that in this instance the Respondent was time barred from rendering its decision and consequently, it is only lawful to presume that the appeal is successful and the impounded goods ought to be released to the Applicant in addition to application of a consistent classification as set out in the said appeal. It was therefore submitted that the action of the Respondent can only be construed as frustration of the legislative purpose it was intended to achieve and a breach of a statutory imposed duty as it is bound to allow the appeal as successful. In support of this submission the Applicant relied on **Fordham Michael, *Judicial Review Handbook***, 5th Edition at page 491 where it is stated:

"Statutes ate interpreted by reference to their purpose, and statutory powers must be

exercised for the purpose for which they were conferred. Public authorities are required to promote, and not to frustrate, the legislative purpose."

22. Further reliance was placed on **Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR** where it was held:

"If statutory power is exercised in a manner contrary to the drafters or against public interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations."

23. Citing the provisions of sections 106, 107(1), 122(3) and 229(6) of the Act it was submitted that the Applicant having furnished sufficient security as determined by the Respondent, the Respondent is charged with the responsibility of facilitating the ex parte applicant's business by ensuring clearance of imports once tax obligations have been complied with.
24. By refusing the release the Applicant's goods based on similar security as earlier given, it was submitted that the Respondent has acted in unpredictable fashion and in a manner contrary to which any sensible authority acting with due appreciation of its responsibilities would have decided to adopt and is hence in breach of statutory obligations as it is bound to release the said goods having accepted the said bonds. It was therefore submitted that the Respondent has acted contrary to the Applicant's legitimate expectation and in bad faith. In support of this submission the Applicant relied on **De Smith, Woolf & Jowell, *"Judicial Review of Administrative Action"*** 6th Edn. Sweet & Maxwell page 609 to the effect that:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

25. With respect to bad faith the Applicant relied on ***Black's Law Dictionary***, 9th Edn. at page 159, to the effect that dishonesty of belief or purpose is what the law considers bad faith.
26. It was contended that the Respondent having classified the earlier consignment as machinery could not seek to apply a different classification to the other subsequent consignments. In doing so it was submitted that the Respondent was displaying inconsistency in execution of its statutory mandate to the disadvantage of the ex parte applicant contrary to the principle of certainty which is an essential ingredient under the law of tax which stems from clarity underlying the law, and the confidence that the law will be interpreted and applied in a consistent manner hence contributing to the fundamental principle of fairness. In this respect the Applicant relied on **Fordham Michael, *Judicial Review Handbook*** (supra) at page 502 to the effect that:

"Consistency is a principle of good administration. Judicial Review may lie because treatment is unjustifiably unfavourable with action in relevantly likely cases (or prior treatment in the same case), or because it unjustifiably fails to distinguish other unlike cases. Consistency links with freedom from arbitrariness, each of which also links with (and is promoted by) adequate certainty of approach."

27. Similarly, in **Rank vs. East Cambridgeshire District Council EWHC 2081 Admin**, it was held:

"One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process...But it is also important for the purpose of securing public confidence in the operation of the development control system....The potential relevance arises because consistency is desirable

and inconsistency may occur if the authority fails to have regard to a previous decision."

28. To the applicant and based on **South Bucks District Council & Another vs. Porter [2004] UKHL 33**:

    "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues". Disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds."

29. If a public authority is to depart from previous decisions in similar cases, it was submitted it must then demonstrate good reason for that departure. Hence in **R (Bibi) vs. Newham London Borough Council 2001 EWCA CIV 607**, it was held:

    "Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires."

30. In this case the Respondent not only led the ex parte applicant to believe that the subsequent consignments will be classified in a like manner to the first consignment, but also that upon execution of bonds as was done previously, the said consignments would be released pending determination of the dispute and in **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Ltd [1981] UKHL 2** it was held that:

    "A taxpayer would not be excluded from seeking judicial review if he could show that the Revenue had either failed in its statutory duty towards him or had been guilty of some action which was an abuse of their powers or outside their powers altogether...I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly...to ensure that there are no favourites and no sacrificial victims"

31. According to the Applicant the functions of the Respondent are laid out in statute hence the Respondent is bound to presume the ex parte applicant's appeal as successful and on this point the applicant cited **Council of Civil Service Unions vs. Minister for the Civil Service Unions vs. Minister for the Civil Service [1984] 3 All ER 935** to the effect that:

    "the decision-maker, (in this case the Respondent) must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable."

32. Based on the foregoing it was submitted that the Application ought to be allowed.

Respondent's Submissions

33. On behalf of the Respondent, it was submitted that where person is dissatisfied with the decision of the Commissioner of Customs, the option is to appeal to the Customs Tribunal established under the Act and not to apply for judicial review as the applicant has done in this case.
34. It was further submitted that the applicant's objection was dealt with in accordance with the

requirements of section 229 of the Act hence the applicant's assertion that the Respondent failed to respond to its objection within the timelines prescribed under section 229(4) of the Act is incorrect both in law and in fact and this is evidenced from the correspondence exchanged between the parties.

35. It was further submitted that the Respondent is by law authorised to determine the nature of the security to be placed to secure the release of imported goods in instances where there is a pending dispute and this may be in form of surety, deposit or some other appropriate security as he may determine including partly deposit and partly by bond and partly by cash deposit. It was submitted that the acceptance of the Bond was before the Commissioner made her final ruling but thereafter she decided to require cash deposit.
36. It was therefore submitted that the Respondent's action was not unreasonable or unfair. Citing **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] All ER 683**, it was submitted that the effect of the legislation is not to set up the Court as an arbiter of the correctness of one view over another and provided the authority acts within the four corners of its jurisdiction, the Court cannot interfere. The Respondent further relied on **Arpees vs. Kenya Revenue Authority MSA HCMA No. 1031 of 2006** and submitted that the Court cannot determine the merits of the decision and in this instance, the applicant's representations were taken into consideration before the taxes were demanded and appropriate conditions imposed.
37. It was submitted based on **Coastal Bottlers Limited vs. The Commissioner of Domestic Taxes HCMA No. 1756 of 2005** that computation of duty or assessment involves the Court going into the details of every claim and the principles of assessment which is not a purview of judicial review. It was therefore submitted that going into determining the correct HS Code for the consignment in question will amount into the merits of the Respondent's decision which is not a matter for judicial review but a Customs Tribunal under the Act. However in this case as the Applicant has not moved the Tribunal, the instant application is an abuse of the Court process and ought to be dismissed with costs.

Determinations

38. Having considered the application, the affidavits both in support of the Motion and in opposition thereto as well as the rivalling submissions, this is the view I form of the matter.
39. It is clear that the orders sought by the applicant herein are all judicial review orders of mandamus. In **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996** the Court of Appeal expressed itself with respect to such order as follows:

"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."

40. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** was 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 the 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 matters…The court should not act as a Court of Appeal 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."

41. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that 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 constituted 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) Para 60.***
42. In this case the Applicant contends that vide its letter dated 28th April, 2012 it lodged an appeal with the Respondent pursuant to section 229 of the Act and that since no determination was made in respect thereof, the said appeal under the said provision was deemed to have been allowed.
43. However vide its letter dated 17th July, 2012, the Respondent's contention was that the said appeal was unsuccessful and that this was indicated vide a demand dated 7th May 2012.
44. Section 229 of the Act provides:

(1)A person directly affected by the decision or Application omission of the Commissioner or any other officer on matters relating to Customs shall within thirty days of the date of the decision or omission lodge an application for review of that decision or omission.

(2)The application referred to under subsection (1) shall be lodged with the Commissioner in writing stating the grounds upon which it is lodged.

(3)Where the Commissioner is satisfied owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision Commissioner was unable to lodge an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application the Commissioner may accept the application lodged after the time specified in subsection (1).

(4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.

(5)Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application.

(6) During the pendency of an application lodged under this section the Commissioner may at the request of the person lodging the application release any goods in respect of which the application has been lodged to that person upon payment of sufficient duty as determined by the Commissioner or security for the duty and for any penalty that may be payable as determined by the Commissioner.

45. The letter dated 7th May, 2012 was however addressed to Mentap Resources Freight Limited although the same was copied to the applicant. According to the Applicant Mentap Resources Freight Limited were the clearing agents. Even if for arguments sake the said Mentap Resources were to be taken as agents of the Applicants, there was no reference to the appeal in the said letter. Section 229(4) the Act enjoins the Respondent not only to communicate its decision within 30 days but to also communicate the reasons for the decision. This is so because it is from the said decision and reasons that the applicant may make an informed decision whether or not to invoke the provisions of section 230 of the Act and appeal to a Tax Appeal Tribunal established under section 231 of the Act which appeal is to be made within 45 days of service with the decision.
46. This Court dealt with similar circumstances in Nairobi High Court Judicial Review Miscellaneous Application No. 337 of 2013 – **Republic vs. The Public Procurement Administrative Review Board Ex Parte Noble Gases International Limited** in which a decision of the fate of the bids was not made expressly to the applicant. The Court found that time could not be deemed to have started running before the said communication was done. In this case, however the law provides for the consequences of the failure to communicate the decision within 30 days of the application and the consequences are that the application is deemed to have been allowed. The word "deem" has been interpreted by the Court and in **Gatete and Another vs. Kyobe SCCA No. 7 of 2005 [2008] 2 EA 135** it was held by the Supreme Court of Uganda that:

"The word "deemed" is commonly used in legislation to create legal or statutory fiction. It is used for the purpose of assuming the existence of a fact that in reality does not exist. The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to place beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

47. In this instance it is clear that the word "deem" was used for the purpose of assuming the existence of a fact that in reality did not exist and the fact is that an appeal has been allowed.
48. In my view the letter dated 7th May 2012 cannot by any stretch of imagination be construed as a decision dismissing the appeal since that letter was not served on the applicant in order to trigger the provisions of section 230 of the Act and secondly, the said letter did not contain any reasons for the decision. I associate myself with the decision in **South Bucks District Council & Another vs. Porter** (supra) to the effect that:

"The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues". Disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds."

49. To simply repeat a decision appealed from in my view does not amount to a decision on appeal as contemplated under section 229 of the Act. Such a decision in my view is capricious, irrational and unreasonable and as was held in **Noor Maalim Hussein & 4 Others vs. Minister of State for Planning, National Development and Vision 2030 & 2 Others [2012] eKLR**:

"If statutory power is exercised in a manner contrary to the drafters or against public

interest, the power can be said to have been exercised capriciously, irrationally or unreasonably. Thus irrationality and unreasonableness would play a major role and we shall as courts continue to assert our traditional duty and intervene in situations where authorities like ministers and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations."

50. It was further contended by the applicant that the Respondent having imposed a particular form of security, it was precluded from subsequently imposing a different form of security. In support of this submission the applicant relied on the now over-used principle of legitimate expectation. However as was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. There is no doubt that the Respondent has discretion to "***release any goods in respect of which the application has been lodged to that person upon payment of sufficient duty as determined by the Commissioner or security for the duty and for any penalty that may be payable as determined by the Commissioner".*** As was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) 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. The Court can however interfere in matters of discretion (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

51. In this case it is contended that the Respondent's decision is irrational and unreasonable. However the Respondent's position is that following the dismissal of the appeal, it was entitled to vary the mode of security. Barring my finding hereinabove, I would have had no reason to interfere with the Respondent's decision to vary the mode of deposit before releasing the goods to the Applicant.

52. On the issue of the quantum payable by the applicant, it is my view and I hold that that was an issue going into the merits of the decision and this Court in these kind of proceedings is not entitled to determine such matters.

53. The Respondents have contended that instead of instituting these proceedings the Applicant ought to have challenged the decision of the Respondent before the Tribunal as provided under section 230 of the Act. However as held hereinabove section 230 only comes into play after the applicant has been ***served*** with a decision under section 230(2) of the Act. In this case there is no evidence at all that a decision contemplated under section 229(4) was ever made leave alone that the same was ***served*** under section 230(2) in order for the process of an appeal to the Tribunal to be triggered. As was held in **Kenya National Examinations Council vs. Republic Ex Parte Geoffrey Gathenji Njoroge & Others** (supra) the purpose of an order of mandamus *"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."*

54. In the instant case there is no specific legal remedy provided for where the Respondent does not communicate its decision to the applicant within the stipulated period save for the deeming effect. The remedy of an appeal to the Tribunal in my view would in the circumstances be "*less convenient, beneficial and effectual."*

55. It follows that the Notice of Motion dated Notice of Motion dated 16th January, 2013 by the *ex parte* applicant herein, **Grain Bulk Handlers Limited,** succeeds as hereunder.

Order

56.Accordingly I grant the following Orders:

1. **I grant an order of mandamus compelling the respondent to accept the decision it is deemed to have made with regard to the applicant's application for review under Section 229(4) as read with Section 229 (5)** of the ***East African Community Customs Management Act, 2004*** **hence the respondent is compelled to accept the ex-parte applicant's appeal.**
2. **I grant an order of mandamus compelling the respondent to immediately release the ex-parte applicant's impounded consignments unless otherwise lawfully held.**
3. **I award the costs of this application to the applicant.**

Dated at Nairobi this 8th day of May 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wetangula for the Applicant

Mr Mbae for the Respondent

Cc Kevin