



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPL. NO. 340 OF 2012

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSIONER GENERAL,
KENYA REVENUE AUTHORITY.....RESPONDENT

EX PARTE: BOC KENYA LIMITED

JUDGEMENT

Introduction

1. By a Notice of Motion dated 11th September, 2012, the *ex parte* applicant herein, **BOC Kenya Limited**, seeks the following orders:

1. **An order of Certiorari to remove into the High Court for the purpose of being quashed, the decisions by the Respondent herein contained in the Respondent's letters dated 24th March 2010 and 28th August 2012 to demand payment and enforce recovery of further customs/taxes and penalties thereon totaling in the sum of Kshs. 40,765,935/- for the Applicant.**
2. **An order of prohibition directed to the Respondent, prohibiting the Respondent whether directly or through its officers and/or agents from issuing an agency notice to the Applicant's bankers or in any other manner whatsoever or howsoever enforcing any recovery measures referred to an embodied in the letter dated 28th August 2012 and/or any other communication, or seeking to recover further customs/taxes in the sum of Kshs. 40,765,935/- or any other sum at all from the Applicant.**
3. **An order of mandamus to compel the Respondent to conduct a thorough investigations and reconciliation of its account with Bax Logistics Company Limited (hereinafter "Bax Logistics") and recover any outstanding customs/taxes that such an investigation and or reconciliation may establish not to have been remitted by the said Bax Logistics to the Respondent in respect of the Applicant's goods if any.**
4. **That costs of this application be provided for.**
5. **THAT any other or further and consequential orders and/or directions be given.**

Ex Parte Applicant's Case

2. The application was supported by an affidavit sworn by **Arthur Kamau**, the Applicant's General Manager – Finance & Administration on 4th September, 2012.
3. According to the deponent, under the provisions of the various Acts of Parliament including the ***Customs and Excise Act***, and under the ***East Africa Community Customs Management Act, 2004***, the Respondent has licensed various Customs Agents, who are authorized by the Respondent to provide clearing services to importers/owners of goods in the position of the Applicant. Pursuant to Section 12 of the ***Customs and Excise Act*** and the provisions of the ***East African Community Customs Management Act, 2004*** the Respondent is in full control of the licensing of Customs clearing and forwarding agents, the system of payment of duties, audit of payments prior to release of goods, investigation and procedures of release of the goods the subject matter of the duty.
4. It was deposed that the Respondent has put in place very stringent measures and mechanisms in respect of customs to ensure full payment of customs before the release of goods.
5. Between the year 2007 and 2009, the Applicant dealt with one customs Agent known as Bax Logistics Company Limited (hereinafter “ Bax Logistics”, who under such license and under the authority of the Respondent, and on various dates in that period collected, cleared and forwarded various consignments of goods to the Applicant. In the process of clearing and forwarding such consignments, Bax Logistics while licensed/authorized by the Respondent to act as a Customs Agent informed the Applicant through various invoices that it had settled all taxes due from the Applicant for the said period, on the basis of which the Applicant paid in re-imburement to the said Customs Agent, Bax Logistics all the customs/taxes/duty in respect of its goods.
6. However, on about 24th March 2010 the Applicant, having been duly informed that all customs/duties/taxes due to the Respondent had been settled and further having received the actual goods for which the customs/duties/taxes had been paid, received a letter from the Respondent demanding payment of a sum of Kshs 24,361,142/- allegedly for unpaid customs taxes on the alleged basis that there was under declaration and fraudulent clearance of goods.
7. Immediately upon receipt of the Respondent's letter dated 24th March 2010, the Applicant raised the matter with Bax Logistics and by a letter dated 31st March 2010, Bax Logistics informed the Applicant that it (Bax Logistics) had requested the Respondent for reconciliation to be done with the Respondent and clearly and categorically confirmed that full payments of customs/taxes were made through it and further committed itself to settled any claims on the Applicant's behalf if any.
8. By its advocate's letter to the Respondent also dated 31st March 2010, Bax Logistics requested the Respondent for reconciliation and further committed itself to settle any claims that would be found due from its clients (including the Applicant) once the reconciliation was finalized and by letters dated 8th April 2012, the Applicant informed the Respondent and Bax Logistics that it was aware of the reconciliation between Bax Logistics and the Respondent and the commitment by the former to clear any outstanding customs/duties as the Applicant had paid all the customs/taxes and was not involved in any fraud.
9. To the deponent, there was no dispute whatsoever that the Applicant had made appropriate payments and or reimbursements for the customs/duties/taxes through Bax Logistics and the Applicant had a legitimate expectation that it would not be required to pay further customs/duties/taxes. To the deponent, it was in the interest of the Respondent to conduct the reconciliation and recover any outstanding customs/taxes from Bax Logistics as in the written commitment from Bax Logistics in the letters of 31st March 2010.
10. However, without any notice or explanation for its failure or refusal to carry out the reconciliation and recovering the customs/taxes from Bax Logistics, the Respondent after two years and by a letter dated

11th May 2012 revived the claim for customs/taxes in the sum of Kshs 24,361,142/- and despite severally demanding explanations as to how the goods could have been released by the Respondent without full payment of duty and why the Respondent has failed and or declined to conduct reconciliation and recover any customs/taxes that may have been found due as requested exchanged between the Applicant and the Respondent, the same has been unsuccessful. Instead, the Respondents has by a letter dated 28th August 2012 threatened to enforce its demand and payment of customs/taxes and penalties thereon amounting to Kshs 40,765,935 from the Applicant.

11. According to the applicant the facts above point to the conclusion that the Respondent may have been defrauded by the clearing agent as the Applicant had no hand or role on the clearance process and the Respondent cannot therefore lay blame upon the Applicant for the alleged clearance of falsely manifested goods and it is therefore unjust, unreasonable and indeed illegal for the Respondent to demand or continue demanding and enforce any further payment from the Applicant in respect of the customs/taxes and or impose penalties in respect of the taxes. It was contended that the Applicant did not and could not possibly have any ability to supervise and or ensure the full compliance with the procedure relating to the Respondent's operations for the collection of duties and that any fraud could happen or arise from serious negligence, complacency, recklessness acquiescence and or complicity by the Respondent's officials and not the Applicant.

12. It was therefore averred that the decisions by the Respondent to demand further taxes from the Applicant and to enforce the recovery measures in respect of the customs/duties in issue are illegal and null and void to the extent that the Respondent is seeking to recover sums which have already been fully paid to the Respondent and the goods the subject matter of the duties alleged to be due and owing released to the Applicant. Further, the decisions by the Respondent to demand further taxes from the Applicant and to enforce the recovery measures in respect of the customs/duties in issue are unreasonable and lacking in good faith in that the Respondent is fully aware that the Applicant made payments through Bax Logistics, a Customs Agent licensed by the Respondent, and that on the strength of the payment so made the clearance of each and every consignment in issue was made by the Respondent. In addition, the decisions by the Respondent to demand further taxes from the Applicant and to enforce the recovery measures in respect of the customs/duties in issue have been made without any or any sufficient explanation relating to any irregularities in the settlement of duties at the time of payment and release of the goods hence the decisions were not made in good faith.

13. In the deponent's view, the decisions by the Respondent to demand further taxes from the Applicant and to enforce the recovery measures in respect of the customs/duties in issue are unreasonable , oppressive and based on an ulterior motive to the extent that the Respondent is seeking to recover taxes two times over without any lawful justification as to the double recovery in relation to goods for which payment has already been made through the Respondent's authorized clearing and forwarding agent on the strength of which the goods were released to the Applicant and in respect of which the Respondent has not provided any, or any sufficient explanation as to why its institutions have been used as a conduit for fraud, and/or corruption.

14. To the deponent, the decisions by the Respondent to demand further taxes from the Applicant and to enforce the recovery measures in respect of the customs/duties in issue are unreasonable and manifestly unjust to the extent that the Respondent is, by reason of a requirement for placement of performance bonds by duly licensed clearing and forwarding agents, entitled to recourse by the calling up of the said bonds to recover any amounts which may be found not to have been duly settled by any such clearing and forwarding agent. Further, the decisions by the Respondent to demand further taxes from the Applicant and to enforce the recovery measures in respect of the customs/duties in issue are unreasonable and manifestly unjust in that by a letter dated 31st March 2010 Bax Logistics through its advocates Messrs Arimi Kimathi & Company Advocates requested the Respondent to conduct a reconciliation of its account with the Respondent and further committed itself to settle any claims that would be found due from the agents clients (including the Applicant) after the reconciliation. The Respondent has without cause reason or explanation neglected, refused and or declined to conduct the reconciliation requested for by Bax Logistics on 31st March 2010.

15. It was therefore the applicant's case that it is in the interest of justice that the orders sought herein are granted and that the Respondent's decision to enforce payment is stayed so that the matter is heard and determined on its merit and that no harm would be suffered by the Respondent if stay was granted.

Respondent's Case

16. On behalf of the Respondent a replying affidavit was on 26th June, 2013 sworn by **Sylvester Ogello Okello**, an officer appointed under and in accordance with section 13 of the **Kenya Revenue Authority Act**, Cap 469 of the Laws of Kenya (hereinafter referred to as the Act), an Act of Parliament under which the **East African Community Customs Management Act** (hereinafter referred to as EACCMA) is administered.

17. According to him, the ex-parte Applicant is a body corporate and was at all times material to this application the importer (consignee) of the goods the subject of this proceedings while the Kenya Revenue Authority is established under section 3 of the Act and under Section 5(1) thereof is an agency of the government for the collection and receipt of all revenue. Under section 5(2) with respect to the performance of its functions under subsection (1), the authority is required to administer and enforce all provisions of the written laws set out in part 1 & 2 of the First Schedule of the purposes of assessing, collecting and accounting for all revenues in accordance with those laws one such law being the EACCMA, under which the current customs arose.

18. It was deposed that the Respondent in the performance of its statutory duties carried out a systems audit of its Customs systems (SIMBA SYSTEM) and discovered that certain entries registered on behalf of the ex-parte applicants by their clearing agents **Bax Logistics Co. Ltd** the Interested Party herein, had not been accounted for and duties not paid as required by the law and the respondent requested to submit, which they did, copies of the importation documents relating to the imports in question including import entries and payment vouchers. On examination of the said entries and receipts, it was discovered by the Respondent's officers that the receipts and entries were not in the Respondent's Customs systems (SIMBA SYSTEM) and were therefore not genuine. Similarly, the receipts submitted as proof of payment and purporting to have been paid at the National Bank of Kenya Ltd were found not to have been issued by the bank and therefore no payments were received.

19. Consequently, the ex-parte Applicant was notified of this anomaly and the analysis explained to the ex-parte Applicant and the effects on taxes payable explained.

20. Arising from the same anomaly, the Respondent vide a demand letter dated 24th March 2010 wrote to the Applicant demanding a sum of Kshs. 24,361,142.00 being the principal amount of the unpaid taxes. Thereafter, several meetings were held between the Respondent's officers and the Applicant herein, notably the then Managing Director **Maria Msiska** and the Finance and Administration Manager **Mr. Arthur Kamau** during which the representatives of the Applicant were fully briefed on the fraud by their agents including a comparison of the customs entries submitted the said agents against the genuine entries existing in the KRA system. By a letter dated 1st August 2012, the Ex-parte Applicant even requested that it be allowed time to submit the matter to a meeting of its Board of Directors. However, as no payment was received, the Ex-parte Applicant was vide letters of 28th August 2012 notified of the Respondent's intentions to enforce payments.

21. It was deposed that the Respondent, after having sufficiently demonstrated to the Applicant reasons why the taxes are payable and having been patient enough and accorded the Applicant all the opportunity and time to pay the taxes, which is from March 2010, is now convinced that the Applicant is not interested in paying the taxes and has filed the application before court to frustrate any attempt to recover the taxes.

22. It was the Respondent's case that while it is not in doubt that the Respondent licenses customs clearing agents, the Respondent does not dictate to the importers who to engage as their agents for purposes of clearance of goods through customs; that the role of the Respondent is therefore merely to register and allow access to customs clearing system to anybody who meets the conditions for licensing;

that as a licensing body, the Respondent can only take action against the clearing agents who engages in fraud or misconducts by suspending the password used by the clearing agents to access the customs clearing system; that in the instant case the clearing agent was able to generate false invoices to reflect lower customs values for the goods and used the same for preparing entries which were subsequently processed through customs and lower taxes paid; and that customs officers use the invoices submitted by importers (or their agents) to determine the value of the goods and hence the taxes payable and therefore if the invoices are under-valued as was the case herein, then the taxes are also underpaid.

23. It was reiterated that no duties have been paid, either by the Ex-parte Applicant or by their said agents in respect of the goods in question as alleged or at all despite the Ex-parte Applicant being informed on several occasions of the non- payment of the taxes in respect to the goods the subject of these proceedings.

24. It was averred that the allegation by the Ex-parte Applicant that the Respondent ought to have pursued their agents Bax Logistics Limited for the taxes due to hereunder is not legally tenable since the said action according to the Respondent's records, the same does not exonerate the Applicant herein from paying the taxes. Further, even if the said Bax Logistics Limited were to be liable for the taxes Section 147 and 148 of the EACCMA, statutorily and expressly provides that the Applicant herein is equally liable. In the Respondent's view, the Ex-parte Applicant is liable for the actions of its clearing agents having bestowed trust on them and held them out to all, the Respondent herein in particular, to be having authority to clear their goods under the Customs law.

25. The Respondent retorted that in a Judicial Review Application, the court would be concerned not with reviewing the merits of the decision in respect of which the application of the judicial review is made, but the decision making process itself. Given the fact that the East African Customs Management Act empowers the Respondent to demand taxes owed as it did, there is nothing legally wrong with its actions. What a Judicial Review Court would be examining in arriving in its decision is whether the process leading to the assessment and actual demand was fair or not; that the court, in the exercise of its Judicial Review application is not to adjudicate on the tax liability or otherwise of the Ex-parte Applicant on the action of its agent.

26. It was therefore contended that the motion discloses no reasonable cause of action and is totally unfounded and ought to be dismissed.

Applicant's Submissions

27. On behalf of the applicant, it was submitted that since the applicant had no role in the clearance process, any fraudulent clearance of the goods could only happen or arise from serious negligence, complacency, recklessness, acquiescence and or complicity by the Respondent's officials.

28. It was submitted that under the provisions of the *Customs and Excise Act* and EACCMA, the Respondent is in full control of licensing of customs clearing and forwarding agents, the system of payment of duties, audit of payments prior to release of goods, investigation and procedures of release of the goods the subject matter of the duty and that the provisions of section 2(2)(a) of the EACCMA do not allow for entry of goods without all requisite duties having been paid. Further section 15 thereof makes it mandatory that all persons and goods only pass through the designated exit points where a customs officer will conduct the said verification to ensure that goods are entered only after the payment of duties lawfully due. The said provisions together with the stringent measures and mechanisms put in place by the Respondent's Simba system prohibit the release of goods before full payment of customs and further prohibit the Applicant from directly clearing goods except by the engagement of a duly licensed clearing and forwarding agent.

29. It was submitted that the applicant made appropriate payments to the interested party by reimbursement upon receipt of the goods and production of requisite receipts and invoices by the interested party hence the allegation that the documents were not genuine cannot hold.

30. It was therefore contended that the Respondent's demand for further payment of Kshs 40,765,935/- in respect of customs and or impose penalties in respect of the taxes is therefore unjust and illegal since the Respondent is seeking to recover sums which have already been paid and the goods the subject matter of the duties alleged to be due and owing released to the Applicant hence the Applicant had a legitimate expectation that it would not be required to pay further customs.

31. It was submitted that based on **R vs Kenya Revenue Authority & The Commissioner General, ex parte Unilever Tea Kenya Limited Misc. Civil Appl. No. 1109 of 2005**, that the Respondent's argument that under section 147 of the Act, the interested party was an agent of the applicant and therefore liable for the actions and or omissions of the interested party is incorrect.

32. It was contended that the conduct of the Respondent prior to and subsequent to the filing of these proceedings clearly demonstrates that the impugned decisions were actuated by reasons divorced from the goals of justice. In support of the submission that the Respondent ought to have gone after the interested party, the applicant relied on **R vs. Kenya Revenue Authority & Another ex parte Kronos Les Centre East Africa Limited [2012] eKLR**. It was therefore contended that the Respondent's action was on the authority of **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1947] All ER 680**, unreasonable and irrational since Parliament has empowered the Respondent to take action against and deal with errant clearing agents. Therefore the Respondent had a duty to ensure that the clearing agents duly licensed follow the guidelines established under national law and when they fail to, the Respondent should take appropriate action against the agents and the Respondent's argument that its duty is merely to register and allow access to the customs clearing system to anybody who meets conditions for licensing is clearly an abdication of statutory power and duty on its part. Relying on **R vs. Commissioner of Co-operatives ex parte Kirinyaga Tea Growers [1999] 1 EA 247**, it was submitted that it is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably and that no statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith.

33. It was therefore submitted that the Respondent's impugned decisions are unjust, illegal, unreasonable and mala fides hence warranting the orders sought.

Respondent's Submissions

34. On behalf of the Respondent, it was submitted that while it is not in doubt that the Respondent licenses customs clearing agents, the Respondent does not dictate to the importers who to engage as their agents for purposes of clearance of goods through customs and that the role of the Respondent is merely to register and allow access to the customs clearing system to anybody who meets the conditions for licensing

35. It was submitted that as a licensing body the Respondent can only take action against a clearing agent who engages in fraud or misconduct by suspending the password used by the clearing agent to access the customs clearing system. In the instant case, the Respondent has revoked the licences of the clearing agents involved and is currently investigating the case with a view to prosecuting the parties that may have been involved in the fraud.

36. According to the Respondent, in this case the clearing agent was able to generate false invoices to reflect lower customs values for goods and used the same for preparing entries which were subsequently processed through customs and lower taxes paid. Since custom officers use the invoices submitted by importers (or their agents) to determine the value of the goods and the taxes payable, if the invoices are under-valued as was the case herein, then the taxes are also underpaid.

37. On the authority of **Republic vs. Judicial Service Commission ex parte Pareno Nairobi HC Misc. Civil Application No. 1025 of 2003**, it was submitted that judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision making process. To the Respondent, the EACCMA empowers the Respondent to demand the taxes owed as it did hence what the judicial review court would be examining is whether the process

leading to the assessment and actual demand was fair and not to adjudicate on the issue of vicarious liability or otherwise of the ex parte applicant on the actions of its agent. In view of sections 147 and 148 of the said Act, it was within the Respondent's statutory powers to demand the payment of the taxes as it did, the ex parte applicant having failed to account for the taxes.

38. On the authority of **John Murphy (Street on Torts) 11th Edn page 642**, it was contended that the ex parte applicant must in law be liable for the actions of its agents having bestowed trust on them and held them out to all to be having authority to clear their goods under the Customs Law. Therefore, it was the Respondent's position that the ex parte applicant was liable for the taxes notwithstanding the alleged fraud by the agents. In support of this submission the Respondent relied on **Uxbridge Permanent Benefit Building Society vs. Pickard [1939] 2 KB 248**.

39. To the Respondent the allegation of collusion between the agents and the Respondent's employees was only a matter of conjecture as there was no material to this effect and based on **Republic vs. Commissioner of Lands ex parte Somken Petroleum Company Limited [2005] eKLR** ought to be disregarded.

40. It was therefore submitted that the application disclosed no reasonable cause of action and the prayers sought were not deserved and ought to be dismissed with costs.

Determination

41. Section 147 of the Act provides as follows:

A duly authorised agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act:

Provided that nothing herein contained shall relieve the owner of such goods from such liability.

42. Section 148 of the same Act, on the other hand provides *inter alia* as follows:

An owner of any goods who authorises an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorised agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence.

43. Therefore where an importer fails to pay the taxes, he cannot be heard to say that he is not liable to pay the same due to illegal actions perpetrated by the agent since the liability of the agent does not preclude him from meeting his own obligations to pay taxes. Under the said sections both the owner of the goods and its agent are liable under the Act.

44. Dealing with sections 145, 146, 147 and 148 of the Act, **Korir, J** in **Republic vs. Kenya Revenue Authority ex parte African Boot Company Limited Nairobi Misc. Cause No. 54 of 2010** expressed himself as follows:

“A look at the above quoted Part XI of the Act clearly shows that the Commissioner of Customs only licences customs agents. The agents however act on behalf of the importers of goods. The person who appoints the agents to carry out a particular transaction is the importer. That means the customs agent becomes the agent of the importer and not the Commissioner of Customs. The respondent therefore does not foist a particular customs agent on a taxpayer. The tax payer is the one who goes out to look for a particular agent to clear goods on his behalf...When a Customs agent engages in fraudulent activities, the

importer cannot ask the respondent for compensation. The importer has to bear the loss with fortitude and find a way of recovering the money misappropriated from the customs agent.”

45. Similar circumstances arose in **Republic vs. Kenya Revenue Authority ex parte Alltex EPZ Limited Nairobi High Court Judicial Review Application No. 709 of 2008** in which **Majanja, J** held:

“The language of the statute leaves no doubt that the legislature intended that for purposes of collection of duty, the owner of the goods would be liable for the actions of the agent whatever the circumstances.”

46. In Mombasa Court of Appeal Civil Appeal No. 157 of 2007 – **The Commissioner of Customs, The Kenya Revenue Authority and the Registrar of Motor Vehicles vs. Amit Ashok Doshi and Mehil Patel**, the Court of Appeal held that if the process of verification would ultimately result in the applicant being required to pay duty and taxes, the Respondent would not lawfully be estopped from exercising its statutory duty and recovering the duty imposed by the law which should have been paid but for the fraud of the importers and that it would be contrary to public policy to shield the applicant through judicial review from operation of the law and allow him to retain unaccustomed goods contrary to the law.

47. However, in this case, it is contended by the applicant that it satisfied the obligations placed upon it when it reimbursed the agents expenses after the goods were cleared. It is however contended that the applicant’s goods were undervalued and that some of the documents relied upon by the applicant were not genuine. What is striking however is that the interested party informed the Respondent that a reconciliation ought to be done between the Respondent and the interested party and if found that full payment was never effected, the interested party would make good the same. It would seem that for reasons best known to the respondent, the Respondent did not seriously pursue this course but instead decided to cancel the interested party’s licence and demand for payment from the applicant.

48. In **R vs Kenya Revenue Authority & The Commissioner General, ex parte Unilever Tea Kenya Limited** (supra) a case whose facts were similar to the instant one **Musinga, J** (as he then was) held as follows:

“It cannot be denied that in law, the interested party was an agent of the applicant. The fact that the interested party had earlier been vetted by KRA does not make him an agent of KRA. However, all the goods that were imported by the applicant and cleared by the interested party were under the control of KRA as per section 12 of the Customs and Excise Act and section 14 of the Value Added Tax Act. This control included the rigorous checking of all the documents accompanying the said goods. The procedure of clearing goods is closely controlled by KRA. Although it was alleged by KRA that the interested party presented various false document which were vital for clearing of the applicant’s goods, all of those documents were inspected and passed by officials of KRA. The applicant had no hand in such scrutiny. KRA cannot therefore simply allege that there was fraud in clearing the goods and lay all blame upon the applicant...One of the requirements of KRA before a person is registered as a clearing agent is provision of a bond under Regulation 259 of the Customs and Excise Regulations. The agent undertakes that he “shall faithfully and uncorruptly perform his/their duties as agent to the satisfaction of the Commissioner”. I agree with the applicant that this clearly requires KRA to have a watchful eye over all clearing agents to ensure that they perform their duties faithfully. In the event that corrupt officials of KRA collude with corrupt clearing agents to pocket money that is paid as duty by a principal through a clearing agent, it would be unjust to require the principal to shoulder the burden of making another payment....It is an accepted principle of commercial law that where an agent acts without or in excess of authority or in fundamental breach of a contract between him and a principal the agent will be personally liable for such acts.”

49. In my view the officials of KRA ought to have scrutinised the documents presented properly before clearing the goods and taking into account the stringent procedures put in place by the Respondent, one

cannot be faulted for forming an opinion that the said clearance was either as a result of negligence or corruption perpetrated by or with the knowledge of the Respondent's officials and for that the applicant ought not to be crucified. I associate myself with the sentiments of **Korir, J** in **R vs. Kenya Revenue Authority & Another ex parte Kronos Les Centre East Africa Limited** (supra) that:

“In a case where a customs agent has been involved in fraudulent activities, it would be more beneficial to the taxing authority if it went after the agent. The importer does not normally deal directly with the taxing authority's employees and the only people who can collude to defraud the taxman of his dues are the employees of the clearing agent and the employees of the taxman. The only way the taxman can fight corrupt activities is to demand taxes from the clearing agent. The taxing authority also has powers to cancel the licence of a rogue clearing agent. Going after the importer would seem unfair in a situation where there is clear evidence that the clearing agent has misappropriated the money meant for clearing the goods and corruptly cleared the goods.”

50. In this case, the interested party made what in my view was a reasonable suggestion that the accounts be reconciled between the Respondent and the interested party and the short fall, if any, would be made good by the interested party. Why the Respondent thought that the best option would be to cancel the interested party's licence and demand the payment from the applicant defeats reason. It is now trite that it is implied that power given to authorities or persons by an Act of Parliament must be exercised fairly, and the court has the power to reach out where the exercise of that power is unfair. Therefore a power which is abused should be treated as a power which has not been lawfully exercised. See **Reg vs. Secretary of State for the Environment Ex Parte Nottinghamshire County Council [1986] AC.**

51. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. See **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240.**

52. In my view, whereas I agree that the Respondent could choose to seek the payment of taxes from either the Applicant or the interested party, that discretion would only be properly exercised if the Respondent was certain that taxes and duty had not been paid. In the instant case, since an offer to reconcile the account was not pursued, it was in my view an improper exercise of discretion to demand the payment of the said taxes from the applicant. It is trite that even in cases where a discretion is given to an authority the Court is entitled in appropriate cases to interfere with the same (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.**

53. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479** held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.....Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law

before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

54. However the the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by Nyamu, J (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket.....Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations.....Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

55. Similarly in **Bahajj Holdings Ltd. vs. Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai. 97 of 1998** the Court of Appeal held that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions while in **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47**, Nyamu, J (as he then was) held the view that while it is true that so far the jurisdiction of a judicial review court has been principally based on the “3I’s” namely illegality, irrationality and impropriety of procedure, categories of intervention by the Court are likely to be expanded in future on a case to case basis.

56. Again in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions..... This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law.”

57. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three “I’s”) and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoghue vs. Stephenson** in the last century.

58. It is therefore my view that the conduct of the Respondent in failing to take the course of reconciling its records with the interested party in order to arrive at an informed decision was unreasonable in the circumstances and cannot be allowed to stand. The Respondent ought to have adhered to the provisions of Article 47 of the Constitution which enjoins administrative bodies to ensure that their actions and decisions are reasonable.

59. In the circumstances I find merit in the Notice of Motion dated 11th September, 2012.

Order

60. In the result the orders which commend themselves to me and which I hereby grant are as follows:

1. **An order of Certiorari to remove into this Court for the purpose of being quashed, the decisions by the Respondent herein contained in the Respondent’s letters dated 24th March 2010 and 28th August 2012 to demand payment and enforce recovery of further customs/taxes and penalties thereon totaling in the sum of Kshs. 40,765,935/- from the Applicant which decision is hereby quashed.**
2. **An order of mandamus to compel the Respondent to conduct a thorough investigation and reconciliation of its account with Bax Logistics Company Limited (hereinafter “Bax Logistics”) and recover any outstanding customs/taxes that such an investigation and or reconciliation may establish not to have been remitted by the said Bax Logistics to the Respondent in respect of the Applicant’s goods if any so long as such sums are held by the interested party.**
3. **I however decline to grant an order of prohibition in the manner sought in prayer 2 of the Motion as to do so would be preemptive and may well be illegal.**
4. **The applicant will have the costs of the application to be borne by the Respondent.**
5. **Liberty to apply given.**

Dated at Nairobi this 19th day of September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Muthui for the Applicant

Miss Ngugi for Mr Ado for the Respondent

Cc Patricia