REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 268 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY

MINISTRY OF INDUSTRIALIZATION &

ENTERPRISES DEVELOPMENT .....1ST RESPONDENT

KENYA REVENUE AUTHORITY .....2ND RESPONDENT

EX-PARTE

RISHIT METALS LIMITED

JUDGEMENT

The ex-parte Applicant, Rishit Metals Limited, is a limited liability company incorporated in Kenya under the provisions of the Companies Act, Cap 486. Its core business is recycling of non-ferrous metals. The 1st Respondent is the Principal Secretary of the Ministry of Industrialization and Enterprises Development (the Ministry) and is in charge of administration in the Ministry. Kenya Revenue Authority (KRA) is the 2nd Respondent and is a body corporate established under the Kenya Revenue Authority Act, Cap 469. Its mandate is to administer all tax and revenue laws in Kenya.

In early June, 2013 the ex-parte Applicant (the Applicant) sought to export two containers of forklift counterweights. The 2nd Respondent was of the view that the said products where among the restricted goods found in the East African Community Legal Notice No. EAC/16/2010 dated 29th June, 2010. The 2nd Respondent sought the opinion of the 1st Respondent as to whether the said products fell in the category of the goods restricted by the said Legal Notice. The 1st Respondent wrote to the 2nd Respondent indicating that the said products were restricted goods. Through a letter dated 12th July, 2013, the 2nd Respondent conveyed the decision of the 1st Respondent to the Applicant and concluded that:-

> **"In view of the foregoing the Authority has no option but to seize the goods deposited at ICD, Embakasi, in accordance to Section 200 as read with Sections 210 & 213 of EACCM Act 2004. The goods will be dealt with by the Commissioner as may be deemed fit."**

On 23rd July, 2013 the Applicant sought and obtained leave from this court to commence judicial review proceedings with a view to having the decisions of the respondents quashed. Through the notice of motion application dated 6th August, 2013 the Applicant therefore prays for orders:

1. **THAT an Order of Certiorari do issue to remove to this Honoruable Court for the purposes of quashing, the decision embodied in the letter dated July 12th 2013 of the 2nd Respondent under ref KRA/I&E/CISN/INV/1/13 and the letter dated July 9th 2013 of the 1st Respondent under ref: MOI/CONF.9/8 purporting to extend the application of the East African Community Legal Notice No. EAC/16/2010 dated 29th June, 2010 to finished products such as forklift counterweights manufactured from the processing of lead scrap.**
2. **THAT an Order of Certiorari do issue to remove to this Honourable Court for the purposes of quashing the 2nd Respondent's decision embodied in the letter dated July 12th 2013 threatening and/or purporting to seize the Applicant's goods deposited at the Inland Container Deport (ICD), Embakasi for the purposes of export and being 2 x 20' containers Numbers TCKU 3655234 and FCIU 3672950 containing 50 pieces of Forklift Counterweights.**
3. **THAT an Order of prohibition do issue to restrain the 1st and 2nd Respondents and each of the Respondents from interpreting the East African Community Legal Notice No. EAC/16/2010 dated June 29th 2010 as extending to all finished products manufactured from used automobile batteries, batteries, lead scrap, crude and refined lead.**
4. **Costs of this suit be provided for.**

The application is supported by the chamber summons application for leave, a statutory statement, a verifying affidavit sworn by Aditya Apoorva the Chief Executive Officer of the Applicant and exhibits annexed to the affidavit.

The Applicant's case is clearly brought out by the grounds upon which relief is sought found in the statutory statement as follows:

1. **<u>Illegality</u>**
    1. **The decision to extend application of East African Community Legal Notice No. EAC/16/2010 dated June 20th 2010 to finished products is illegal.**
    1. **The interpretation of the East African Community Legal Notice No. EAC/16/2010 dated June 29th 2010 as extending to finished goods produced from the restricted raw materials offends the literal rule of interpretation.**
2. **<u>Want of Jurisdiction</u>**

2.1 The 1st and 2nd Respondents have no legal authority and/or mandate to amend the subject Legal Notice *to wit* Legal Notice No. EAC/16/2010 dated June 29th 2010 by extending its scope and ambit to include finished products.

3. <u>Excess of jurisdiction</u>

3.1 The 1st and 2nd Respondents have acted in excess of jurisdiction by extending the scope and ambit of Legal Notice No. EAC/16/2010 dated June 29th 2010 to finished products.

4. <u>Irrationality</u>

4.1 It would be patently and manifestly irrational for the 1st and 2nd Respondents to pursue a policy based on the argument that no finished products made out of restricted raw materials can be exported.

Dr. Wilson Songa, the 1st Respondent opposed the application through a replying affidavit and a further replying affidavit filed in court on 1st September, 2013 and 13th September, 2013 respectively. The 2nd Respondent opposed the application through a replying affidavit sworn by Sylvestor Okello Ogello a Senior Assistant Commissioner in its Investigation and Enforcement Department. In the replying affidavit Dr. Wilson Songa gave the history behind the issuance of Legal Notice No. EAC 16/2010 and averred in paragraphs 10, 11, 12, 13, 14, 17 and 18 that:-

> **10. That the rationale behind Kenya's request for an export restriction order was informed by the fact that an export restriction on old automotive batteries, scrap lead, refined or unrefined lead at low value would be beneficial to the local industries.**
>
> **11. That some companies seek to export products from processed lead scrap under other tariffs to go round the export restrictions.**
>
> **12. That the 1st Respondent Ministry declined to issue export license to the ex-parte applicant's company in the public interest to protect the limited supply of locally available raw materials in the Country.**
>
> **13. That it is noteworthy that Kenya cannot import lead scrap from either Tanzania or Uganda since exports of the materials are prohibited in both countries as a deliberate measure to secure adequate raw materials for their local automotive battery and solar panel manufactures.**
>
> **14. That the decision to amend Part B of the Third Schedule was made by the Council of Ministers and to that extent, that should be litigated regionally rather than in our municipal courts.**
>
> **15. …….**
>
> **16. …….**
>
> **17. That the Government of Kenya is bound by its treaty obligations as enjoined under Article 2(6) of the Constitution of Kenya.**
>
> **18. That the 1st Respondent was guided by the policy decision of the EAC Council of Ministers in giving a purposive interpretation of the legal notice in issue.**

In the further affidavit filed on 13th September, 2013 Dr. Wilson Songa avers in paragraph 3, 9, 10, 11, 12 and 13 that:-

3. **That I verily believe that the alleged exportation of 'forklift counter weights' by Rishit Metals Ltd is an attempted disguise of exporting re-cycled lead from Kenya.**
4. **……**
5. **……**
6. **……**
7. **……**
8. **……**

> **9. That the Council of Ministers acceded to the Kenyan government's prayers and issued EAC Legal Notice No EAC/16/2010, which essentially forms part of the East African Community Partner States regional policy restricting the export of these materials.**
>
> **10. That the rationale behind the said action was to prevent the siphoning very essential**

industrial raw materials through cheap exportation of re-cycled lead on the one hand without significant value addition and at the same time, discourage the importation of the same raw material in billets/ingots form at a higher price for the production of automotive batteries.

11. That during the equipment installation phase at Rishit Metals Ltd, this Ministry and the Ministry of Trade conducted a joint site inspection at the request of Rishit Metals Ltd where the top management of Rishit Metals Ltd was advised right from the beginning of their investment plan that, the government would not allow the exportation of lead raw material in whatever form or shape.

12. That it is also noteworthy that the top management of Rishit Metals Ltd participated in the development of the current Draft Scrap Metals Bill, 2013 which had already been presented to Cabinet for approval before being tabled in Parliament for debate which expressly states that, no person shall export any form of scrap metal or ingots/billets unless under special consideration, the point being that the management of Rishit Metals Ltd has always been fully aware of the regional policy and in particular the official position of the government of Kenya with respect to the exportation of lead materials.

13. That according to international best practice, forklift counterweights are made from gray iron, ductile iron and casting iron.

The 2nd Respondent's case as gleaned from the affidavit of Sylvestor Okello Ogello is that it is mandated to administer and enforce certain laws for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws and one such law is the East African Community Customs Management Act, 2004 (EACCMA) under which the current dispute arose. The 2nd Respondent states that in the performance of its statutory duties it carried out a system audit of its customs system (SIMBA SYSTEM) and discovered that certain entries registered on behalf of the Applicant by their clearing agents had been declared as **"25 metric tons of grey oxide", "22 pkgs of new forklift counterweights"** and **"new forklift counterweights size 850mm x 900mm."** The 2nd Respondent informed the court that its intelligence gathering had revealed that a number of exporters were still exporting scrap metal out of the country despite the restriction imposed by Legal Notice No. EAC 16/2010. According to the 2nd Respondent, in order to beat the restriction imposed by the Legal Notice, exporters would disguise the exports as other goods by assigning them descriptions which would on the face of it appear to be goods other than the goods specified in the said Legal Notice. Based on the information it had the 2nd Respondent subjected the Applicant's goods to a laboratory test and established that the goods had 95.01% lead content. The Applicant was notified of the results. The 1st Respondent was also asked for guidance in respect of the Applicant's goods. The 1st Respondent informed the 2nd Respondent through a letter dated 9th July, 2013 that Legal Notice No. EAC/16/2010 covered the Applicant's goods. The Applicant was notified of the Ministry's position through a letter dated 12th July, 2013 and the Applicant's goods declared restricted goods. The 2nd Respondent submitted that all its actions as regards the Applicant's goods were based on the law and judicial review orders are therefore not available to the Applicant.

Looking at the positions taken by the parties in this matter, I find that the question for the determination of this court is whether the Minister was wrong in concluding that the Applicant's goods fell into the category of the goods restricted by Legal Notice No. EAC/16/2010.

In order to answer the question before this court, there is need to seek an answer as to the place of judicial review in these proceedings. What is judicial review and what does it do? Judicial review is a tool used by the High Court to check the exercise of power by tribunals, public authorities and public officials. It is used to ensure that those entrusted with authority do not abuse their powers. Lord Diplock clearly summarized the purpose of judicial review when he observed in the **COUNCIL OF CIVIL SERVICE UNIONS v MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935** case as follows:-

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..

By "illegality" as a ground for judicial review I mean that the decision-maker 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 be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

Judicial review therefore confines itself to checking the decision making process. It does not concern itself with the merits of the decision. A court exercising its judicial review powers ought not to substitute its own opinion with that of the body statutorily mandated to make the decision. However, where a body mandated to make a decision makes a decision that is so unreasonable that no person applying his mind to the facts of the case would reach such a decision, the court can quash such a decision for being unreasonable-see **ASSOCIATED PROVINCIAL PICTURE HOUSES V WEDNESBURY CORPORATION (1948) 1 KB 273.** One can therefore say that where a public entity makes an illogical, unreasonable, irrational or preposterous decision, it automatically invites the court to look into the merits of the decision.

The answer to the question as to what judicial review does was given by the Court of Appeal in the case of **KENYA NATIONAL EXAMINATION COUNCIL V REPUBLIC EX-PARTE GEOFFREY GATHENJI NJOROGE & 9 OTHERS, CIVIL APPEAL NO.266 OF 1996** when the Court outlined the purpose of the core judicial review remedies as follows:-

"What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the law of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings……..Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision……

What is the scope and efficacy of an ORDER OF MANDAMUS?.....an order of mandamus will compel 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……

To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is placed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then madamus is the 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 <u>CERTIORARI</u> can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

It is therefore clear that judicial review remedies are fashioned in a manner that aid in the fulfillment of the purpose of judicial review.

Having established the law, I will now proceed to apply the law to the facts of this case. The Applicant attached to its application Legal Notice No. EAC/16/2010 issued in the East Africa Community Gazette on 29th June, 2010 which provides that:-

"THE EAST AFRICAN COMMUNITY CUSTOMS MANAGEMENT ACT 2004 AMENDMENT OF PART A OF THE THIRD SCHEDULE (RESTRICTED GOODS).

In exercise of the powers conferred upon the Council of Ministers by Section 71 of the East African Community Customs Management Act 2004, the Council has amended part B (Restricted Goods) of the Third Schedule by inserting sub-paragraph (f) as follows:-

"(e) used automobile batteries, lead scrap, crude and refined lead and all forms of scrap metals".

HON. DR DIODORUS KAMALA

Chairperson

Council of Ministers."

The Applicant does not in any way dispute the legality of the said Legal Notice. What I get the Applicant to be saying is that the 1st Respondent extended the said Legal Notice beyond its intended parameters. The Applicant submitted that the decision of the respondents was illegal in that they purported to extend the Legal Notice to finished products. The Applicant argues that the respondents have usurped the power of the legislature to amend laws since they had no authority to extend the scope of the Legal Notice.

The Applicant in a follow up to the argument of illegality has asserted that the respondents did not have jurisdiction to declare its products restricted goods. The Applicant contends that the respondents acted in excess of jurisdiction by purporting to extend the scope and ambit of the Legal Notice to finished products. The Applicant argues that the respondents had no jurisdiction to do what they did.

The Applicant submitted that the respondents' conduct and behavior was manifestly irrational and contrary to the legitimate expectation of the Applicant who had in the past manufactured and exported the same products during the subsistence of the Legal Notice.

In response to the Applicant's arguments the respondents submitted that the Legal Notice was in response to limited supply of lead in Kenya. It is the respondents' case that at the time the Applicant was setting up its plant it was clearly advised that it would not be allowed to export raw lead material in whatever form. The respondents' argument is that the Applicant has through the annextures to the verifying

affidavit of Aditya Apoorva admitted that even though the Ministry had previously given a limited waiver of exportation of scrap metal that waiver was limited to copper, cast aluminum, stainless steel, brass, bronze and radiator, no waiver was granted in respect to lead. The respondents also asserted that the Applicant had through a letter dated 27th November, 2012 acknowledged that the restriction of export of scrap metal by the East African Community was to promote industrialization in the region.

In line with these submissions, the respondents contend that the 1st Respondent has the mandate to interpret the Legal Notice as the Ministry is charged with the mandate to implement some aspects of the said Legal Notice. The 1st Respondent avers that the Legal Notice should be interpreted purposively since it was intended to deal with a certain mischief namely to prevent the exportation of essential raw materials from the region. The 1st Respondent argues that a literal interpretation of the Legal Notice as urged by the Applicant will lead to absurd results.

The 1st Respondent submits that this court should not concern itself with the correctness of the interpretation of the Legal Notice but it should concern itself with the decision making process. The respondents assert that the interpretation of the Legal Notice is not absurd or unreasonable. The respondents finally submit that even where judicial review orders are deserved, the court has discretionary powers in regard to the issuance of such orders. It is the respondents' case that the orders sought should not be granted to the Applicant since granting the orders would go against the public interest.

During the highlighting of submissions, Mr. Oraro for the Applicant argued that under the East African Community External Tariff (EACET) of 16th December, 2004, refined lead means **"metal containing by weight at least 99.9% of lead".** He submitted that a test carried out by the 2nd Respondent in its laboratory clearly showed that the lead content of the Applicant's product was 95.01%. He contended that the same laboratory test had revealed that his client product was considered to be counterweights for forklifts.

Mr. Oraro further submitted that the respondents had breached the clear provisions of Article 210 of the Constitution. Article 210 provides that:-

> **210. (1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.**
>
> **(2) If legislation permits the waiver of any tax or licensing fee—**
>
> **(*a*) a public record of each waiver shall be maintained together with the reason for the waiver; and**
>
> **(*b*) each waiver, and the reason for it, shall be reported to the Auditor-General.**
>
> **(3) No law may exclude or authorise the exclusion of a State officer from payment of tax by reason of—**
>
> **(*a*) the office held by that State officer; or**
>
> **(*b*) the nature of the work of the State officer.**

I wish to dispose of the issue of Article 210 at this point. The matter before this court does not concern imposition, waiver or variation of a tax or licensing fee. It relates to classification of a certain product. With due respect to the Applicant's counsel, I do not see how the said provision of the Constitution comes into play in this matter. I therefore conclude that the respondents did not breach the said provision of the Constitution.

The 1st Respondent's impugned decision was triggered by the 2nd Respondent's letter dated 19th June, 2013 through which the 2nd Respondent informed the 1st Respondent that it had seized two containers

containing forklift counterweights belonging to the Applicant. The 2nd Respondent was therefore seeking advice as to how the goods should be treated considering that the Ministry had banned export of scrap metal. The 1st Respondent replied through a letter dated 9th July, 2013. The letter gives a detailed account on the decision to ban the export of lead and concludes that:-

> **"Arising from laboratory analysis conducted by your Inspection and Testing Centre, the sample tested (counterweight for forklift) was found to be a base metal block of lead (95% m/m). These findings only reaffirm that, indeed this is the same lead that had been restricted under the above mentioned EAC Legal Notice No. 16/2010 and the same was being exported under the guise of counterweight for Forklift.**
>
> **Our firm position on this matter is that, the seized consignment of refined lead disguised as "Counterweight for Forklift" should not be permitted for export now or in the future as this contravenes the existing law and will deny the Local manufacturers the much sought after raw materials. "**

In my humble view, only one issue presents itself for the consideration of this court namely whether the 1st Respondent exceeded his authority in classifying the Applicant's product among the items banned from export by the Legal Notice. In order to answer that question, there is need to understand the tools available when one is interpreting a statute. In **HASSAN ALI JOHO & ANOTHER V SULEIMAN SAID SHAHBAL & 2 0THERS, Malindi Civil Appeal No. 12 of 2013** E.M. Githinji, J.A. noted that:-

> **"The problematic words in this appeal *announce* and *declare* should be given their ordinary and natural meaning according to the context in which they are used unless the context shows that they should be used in technical sense."**

That words should be given their ordinary meaning is a rule of interpretation of statutes that has long been established. In the case of **REPUBIC V MANN (1969) EA.357** the Court stated that:-

> **''We do not deny that in certain contexts a liberal interpretation of the constitution may be called for, but in one cardinal respect we are satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is where the words used are precise and un-ambiguous they are to be construed in their ordinary and natural sense. It is only where there is some inprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words.''**

The Court also observed in the same judgement that:-

> **"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.''**

It is therefore clear that in interpreting a statute, the words used should be given their ordinary meaning unless there is clear indication that those words should be given different connotations. The Court of Appeal in the case of **CENTRE FOR HUMAN RIGHTS EDUCATION AND AWARENESS & 2 OTHERS v JOHN HARUN MWAU & 6 OTHERS [2012] eKLR,** however, warned that a statute should be interpreted in a manner that will achieve the objectives of the legislature. This is what the Court said:-

> **"Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus:-**
>
> **· that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and**

fundamental freedoms and permits development of the law and contributes to good governance.

· that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.

· that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism."

· that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).

These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution."

The above cited cases summarize the principles to be applied when a statute is being interpreted. In interpreting the Legal Notice, the 1st Respondent was expected to apply these principles. Did he do so? Does his interpretation show that he took these principles into account? In my view, the words in the Legal Notice should be given their ordinary meaning. The words *used automobile batteries* need no explaining. The word *scrap*, in the context of the Legal Notice, should refer to old metal that can be used again after undergoing certain processes. *Crude lead* simply means lead in its natural state and *refined lead* would mean lead which has undergone certain processes resulting in removal of all impurities. The Applicant's case is that its product does not fall into any of the above categories. I agree. In fact, the EACET defines refined lead as **"metal containing by weight at least 99.9% of lead."** The 1st Respondent cannot therefore be said to have acted on the plain words of the Legal Notice.

Counsel for the 1st Respondent argued that a purposive interpretation was given to the Legal Notice and through that interpretation the 1st Respondent concluded that the Applicant's product fell into the class of goods banned from export. I am persuaded by this argument. As already stated, a statute should be read in a manner that fulfills the intention of its drafters. The Legal Notice was aimed at curing a certain mischief. That mischief was the export of lead without any value addition. The 1st Respondent noted that there was no value addition to what the Applicant wanted to export.

The 1st Respondent also observed that forklift counterweights are normally fabricated using gray iron, ductile iron and casting iron. The Applicant never challenged this statement. The 1st Respondent therefore concluded that the Applicant was attempting to circumvent the Legal Notice and from the evidence adduced, the 1st Respondent cannot be faulted for reaching this conclusion. It should be remembered that the 1st Respondent as the implementer of the Legal Notice was allowed to interpret it in a manner that would take care of the objectives for which it was passed.

I may be wrong in concluding that the 1st Respondent was right in interpreting the Legal Notice in a manner that achieved the purpose for which it was made. I will therefore proceed to consider whether the Applicant is entitled to the remedies sought. Judicial review remedies are discretionary in nature. It is not enough for an applicant to establish that orders of judicial review ought to issue. An applicant must also establish that those orders are indeed necessary. However, the discretion must be exercised judiciously. Principles have been laid down for exercising the discretion. These principles have been summarized by the authors of **HALBURY'S LAWS OF ENGLAND**, **Vol 1(1) at Page 270 para. 122** as follows:-

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus), declaratory orders and injunction are all discretionary. The court has a wide discretion whether to grant relief at all and, if so, what form of relief to grant.**
>
> **In deciding whether to grant relief the court will take account of the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver of the right to object may all result in the court declining grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfillment.**
>
> **The court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of the demands of good public administration may lead to a refusal of relief."**

My brother Justice J.V. Odunga also made a similar observation, on the discretionary nature of judicial review orders, when he stated in the case of **REPUBLIC v MINISTER OF AGRICUTURE & 2 OTHERS EX-PARTE EQUITORIAL NUTS PROCESSORS LIMITED & 3 OTHERS [2013] eKLR** that:-

> **"Accordingly, even if I were to find that the application was merited the law is that the decision whether or not to grant the remedy of judicial review is discretionary. In Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209 it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and hence the Court will refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000."**

I will add that the court will not exercise its discretion in favour of an applicant where it is clear that the

judicial review orders are being sought for an ulterior purpose. Orders of judicial review are meant to assist in the enforcement of the rule of law.

Looking at the circumstances surrounding the Applicant's application, I find that the orders sought are aimed at achieving an ulterior motive. The Applicant was licensed to engage in a business activity known as "casting and processing of non-ferrous metals" as per Investment Certificate No. 0384 issued on 25th July, 2012. Licence No.000563 dated 17th September, 2012 from the National Environment Management Authority (NEMA) also shows that the Applicant was licenced as a recycler of scrap metal. None of these licences indicate that the Applicant was licensed to manufacture motor vehicle spare parts. In fact, through a letter dated 27th November, 2012 addressed to the Minister of Industrialization, the Applicant acknowledges that it had written numerous letters to the Ministry **"to enforce and completely restrict the export of Non-Ferrous Metal Scrap as to ensure that scrap metals as primary raw material are utilized, processed and recycled within the country."**

The Applicant, however, suddenly metamorphosed into an automobile spare parts manufacturer and in its letter dated 15th May, 2013 to the Minister, claims that its vision was to become a leading manufacturer of automobile spare parts for the international and East African markets. That is when it started talking of forklift counterweights. It is therefore clear that the Applicant's aim from the time it was established was to export all forms of scrap metal on the pretext that it had done some value addition. That aim goes against the Legal Notice. The court cannot aid parties who attempt to circumvent the law. The court is an enforcer of the law and cannot be party to the schemes of those who seek to bend it.

As was noted by the Court in **KENYA ANTI-CORRUPTION COMMISSION v JUDITH MARILYN OKUNGU & 2 OTHERS [2007] eKLR,** the court should aid the lawmaker in ensuring that a statute cures the mischief it was intended to sort out. In that case the Court quoted with approval the authors of **INTERPRETATION OF STATUTE BY MAXWELL, 12th Edition** where at page 137 they stated:-

> **"On the other hand, there is no doubt that the office of the judge is to make such construction as will suppress mischief and advance the remedy, and suppress all evasions for the continuance of the mischief. To carry out effectively, it must be so construed as to defeat all attempts to do, or avoid doing, in an indirect or circuitous manner that it has prohibited or enjoined."**

I entirely agree. The courts are expected to aid in the fulfillment of the objective of a given piece of legislation.

There was an argument that the Applicant had a legitimate expectation that it would be allowed to export the product since it had been allowed to export the same product before. Legitimate expectation may arise from a representation or promise made by a public body. Legitimate expectation can be implied. From the papers filed, I get the impression that the Applicant may have exported the same product only once previously. This cannot be said to be a consistent past practice. The export may have occurred due to a mistake. Legitimate expectation could not have been created in such circumstances. It should also be remembered that legitimate expectation cannot be created where the same would result in the breach of the law.

For the reasons aforesaid, I come to the conclusion that the Notice of Motion dated 6th August, 2013 should be dismissed. It is so dismissed with costs to the respondents.

So as to bring this matter to a full and final conclusion, I order the 2nd Respondent, subject to payment of its charges, to release the two containers (No. TCKU 3655234 and FCIU 3672950) to the Applicant.

Dated, signed and delivered at Nairobi this 4th day of October, 2013

W. K. KORIR,

JUDGE