



**Executive Super Rides Limited v Commissioner of Customs &
3 others; Pandya & another (Interested Parties) (Civil Appeal
E065 of 2023) [2026] KECA 555 (KLR) (13 March 2026) (Judgment)**

Neutral citation: [2026] KECA 555 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E065 OF 2023
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA
MARCH 13, 2026**

BETWEEN

EXECUTIVE SUPER RIDES LIMITED APPELLANT

AND

THE COMMISSIONER OF CUSTOMS 1ST RESPONDENT

KENYA REVENUE AUTHORITY 2ND RESPONDENT

NATIONAL TRANSPORT AND SAFETY AUTHORITY 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

AND

PARTHARSHA JAGDISH PANDYA INTERESTED PARTY

BHAVIN MOTORS LIMITED INTERESTED PARTY

(Being an appeal from the Judgement and Decree of the High Court of Kenya at Mombasa (Mativo, J.) (as he then was) dated 18th August 2022 and delivered by Onyiego, J. on 19th August 2022) in Judicial Review Application No. E030 of 2021 (JR))

JUDGMENT

1. The genesis of this appeal is the Judicial Review proceedings filed by Executive Super Rides Limited (the appellant) by way of an Amended Notice of Motion dated 8th October 2021. The learned Judge (Mativo, J.) (as he then was) considered the merits of the appellant's amended Motion and dismissed it on several grounds, which we shall revert to later in this Judgement.
2. The appellant's complaint was against the 1st, 2nd, 3rd and 4th respondents respectively and both the 1st and 2nd interested parties.



3. The amended Motion was founded on the appellant's Statement filed pursuant to Order 53 rule 1(2) of the Civil Procedure Rules dated 21st June 2021, the supporting and supplementary affidavits sworn by Justine Kendi, one of the appellant's Director dated 21st June 2021 and 15th September 2021 respectively, the supplementary affidavits of F. Kinyua Kamundi, counsel for the appellant, and Joseph Akoko Ong'icha, the appellant's customs clearing agent, both sworn on 21st June 2021, from which we summarise the factual background to the dispute as below.
4. In the month of April 2019, the appellant imported from Yokohama Japan a Toyota Land Cruiser Prado, Chassis No. TRJ 150-0074269 (the motor vehicle) at a purchase price of USD 31,500. On 28th April 2020, Auto-terminal Japan Limited issued a Certificate of Road Worthiness of the motor vehicle, and it arrived at the port of Mombasa on 23rd July 2020.
5. On 29th December 2020, the appellant's clearing and forwarding agent lodged entry No. 20MBAIM401229820 – 1 for clearance of the motor vehicle, and it was required to pay an assessed sum of Kshs.2,115,452, being the fee towards import duty, excise duty, VAT and other fees, including the purchase of one pair of number plates. The appellant did not make the payments on time and, by letters dated 27th October 2020 and 14th January 2021, it wrote to the Commissioner of Customs requesting for extension of time to clear the motor vehicle.
6. It was not until 19th May 2021 that the appellant paid to the 2nd respondent the assessed tax of Kshs.2,115,452, and was issued with an ETR and payslip. On 20th May 2021, the appellant's clearing agent, one Mr. Joseph Ong'icha, proceeded to Siginton CFS Mombasa to verify and collect the motor vehicle, but could not find it. He later learnt that the motor vehicle had been taken to Kencot CFS Mombasa and auctioned. Subsequently, the appellant found a Gazette Notice No. 1057 of 5th February 2021, which had placed the advertisement for auction of the motor vehicle, but whose contents the appellant alleged to be false based on the following:
 - i. The voyage of the Motor Vessel Paradise Ace is given as 125A when the actual voyage was 124A.
 - ii. The consignee and therefore the person that was notified of the intention to auction the motor vehicle was Africa Forwarding Agency Limited of P.O. Box 87680 - 80100 Mombasa while the correct consignee was Executive Super Rides Limited.
 - iii. The location of the motor vehicle was given as KEN (meaning Kencont CFS) against the destination in the Bill of Lading described as Siginton Mombasa.
 - iv. The description of the motor vehicle was most inadequate for purposes of the notice. It was just written "01 used Toyota Land Cruiser".
 - v. The Bill of Lading number in the Gazette Notice was MOLU-18001093940D, but the correct Bill of Lading was PA0124YKMBS017.
7. The appellant complained that the 1st and 2nd respondents, and a Mr. AbdiMalik Hussein, Chief Manager, Port Operations, knew or ought to have known that the details in the Gazette Notice were incorrect in the sense that: they had the Bill of Lading Number and the Ship's Manifest; they had the details of the entry number 20MBAIM401229820-1 of 29th December 2020; and The Commissioner of Customs had the letters of 27th October 2020 and 14th January 2021.
8. According to the appellant, Lot No. 293/2021 in the Gazette Notice concerned another motor vehicle which the appellant had imported. The appellant further particularised the grounds upon which the



orders of certiorari, mandamus, prohibition, injunction, restitution and damages were founded as follows:

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- i. the decision to auction the motor vehicle was unlawful and fraudulent;
- ii. the decision was ultra vires as the motor vehicle could not be sold without giving notice to the correct consignee;
- iii. a mandatory and material procedure and condition prescribed by Section 42 of East African Community Customs Management (Amendment) Act, 2019 and Sections 34 and 222 of Customs and Excise Act with regard to the giving of notice of auction were not complied with. Under Section 222 (2) of the *Customs and Excise Act*, the Commissioner of Customs was required to give written notice to the ex-parte applicant by delivering it to the ex-parte applicant, by leaving it at the ex-parte applicant's office or by sending it by post to the ex-parte applicant. He did not do so;
- iv. both the decisions to auction and the actual auction were procedurally unfair, irrational, unreasonable, violated the appellant's legitimate expectation, made in bad faith, constituted arbitrary deprivation of property contrary to Article 40 of *the Constitution*;
- v. the auction was done with an ulterior motive or purpose calculated to prejudice the applicant's legal rights;
- vi. the Commissioner of Customs and the Chief Manager, Port Operations failed to take into account relevant considerations, to wit, that the ex-parte applicant was the consignee and the owner of the motor vehicle;
- vii. not having notice to the ex-parte applicant, the Commissioner of Customs and the Chief Manager, Port Operations denied the appellant the right to be heard;
- viii. the Commissioner of Customs violated the rules of natural justice by making a decision prejudicial to the commercial interests of the appellant without hearing the appellant;
- ix. by refusing to notify the appellant of the intention to auction the motor vehicle the Commissioner of Customs denied the appellant the opportunity to take steps to remove the motor vehicle;
- x. the Commissioner of Customs received and accepted taxes in the amount of Kshs. 2,115,452/= for the motor vehicle even though he knew he had already auctioned it. He has not returned the taxes or the proceeds of the auction;
- xi. the appellant had already complied with the first requirement in the Gazette Notice as the motor vehicle had been entered under entry number 20MBAIM4401229820-I of 29th December 2020 and the motor vehicle could not therefore have been categorized as abandoned goods;
- xii. auction sale without publishing the notice was premature and null and void ab initio;



- xiii. the Commissioner of Customs failed to make a decision expeditiously after we lodged the complaint demanding that we attend the interview at Mombasa after recording the statement. The interview would not have advanced any investigations as the Commissioner can access and has all the details of the import of that suit motor vehicle from ICMS (Integrated Customs Management System);
- xiv. the Commissioner of Customs had failed or refused to disclose to the appellant the name and address of the person who purchased the motor vehicle as well as the name and address of the auctioneer who conducted the auction. If indeed the motor vehicle was sold in a proper auction the Commissioner of Customs must have those details particularly as the alleged purchaser must have paid the bid price;
- xv. the interested party or any other person cannot obtain the title to the motor vehicle at the tail end of a fraudulent and illegal process;
- xvi. as all clearing and forwarding agents are licenced by the Kenya Revenue Authority, the Commissioner of Customs and the Kenya Revenue Authority had the contact details of the appellant's clearing agent. The clearing agent had lodged the entry in December 2020 but was not notified of the auction; and
- xvii. had the Commissioner of Customs disclosed to all interested buyers that he had falsified the details of the consignee and the Bill of Lading no person would have purchased the suit motor vehicle."

9. The appellant forwarded its complaint to the 1st respondent and recorded a statement on 26th May 2021. On 7th June 2021, the appellant received a letter from the 2nd respondent's Commissioner of Investigations and Enforcement, informing it that they had commenced investigations. The appellant contended that one Mr. AbdiMalik Hussein, Chief Manager Port Operations, intentionally and fraudulently inserted false details in the Gazette Notice contrary to Section 203 (a) and (b) of the East African Community Customs Management (Amendment) Act, 2019 (EACCMA).
10. The appellant contended that the exclusion of Section 38 of the *Auctioneers Act*, Cap 526 on the application of auctions related to customs was unconstitutional, null and void as it violated Article 10 of *the Constitution* and Section 243 of EACCMA read together with The *Auctioneers Act* and the Rules made thereunder.
11. In the supplementary affidavit dated 21st June 2021 deposed by Joseph Akoko Ong'icha, the Director of Kandito International Company Limited, a clearing agent, stated that he received instructions in December 2020 from the appellant to handle the importation of the motor vehicle; that he then prepared and lodged an entry on 29th December 2020; that an e-slip was generated of the assessed taxes in the sum of Kshs.2,115,452/; that the assessed taxes were paid on 19th May 2021; that, on 20th December 2021, he proceeded to Kencot CFS where he learnt that the motor vehicle had been auctioned; that he took up the matter with the Commissioner General, the Commissioner of Customs and the Commissioner of Investigation and Enforcement, all of the 2nd respondent; and that, on 9th June 2021, he visited Forodha House where he was interviewed and also recorded a statement. Mr. Ong'icha denied receiving a notice of intention to auction the motor vehicle.



12. In a supplementary affidavit sworn on 21st June 2021 by Mr. Kinyua Kamundi, learned counsel in conduct of the matter on behalf of the appellant, referred to a decision in Mombasa HC Misc. Civil Application No. 214 of 2015 - W.E. Tilley Muthaiga Limited as the ex-parte applicant vs. Kenya Revenue Authority, in which Sergon, J. quashed the auction on the ground that the Commissioner of Customs, KRA had published a Gazette Notice indicating the consignee as a shipping line when he/she knew that the consignment belonged to the ex-parte applicant therein. Counsel stated that Sergon, J. found that the Commissioner of Customs had not complied with Section 43(1) & (2) of the Customs and Excise Act, and that the Kenya Gazette Notice did not constitute sufficient notice to warrant the intended auction as it had not named the ex-parte applicant as the consignee; and that an appeal by the KRA to this Court was dismissed on the findings that it had acted with impunity and in a callous manner which exuded mala fides.
13. Against the above background, the appellant prayed for a raft of orders against the respondents and the interested parties as follows:
- “a) An order of certiorari to bring to this Court and quash the decision of the 1st respondent contained in Gazette Notice No. 1057 of 5th May 2021 to auction the motor vehicle.
 - b. An order of prohibition or in the alternative an order of injunction prohibiting and restraining the interested parties from selling, leasing or in any manner dealing with the motor vehicle.
 - c. An order of injunction restraining the 3rd respondent from registering the motor vehicle in the name of the 2nd interested party or any person other than the appellant or its nominee.
 - d. An order of mandamus compelling the 1st respondent to recover the motor vehicle from the interested parties or any other person and deliver it in the condition it arrived in from Japan to the appellant.
 - e. A declaration that the auction sale of the motor vehicle was fraudulent, illegal, unconstitutional and null and void and that it did not pass any title to the 2nd interested party or any other person.
 - f. General, punitive and aggravated damages against the 1st and 2nd respondents jointly.
 - g. Punitive and aggravated damages against the interested parties for moving the motor vehicle from the 1st interested party’s show room and in the process damaging the motor vehicle after the 1st interested party was served with the orders given on 22nd June 2021 and for the announcement by the 1st interested party’s Director Bipin that the 1st interested party will use Kshs. 50,000,000/= in court to make sure that the Judicial Review application will not succeed.
 - h. A declaration that Section 38 of the [Auctioneers Act](#) is unconstitutional and contradicts Section 243 as read with Section 2 and 8 of the East African Community Customs Management (Amendment) Act, 2019 and therefore null and void.



- i. A declaration that the *Auctioneers Act*, 1996 and the Rules made thereunder apply to Customs Auctions and therefore, the reserve price for the motor vehicle should have been based on the market value, Kshs.7,500,000.
 - j. A declaration under Article 10 of *the Constitution* of Kenya 2010 and Section 10 of the *Public Officer Ethics Act*, 2004 that in deciding to auction and auctioning the motor vehicle, the 1st respondent failed to carry out his duties in accordance with the law, violated Section 10 (2) of the *Public Officer Ethics Act* which prohibits Public Officers from violating the rights and freedoms of any person under *the Constitution* and for those reasons, the 1st respondent should take personal responsibility for the decision to auction and the auction within the meaning of Section 9 as read with Section 52 (1) of the *Leadership and Integrity Act*, NO. 19 of 2012.
 - k. A mandatory injunction compelling the interested parties to deliver the motor vehicle to the Regional DCI Headquarters Mombasa for safe custody.
 - l. Costs of the Motion and of the application.”
14. The 1st and 2nd respondents opposed the Motion by way of a replying affidavit sworn by Stephen Mwangi, a Manager with the 2nd respondent at Customs Warehouses, on 20th August 2021. He deposed that the motor vehicle arrived in Mombasa on 23rd July 2020, and that it was transferred to Ken Freight CFS for the release process to commence; that upon, expiry of 21 days, the motor vehicle was deemed to have been imported into Customs Warehouse as the owner had not entered it for any of the purposes provided under Section 34(4) and (5) of EACCMA, 2004; that the motor vehicle was not lawfully removed from the warehouse within 30 days, thereby prompting the 2nd respondent to publish Gazette Notice No. 1057 LOT Number 288/2021 dated 5th February 2021, the effect of which was to deem the motor vehicle to have been abandoned to Customs for sale by public auction; and that no request for withdrawal of the goods from auction before the lapse of 7 days was made as per Routine Order No. 2 of 1st November 2010.
15. It was further deposed that, from the ICMS system, the appellant’s clearing agent made ICMS entry No. 2020MBAIM401229820 on 29th December 2020 of Kshs.2,115,452 on behalf of the importer, but with no payment accompanying it; that on 9th March 2021, the motor vehicle was sold in an auction to the highest bidder, the 2nd interested party, at Kshs.5,120,000; that, on 23rd March 2021, an entry was made and approved to facilitate the registration of the motor vehicle; that, pursuant thereto, the motor vehicle was registered by the 3rd respondent, National Transport and Safety Authority, on 13th April 2021 and released on the same date to the buyer; and that the initial importer paid the pending entry on 19th May 2021, which was after the auction date.
16. The 2nd respondent denied that there was violation or infringement of the appellant’s rights to warrant the orders sought by the appellant.
17. The 4th respondent opposed the appellant’s amended Motion through Grounds of Opposition dated 1st November 2021. They are as follows:
- “i. That the appellant’s prayers (h) and (i) seek to amend a law (the *Auctioneers Act*, Cap 526) through a declaration and without following due procedure for a law that was enacted within the confines of a proper and justified legal process and therefore ought not to issue.



- ii. That the appellant has not adduced any evidence to show that the formulation and enactment of the Auctioneers Act, 1996 was tainted with illegality, irrationality and procedural impropriety.
 - iii. That the appellant has failed to demonstrate how Section 38 of the Auctioneers Act, 1996 is tainted with illegality, irrationality and is against the rules of natural justice.
 - iv. That section 38 of the Auctioneers Act, 1996 does not violate or threaten to violate the Constitution or any other Law as the same was duly enacted under the Constitution of Kenya.
 - v. That the applicant's prayer (h) and (i) are bad in law, unmerited and abuse of the process of this Court and ought not to be allowed."
18. The 1st interested party, through Bhupendra Rathod, one of its Directors, filed a replying affidavit dated 27th August 2021. He deposed that the Judicial Review proceedings as filed do not disclose any impropriety on its part as it neither purchased the motor vehicle nor presided over its auction; that it is not the registered owner of the motor vehicle, and neither was it in possession of it; that, on a 'without prejudice' basis, even assuming that it purchased the motor vehicle, it would be a bona fide purchaser for value, and that, it should not be inconvenienced with, or by, the appellant's claim for cancellation of title or refund of duty paid or of the purchase price; that, accordingly, the appellant ought to file a claim against the 1st and 2nd respondents for compensation for liquidated sum of the value of the motor vehicle in the event that the court were to find that the motor vehicle was irregularly sold by auction; and that, for the foregoing, the appellant was not entitled to the prayers sought against it.
 19. The 2nd interested party was employed by the 1st interested party, filed a replying affidavit dated 3rd December 2021. She stated that it was the appellant who failed to comply with Section 42 of EACCMA by making the mandatory payments to the 2nd respondent; that she got interested in purchasing the motor vehicle, which was advertised for sale vide Gazette Notice of 5th February 2021; that she requested her agent, one Mr. Bipin, to place the bid on her behalf and she emerged the highest bidder at a price of Kshs.5,120,000; and that she thereafter took possession of the motor vehicle and became the duly registered owner.
 20. The 2nd interested party stated that she followed all the necessary procedures of paying the requisite fees as advised by the 2nd respondent towards settlement of: Kshs.7,094 for entry No. 2021 MSA 7766529 for Lot No. 288/2021; Kshs.45,899, being CFS charges at Kencot; Kshs.30,720 to Kenya Bureau of Standards for the inspection of the motor vehicle; Kshs.2,600 to the Ministry of Transport and Infrastructure Housing and Urban Development; and Kshs.18,755 for registration, transfer and issuance of the motor vehicle registration number KDC 880T.
 21. The 2nd interested party posited that the appellant ought to have limited its claim to the respondents who sold and transferred the motor vehicle as she was just but a bona fide purchaser whose right to the title could not be impeached; and that, as at the time when the appellant paid the duty fee, the motor vehicle had been lawfully sold by public auction on 9th March 2021, which was 5 months after default and 3 months after the public auction.
 22. In his decision, Mativo, J. (as he then was) suo moto addressed the question as to whether the suit offended the doctrine of exhaustion of remedies as a preliminary point. He made reference to Section 229(1) of the EACCMA which provides for the recourse a party should have in the event of being aggrieved by the decision of the Commissioner of Customs within 30 days of the date of the decision.



Further reference was made to Section 230 of EACCMA, which provides that the decision under Section 229 may be appealed to the Tax Appeals Tribunal established under Section 231 of EACCMA. The learned Judge faulted the appellant for not invoking the mechanism for review as provided under these provisions.

23. The trial court further considered the provisions of Section 9(2) of the *Fair Administrative Action Act*, 2015 (the FAA) which prohibits the High Court or any subordinate court from reviewing an administrative action or decision unless the internal mechanism for appeal and all remedies available therein have been exhausted. It then held that the operative word ‘shall’ as coached therein was not permissive but, rather, mandatory, thus denoting an obligation to whomsoever it is directed.
24. According to the trial court, the internal remedy that was available to the appellant ought to have been exhausted prior to filing the judicial review proceedings unless exceptional circumstances prevailed; and that, for the failure to comply therewith, the Judicial Review proceedings before it offended the provisions of Section 9(2) of the FAA, and were ripe for dismissal.
25. As to the constitutionality of Section 38 of the *Auctioneers Act*, now Cap 526 (‘the *Auctioneers Act*’), which the appellant alleged contravened Articles 10 and 232 of *the Constitution*, the learned Judge held that EACCMA is self-contained in that it provides that custom auctions be governed by it, thereby excluding the application of the *Auctioneers Act*; and that, therefore, the argument that Section 38 of the *Auctioneers Act* was unconstitutional was unfounded.
26. The trial court further held that the appellant failed to comply with the requirement relating to removal of goods from the port at the expiry of 21 days as provided for under Section 34(4) and (5) of EACCMA; and that, by the appellant’s own admission, the payment was lodged through its agent on 19th December 2020, and payment of duty made on 19th May 2021, long after the lapse of 21 days.
27. As to the particulars of the motor vehicle entered in the impugned Gazette Notice, which the appellant contended were a misdescription, the learned Judge held that the chassis and container numbers were correctly and sufficiently captured in the Gazette Notice; that failure of the 1st respondent to serve the appellant with the Gazette Notice and the purported misdescription of the motor vehicle was not sufficient reason to nullify the auction; and that the transfer of the motor vehicle was done in accordance with the law.
28. As to the reliefs of mandamus, certiorari and prohibition from any dealings with the motor vehicle, the trial court held that the motor vehicle was already sold to the 2nd interested party, who was a bona fide purchaser for value, and that granting such orders would have been an academic exercise in the circumstances; that the respondents did not act irrationally or in bad faith; and that the allegations of fraud fronted against the respondents and the interested parties were not proved.
29. In the end, the learned Judge was not persuaded that the appellant’s amended Motion was merited to warrant grant of the reliefs sought. Accordingly, the Motion was dismissed with costs to the 1st and 2nd respondents, and to the interested parties.
30. Dissatisfied, the appellant has proffered the instant appeal, which is anchored on 18 grounds of appeal, but which we have condensed into 8 grounds. The appellant faults the learned Judge for:
 - i. Creating extraneous issues on exhaustion of remedies which was not raised by any party and by failing to apply Article 47 (3) (a), and by failing to invite the appellant to comment on that issue thereby denying the appellant its right to a fair trial and hearing under Articles 25 (c) and 50 (1) of *the Constitution*;



- ii. failing to determine and consider the constitutional and statutory provisions under which the judicial review application had been filed;
 - iii. holding that: the East African Community Customs Management (Amendment) Act, 2019 was self-contained; auctions are governed by that Statute; and that the East African Community member States consciously excluded the provisions of the *Auctioneers Act*;
 - iv. by mis-reading Section 38 of the *Auctioneers Act* by omitting a material word thereby delivering an erroneous and unreasonable judgement, and thus not finding that the said provision is inconsistent with the provisions of the East African Community Customs Management (Amendment) Act, 2019 and Article 10 of *the Constitution* of Kenya, hence null and void;
 - v. failing to distinguish between the publication of a gazette notice from whether its contents constituted a notice to the importer and thereby failed to hold that the appellant had not been notified of the intention to auction its vehicle;
 - vi. misdirecting himself on Section 229 of the East African Community Customs Management (Amendment) Act, 2019;
 - vii. holding that a writ of certiorari would have been in vain after the vehicle was sold and transferred; and
 - viii. dismissing the appellant's Judicial Review application with costs.
31. The appellant therefore prays that: the trial court Judgement and Decree be set aside in its entirety; grant of prayers (e), (h),
- (i) and (j) as sought in the amended Motion; damages for loss of the motor vehicle of Kshs.8,000,000.00 to be paid by the 1st, 2nd and 3rd respondents jointly; punitive and aggravated damages of Kshs.16,000,000 to be paid by the 1st, 2nd and 3rd respondents jointly and severally; punitive and aggravated damages of Kshs.5,000,000 to be paid by the interested parties jointly and severally; costs of the judicial review proceedings in the court below to be paid by the respondents and the interested parties jointly and severally; and that the appeal be allowed with costs to be paid by the respondents and the interested parties jointly and severally.
32. At the plenary hearing of this appeal on 10th June 2025, in attendance were learned counsel: Mr. Kinyua for the appellant; Mr. Shijenje for the 1st and 2nd respondents; Ms. Wandia holding brief for Mr. Ambetsa for the 4th respondent; Mr. Augustus Wafula for the 1st interested party; and Mr. Opolu for the 2nd interested party. The 3rd respondent did not appear despite having been duly served with a hearing notice.
33. Mr. Kinyua highlighted the appellant's written submissions dated 11th June 2024 as well as rejoinder submissions in response to the 2nd respondent's submissions dated 31st May 2025. Counsel argued that Section 243 of EACCMA provides that, where goods are sold under the Act, the provisions relating to auctioneers shall apply to such sale, but that the learned Judge added his own words 'not so', contrary to the wordings of the said provision; that Section 38 of the *Auctioneers Act*, which was introduced by the Finance Act, is inconsistent with EACCMA and, was, therefore, null and void for the reasons that Section 253 of EACCMA provides that it shall take precedence over laws of the Partner States with respect to any matter to which its provisions relate. To counsel, the conflict arises in that, whereas the provisions of EACCMA states that the *Auctioneers Act* shall apply to customs sales, the *Auctioneers Act* provides that auctions conducted under EACCMA will not be applicable to it (the *Auctioneers Act*);



- and that the learned Judge therefore arrived at a wrong finding that there is no conflict between Section 38 of the *Auctioneers Act* and Section 243 of EACCMA.
34. Counsel also faulted the learned Judge for raising the issue of the doctrine of exhaustion suo moto. He referred to the decision of this Court in Independent Electoral & Boundaries Commission vs. Stephen Mutinda Makenzi & Others (2014) eKLR and of Supreme Court in Raila Amollo Odinga & Another vs IEBC & 2 Others (2017) eKLR for the proposition that, where parties have not raised an issue, judges or judicial officers have no business bringing it up; that, if the learned Judge had informed the parties of his concerns on this issue, they would have prepared responses premised on the letter and spirit of Article 47(1) and (3) (a) of *the Constitution* that mandates a Court to review administrative actions; that the 1st respondent could not be a decision maker and, at the same time, be an impartial arbiter (tribunal) for purposes of reviewing its own unlawful and fraudulent decision to sell the motor vehicle; and that, therefore, it would have been impossible to appeal to the 1st and 2nd respondents against the decision of the sale of the motor vehicle.
 35. Reference was also made to the decision of this Court in Malindi Civil Appeal No. 21 of 2013 - Kenya Revenue Authority vs. W.E. Tilley Muthaiga Limited (unreported) where it was held that Kenya Revenue Authority cannot sell people's properties or goods without giving them notice; that the decision to publish the Gazette Notice in the name of African Forwarding Agency Limited as the consignee instead of the appellant was intentional so that the appellant could not be notified of the intention to sell the motor vehicle, which act this Court in Kenya Revenue Authority vs. W.E. Tilley Muthaiga Limited (supra) frowned upon. Counsel cited lack of transparency in the auction of the motor vehicle since the Gazette Notice did not publish clear communication to would-be interested buyers.
 36. It was urged that the appeal is meritorious as a result of which we should allow it as prayed.
 37. Learned counsel Mr. Shijenje highlighted the 1st and 2nd respondents' brief submissions dated 9th June 2025. He submitted that it was not factual that the 1st and 2nd respondents did not raise the issue of the doctrine of exhaustion of remedies; that the same was raised at paragraph 9 of the parties' replying affidavit where it was deposed that the appellant did not make a request for withdrawal of the motor vehicle from the auction list, which was the first port of call; that, by failing to do so, the appellant did not exhaust internal remedies before rushing to court; and that, accordingly, the learned Judge could not be faulted for upholding the provisions of Section 9(2) of the FAA which forbid him from reviewing any administrative action or decision unless the locally available dispute resolution mechanisms or reviews had been exhausted. In this regard, reference was made to the decision of this Court in Goeffrey Muthinja Kabiru & 2 Others vs. Samuel Munga Henry & 1756 Others (2015) KECA 304 (KLR).
 38. Counsel submitted that the decision of Kenya Revenue Authority vs W.E. Tilley Muthaiga Limited (supra) was not applicable in the instant case since the details of the description of the motor vehicle therein was incorrect unlike in the present case. In this regard, counsel referred to the import manifest at page 1234 of the record of appeal, which indicated the consignee as Africa Forwarding Agency Limited, as was what was reproduced in the Gazette Notice; that the purpose of a Gazette Notice is to notify all the importers listed thereunder, and that it would be impossible to serve the Gazette Notice to each and every importer at their doorstep; that the auction of the motor vehicle was above board; and that, accordingly, the appeal ought to be dismissed.
 39. Ms. Wandia for the 4th respondent relied on their written submissions dated 5th June 2025. The 4th respondent submitted that the appellant failed to demonstrate how Section 38 of the *Auctioneers Act* was tainted with illegality or irrationality, thereby rendering it unconstitutional; that the *Auctioneers*



- Act is a valid statute which was enacted within the confines of a proper and justifiable process, and that there was no reason for which the learned Judge would have declared it unconstitutional; and that we should not find merit in the appeal, which ought to be dismissed with costs.
40. Mr. Wafula also highlighted the 1st interested party's brief written submissions dated 9th June 2025. He submitted that the motor vehicle had to be auctioned because, under Section 34(4) of EACCMA, if imported goods are not claimed within 21 days, they are deposited with Customs Warehouse; that the auction then commences according to the law; that the law was adhered to before sale of the motor vehicle; that neither the 1st and 2nd respondents nor the 1st interested party could be blamed for impropriety for the manner in which the motor vehicle was auctioned; and that, furthermore, the 1st interested party was the purchaser of the motor vehicle, and was unnecessarily dragged into the dispute. We were urged to dismiss the appeal with costs.
41. The 2nd interested party filed submissions dated 9th July 2024, which Mr. Opolu orally highlighted. It was submitted that the appellant, having defaulted in paying the requisite taxes within the prescribed time, had to bear the consequences which resulted in the sale by auction of the motor vehicle; that the mistake cannot be corrected through Judicial Review; that the 2nd interested party was a bona fide purchaser of the motor vehicle; that it was not substantiated how she was complicit in, or party to, any alleged fraudulent activity pertaining to the auction of the motor vehicle; that the law is clear that, once the requisite taxes for the goods, in this case the motor vehicle, are not paid for, the 1st and 2nd respondents gained title over them, after which they were liable to being auctioned; that, after such auction, the purchaser, and in this instance, the 2nd interested party, obtained good title; and that therefore, the appeal is unmerited and should be dismissed.
42. In response to the appellant's submission that the learned Judge inserted his own words which were not provided for in the amendment to Section 243 of EACCMA, counsel submitted that nothing could be further from the truth as the Judge was merely stating the provision as it read after the amendment; and that the learned Judge was right in upholding that EACCMA, as read with Section 38 of the Auctioneers Act, was the applicable legislation to customs auction sales.
43. On the issue relating to the doctrine of exhaustion, counsel submitted that, even if parties do not raise it, a Judge is not barred by any law from addressing it suo moto; that the suit before the trial court was properly dismissed, and we were accordingly urged to dismiss the appeal for want of merit.
44. In the rejoinder written submissions, the appellant contended that the 2nd interested party could not be deemed to be a bona fide purchaser for value of the motor vehicle since she first registered the vehicle as a 2014 model Toyota Voxy Registration No. KDC 838H and subsequently changed it to a 2018 model Toyota Land Cruiser Prado KDC880T while the fact is that the motor vehicle was a 2017 model.
45. This being a first appeal, by dint of rule 31(1) of this Court's Rules, our mandate as a first appellate court is to re-appraise the evidence and to draw inferences of fact as was enunciated in *Peters vs. Sunday Post Ltd* (1958) EA 424, and affirmed by this Court in *Selestical Limited vs. Global Programs for Research and Training & Another* (2021) KECA 164 (KLR), as follows:
- “...a first appeal is by way of a retrial where this Court is mandated to re-evaluate the evidence on record, examine and analyze it in order to reach its own conclusions...”
46. We have in the exercise of our mandate carefully interrogated the record of appeal, the respective parties' oral and written submissions, the authorities relied upon and the law. In our view, the issues that fall for determination are: (i) whether the 1st and 2nd respondents followed the properly laid down legal procedure before auctioning the motor vehicle; (ii) whether the EACCMA or the Auctioneers Act was



- applicable to the auction of the motor vehicle; (iii) whether the appellant ought to have considered alternative dispute resolution mechanisms before approaching the court to determine the dispute by way of Judicial Review proceedings; and (iv) whether the appellant was entitled to the prayers sought.
47. As to whether the 1st and 2nd respondents followed the properly laid down legal procedure before auctioning the motor vehicle, it is undisputed that the appellant purchased and imported the motor vehicle from Yokohama, Japan. The particulars of the motor vehicle as per the Bill of Lading were that: it was manufactured in the year 2017; it was a Toyota Land Cruiser Prado Model, Chassis No: TRJ150-0074269; and that it was Engine No: 1911882/2TR. The motor vehicle arrived at the port of Mombasa on 23rd July 2020 aboard Vessel Paradise ACE 0124A. The final destination of the motor vehicle was indicated to be Mombasa Sigionon. The motor vehicle was then transferred to Ken Freight CFS for the release process to commence. It is common ground that, due to the appellant's failure to pay the applicable taxes within the stipulated period, the 1st and 2nd respondents auctioned the motor vehicle after which it was registered in the 2nd interested party's name, which forms the basis of the appellant's grievance.
48. The law governing the importation of goods is underpinned in the East African Community Customs Management (Amendment), Act 2019 (EACCMA). The starting point prior to clearance of goods is for the cargo to be 'entered by the owner'. In this regard, Section 34(1) of EACCMA provides:
1. Save as otherwise provided in the Customs laws, the whole of the cargo of an aircraft, vehicle or vessel which is unloaded or to be unloaded shall be entered by the owner within twenty-one days after the commencement of discharge or in the case of vehicles on arrival or such further period as may be allowed by the proper officer, either for-
 - a. Home consumption;
 - b. Warehousing;
 - c. Transshipment;
 - d. Transit; or
 - e. Export processing zone
49. Section 34 (5) goes on to state that:
- (5) Where entered goods are not removed from the port of discharge after the expiry of the twenty-one days prescribed under subsection (1), the goods shall be deemed to be in a customs warehouse.
50. The foregoing provisions place an obligation on the owner of goods imported into the country, and in this instance, the motor vehicle, to have it entered within 21 days after commencement of the discharge process. In default of removing from the port of discharge, the goods shall be deemed to be in a customs warehouse. In simple terms, this means that the customs warehouse is deemed to be the legal owner of goods not discharged within 21 days, and can deal with them as they deem fit, but within the confines of the law, unless the owner of the goods redeems them. In other words, once the goods are not removed from the port of discharge within 21 days, the goods are deemed to be in a customs warehouse and no longer under the importer's control.
51. Back to the facts of this case, the motor vehicle arrived in the country on 23rd July 2020. The 21 days within which the entry ought to have been made was on or before 13th August 2020. By its own admission, the appellant stated that it only managed to lodge an entry on 29th December 2020, and



thereafter made payments of the taxes due on 19th May 2021. The appellant cited financial constraints as the cause of the delay in paying the applicable taxes.

52. What then is the consequence of a party who fails to comply within the 21 days requirement? Section 42(1) of the EACCMA answers the questions as follows:

(1) Where any goods which have been deposited in a customs warehouse are not lawfully removed within thirty days after deposit, then the Commissioner shall give notice by publication in the Gazette that unless such goods are removed within thirty days from the date of notice they shall be deemed to have been abandoned to Customs for sale by public auction and may be sold in such manner as the Commissioner may deem fit.

53. Gazette Notice No. 1057 dated 5th February 2021 was issued by the Customs and Border Control Department pursuant to Section 42 of EACCMA, which required the underlisted motor vehicles to be removed within 30 days or would be sold via public auction on 9th March 2021. Hence, the owners of the goods were given a second bite of the cherry. The particulars of the disputed motor vehicle in the Gazette Notice was listed and described as follows:

Lot No: 288/2021

Ship's Name and Date: Paradise Ace 125a Date of arrival: 7/23/2020

Container's Chassis Marks and Numbers: TRJ150- 0074269

Container Size: Unit

Consignee: Africa Forwarding Agency Limited P.O. Box 87680 -80100 Mombasa Kenya

Location: KEN

Description of Goods: 01 Used Toyota Landcruiser Manifest No: (Not indicated)

Bill No: MOLU-18001093940D

54. The appellant stated that, through several letters, among them those dated 27th October 2020 and 14th January 2021 respectively, it requested Commissioner, Customs, for extension of time to comply with clearance of the motor vehicle.

55. We have perused the letter dated 27th October 2020. The appellant acknowledged the delay in settlement of the custom taxes for several motor vehicles it had imported. In the said letter, the appellant undertook to settle the required taxes within 30 days. In its further letter dated 4th January 2021, the appellant reported positive progress in clearance of their motor vehicles by stating that they had cleared 62 out of their 70 motor vehicles. Although the appellant did not give particulars of the motor vehicles that it alleged not to have cleared so far, an assumption can be drawn that the disputed motor vehicle was one of them. To this end, the appellant stated in part:

“As such, we humbly request for your forbearance while we push harder to settle the same. We may not have a specific timeline we can guarantee at this moment to clear the 8 units due to the above factors, but all efforts are being employed to achieve compliance.”

56. We also find that the contents of another letter dated 24th May 2021 authored by the appellant were instructive, and in which it stated:

“The entry and payment slip for this particular Prado was issued on 29th December 2020 and an amount of Kshs.2,115,452 was the total applicable tax. We continued to receive KRA



reminders and summons on the pending entries, and as late as early May 2021, we were requested by the KRA Officers to ensure the pending entries were settled in full before the end of May 2021. On the 19th May 2021, we paid the full entry amount for this Prado and the same passed.”

57. The above communication is evidence that the appellant was given ample time and opportunity to comply with the clearance of the motor vehicle. Following failure of the appellant to redeem the motor vehicle within 30 days as required, the auction proceeded as required under Section 42(1) of the EACCMA. The Commissioner cannot therefore be faulted for exercising his/her statutory mandate. It was also impractical for the appellant to have expected that the Gazette Notice should have been served personally to all the persons affected by it.
58. Besides, a careful scrutiny of the Bill of Lading indicates that the party to be contacted for the cargo to be released was ‘Africa Forwarding Agency Limited’ which was the same party named as the consignee in the Gazette Notice. Therefore, it was incumbent upon Africa Forwarding Agency Limited, which had the knowledge of the impending auction of the motor vehicle, to convey the message to the appellant. Thus, the appellant’s argument that it was not informed of the sale cannot hold.
59. Similarly, we cannot fault the 2nd interested party’s eventual ownership of the motor vehicle. She participated in the auction without fault and emerged as the highest bidder. She then paid all the requisite statutory charges, which were not alleged to have been unpaid. Our finding is that the 2nd interested party’s ownership of the motor vehicle was not tainted with illegalities or fraud as alleged by the appellant. She was, and remains, a bona fide purchaser for value of the motor vehicle which was eventually registered as KDC 880T.
60. Moving on to the 2nd issue as to whether the EACCMA or the *Auctioneers Act* was applicable to the auction, it is tied to the ground that the learned Judge erred in not finding and holding that Section 38 of the *Auctioneers Act* was inconsistent with the provisions of EACCMA and Article 10 of *the Constitution*.
61. Section 38 of the *Auctioneers Act* provides that:
- The provisions of this Act shall not apply to any auction conducted in accordance with the provisions of the East African Community Customs Management Act 2004.
62. Before the amendment, Section 243 of the EACCMA provided that:
- Where any goods are sold under this Act, then the provisions of any legislation of any Partner States relating to auctioneers shall apply to such a sale.
63. The effect of the amendment was that:
- Section 243 of the principal Act is amended by inserting immediately after the word “auctioneers” the words “inconsistent with this Act” and the word “not” after the word “shall”.
64. Thus, upon inserting the amendments, the statutory provision of Section 243 reads:
- Where any goods are sold under this Act, then the provisions of any legislation of any Partner States relating to auctioneers inconsistent with this Act shall not apply to such a sale.
65. Section 38 of the *Auctioneers Act* clearly ousts any auctions conducted under EACCMA. Even so, the amendment to Section 243 of EACCMA provides that any legislation inconsistent therewith shall



not apply to such a sale. It then goes without saying that it was important for the Partner States to exclude the application of certain homegrown statutes to auctions under EACCMA so as to promote a harmonious application of EACCMA. As the learned Judge observed, EACCMA is, in itself, self-contained. In so holding, he referred to Section 253, which provides that:

This Act shall take precedence over the Partner States' laws with respect to any matter to which its provisions relate.

66. The wording of both Section 38 of the *Auctioneers Act* as well as Sections 243 and 253 of EACCMA are unambiguous, and we need not restate them. All we can say is that, for purposes of customs sales relating to auctions in the EACCMA Partner States, EACCMA takes precedence. Therefore, we find no reason to depart from the findings of the trial Court that Section 38 of the *Auctioneers Act* is neither inconsistent with EACCMA and nor is it unconstitutional. Consequently, the *Auctioneers Act* was not applicable in so far as the procedure for sale by auction of the motor vehicle was concerned.

67. Turning to the 3rd issue as to whether the appellant ought to have instituted an alternative dispute resolution mechanism before approaching the court to determine the dispute by way of Judicial Review proceedings, we begin by posing this question: what recourse then did the appellant have following the decision of the Commissioner, Customs, to auction the motor vehicle? Section 229(1) of EACCMA provides that:

1. A person directly affected by the decision or 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.

68. Such appeals are to be heard by the Tax Appeals Tribunal established by each Partner State in accordance with Section 231 of the EACCMA, which provides that:

Subject to any law in force in the Partner States with respect to tax appeals, each Partner State shall establish a tax appeals tribunal for the purpose of hearing appeals against the decisions of the Commissioner made under Section 229.

69. In our jurisdiction, the Tax Appeals Tribunal is established under the *Tax Appeals Tribunal Act*, Cap 469A ('the TATA'). Under the TATA, Section 2 defines Tax Law to be:

- a. The *Income Tax Act*, Cap 470;
- b. The *Excise Duty Act*, Cap 472; or
- c. The *Value Added Tax Act*, Cap 476;
- d. The East African Community Customs Management Act, 2004;
- e. Any other tax legislation administered by the Commissioner.

70. Further, Section 12 of the TATA provides for appeals to the Tribunal in the following terms:

A person who disputes the decision of the Commissioner on any matter arising under the provisions of any tax law may, subject to the provisions of the relevant tax law, upon giving notice in writing to the Commissioner appeal to the Tribunal... (emphasis ours).

71. The Tribunal is mandated to hear appeals relating to disputes of the decisions made by the Commissioner of Customs under EACCMA. Therefore, the first port of call that was available to the



- appellant to challenge the decision by the Commissioner to sell its motor vehicle was before the Tax Appeals Tribunal.
72. The doctrine of exhaustion of remedies requires that parties explore all the available local administrative remedies before invoking the jurisdiction of a competent court. What this means is that the invocation of the doctrine of exhaustion of remedies is jurisdictional. So that, if there existed other internal dispute resolution mechanisms before a party approaches the court, the court would be divested of jurisdiction to hear the dispute.
73. The Black's Law Dictionary, 10th edition describes jurisdiction as: 'A court's power to decide a case or issue a decree'. 'The Supreme Court of Kenya in Samuel Kamau Macharia vs. Kenya Commercial Bank & 2 Others (2012) KESC 8 (KLR) emphasized that:
- "A court's jurisdiction flows either from *the Constitution* or legislation or both. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law... It cannot expand its jurisdiction through judicial craft or innovation."
74. In Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd. [1989] eKLR, a locus classicus in this subject, this Court pronounced itself thus:
- "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."
75. In emphasising the application of the doctrine of exhaustion of remedies, this Court in the Speaker of the National Assembly vs. Karume (1992) KECA 42 (KLR) held that:
- "Where there is a clear procedure for redress of any redress prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed."
76. We find the decision of the High Court (Achode, Nyamweya (as they then were) & Ogola, JJ., in William Odhiambo Ramogi & 3 Others vs Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) KEHC 10266 (KLR) illuminating. It was observed as follows:
- "...the question of exhaustion of administrative remedies arises when a litigant aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts."
77. This Court in Geoffrey Muthinja & Another (supra) while expressing itself on the doctrine of exhaustion, also said:
- "It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call...exhaustion doctrine is a sound one and serves



the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

78. To further lend credence to this discussion, the Supreme Court in *Albert Chaurembo Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or*

successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs. *Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (2019) KESC 83 (KLR), was emphatic that:

“In pursuit of sound legal principles, it is our disposition that the disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of the superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

79. Section 9(2) and (3) of the FAA prohibits the High Court or any subordinate court from clothing itself with jurisdiction of any matter unless the remedies available under the written law are exhausted first as follows:

2. The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).

80. It is only in exceptional circumstances that an applicant may overlook the strict procedure under Section 9 (4) of the FAA; and the obligation to demonstrate the exceptional circumstances obtaining squarely falls on the applicant. In *Republic vs. National Environment Management Authority Ex parte Sound Equipment Ltd* (2011) eKLR, this Court, addressing itself on the circumstances where the exception may be granted, rendered itself as follows:

“..it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it ...”

81. With the above pronouncements and statutory underpinnings in mind, it remains obvious that a court seized with a dispute which should not have been filed before it in the first instance is under the sacred judicial duty to refer the parties back to the relevant quasi administrative bodies without any of the parties calling upon it to do so. The basic rationale to this is that the parties are expected (and mandated)



to have resolved their disputes before the relevant tribunals in the first instance before resorting to court. A decision of a court which purports to cloth itself with jurisdiction which it does not have ab initio amounts to nothing as expressed in the dicta of Nyarangi, JA. in the Owners of The Motor Vessel “Lillian S vs. Caltex Oil (Kenya) Ltd (supra) thus:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

82. Still on the question of jurisdiction, the appellant argues that the learned Judge erred in raising suo moto, and in determining the issue as to whether the appellant had exhausted the available internal dispute resolution mechanism. To the appellant, by the trial Judge introducing the issue of jurisdiction suo moto, was tantamount to denying the parties an opportunity to be heard contrary to the tenets of a fair hearing under Articles 25 (c) and 50 (1) of *the Constitution*.

83. The question of jurisdiction is vital in that it can even be raised on appeal. Learned P. O. Kiage, JA. addressed himself on this issue in the following words in Francis Macharia Karanja & 6 others vs. Virginia Muthoni Karanja (2020) KECA 521 (KLR), and with which we concur:

“As I considered the record of this appeal and was on the verge of rendering my decision on it, a fundamental jurisdictional issue came to my attention. The issue goes to the heart of this Court’s jurisdiction and as such must be dealt with before we get into the merits of the appeal, if at all. It is trite law that jurisdiction is everything. It therefore must be raised and addressed at the earliest since without it, the Court must down its tools as well elucidated in the famous dicta by Nyarangi, JA in The Owners of the Motor Vessel “lillian s” vs. Caltex Oil Kenya ltd (1989) KLR 1. I appreciate that the respondents did not raise this issue. However, on crucial question of jurisdiction, the Court has authority to act on its own motion. It was so held by this Court in Hafswa Omar Abdalla Taib & 2 Others vs Swaleh Abdalla Taib (2015) eKLR;

‘Unfortunately for the parties and despite their industry in ventilating the issue of goodwill, the determination of the appeal will disappoint them as it turns on the question of jurisdiction; that is, whether this Court has jurisdiction to entertain this appeal in the first place. We appreciate that it is an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this Court can suo moto raise and determine the same.’”

84. We are of a similar view that a jurisdictional issue can be raised by the court suo moto for, without jurisdiction, the court cannot move one more step. Therefore, we cannot fault the learned Judge for finding that the proceedings before him were premature for failure of the appellant to resolve its complaint before the Tax Appeals Tribunal as provided under Section 229(1) of EACCMA.

85. In conclusion, having found that none of the appellant’s complaints is merited, it follows that this appeal fails and is hereby dismissed. Consequently, we uphold the Judgment and decree in Mombasa Judicial Review Application No. E030 of 2021 (JR) delivered by Mativo, J. (as he then was) on 19th August 2022. Costs to the 1st, 2nd and 4th respondents and the 1st and 2nd interested parties.



Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MARCH, 2026.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

