

THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E089 OF 2024

BETWEEN

PETER MACHARIA THIONG'O
1ST PETITIONER

EUTYCUS NDERITU MUMBI.....
2ND PETITIONER

VERSUS

KENYA REVENUE AUTHORITY
1ST RESPONDENT

ATTORNEY GENERAL
2ND RESPONDENT

J U D G M E N T

Introduction

1. The Petition dated 16/2/2024 is supported by the affidavit of the 1st Petitioner, Peter Macharia Thiongo of even date.

2. The Petitioner challenges the seizure of the Petitioner's motor vehicle registration number KCJ 267S and its subsequent detention at Ruaraka Police Station by the

agents of the 1st Respondent on 23/10/2023. The Petitioners aver that the 1st Respondent's action was carried out arbitrarily and without any valid notice, in flagrant disregard of *Section 44 (1) of the Tax Procedures Act* and in violation of the Petitioner's constitutional rights under guaranteed under *Articles 31 (b) and 40 (3) of the Constitution*.

3. The Petitioner thus seeks the following reliefs against the Respondents:

- a) *A declaration that the 1st Petitioner's Constitutional rights of having his property arbitrary seized as guaranteed under Article 31(b) of the Constitution has been Violated and infringed by the 1st Respondent.*
- b) *A declaration that the 1st Petitioners Constitution right to acquire and own property of any description and in any part of Kenya as guaranteed by 40 (3) of the Constitution has been infringed and or violated by the 1st Respondents.*
- c) *A declaration that the seizure by the 1st Respondent of the Petitioners Motor Vehicle without his consent and without giving any notice to that effect is contrary to section 44 (1) of the Tax Procedures Act and the Constitution off Kenya 2010.*
- d) *Reinstitution of the 1st Petitioners Motor Vehicle and prohibitory order to the 1st respondent from seizing and or detaining without following the due process of the law.*

- e) *General damages and Compensation for illegal seizure and detention of the motor vehicle to a tune of Kshs. 5 million.*

- f) *Cost and interests of this Petition.*

Petitioner's Case

4. The Petitioner deposed that he has been the registered owner of Motor vehicle Registration number KCF 267S, make Subaru, since the 6th of June 2023, having purchased it from the 2nd Petitioner. In support of this assertion, the Petitioner annexed a copy of the log-book and the sale agreement, marked as *exhibits PM1 and PMT-2*.
5. On 23rd October 2023 while using his said motor vehicle in Nairobi, it was seized and detained at the Ruaraka police station by the officers/agents of the 1st Respondent without any prior notices or explanation contrary to the provisions of *Section 44 of the Tax Procedure Act* and the right to acquire and own property as guaranteed under Article 40 (3) of the Constitution of Kenya.
6. Further, the 1st Petitioner contended that the 1st Respondent violated his rights under Article 31 (b) of the

Constitution of Kenya in view of the arbitrary act of seizure and detention of his Motor vehicle.

7. As a result, the petitioner stated he has suffered and continues to suffer inconveniences and loss as he is forced to hire Ubers or use public transport because of the 1st Respondent's action which, despite repeated demands for the release of the Motor Vehicle, the 1st Respondent has ignored, neglected and/or refused to release.
8. In the supplementary affidavit filed on 22/2/2024, the Petitioner urged this Court disregard the Respondent's Replying affidavit on grounds that it had not been commissioned by an authorised person as required by the Oaths and Statutory Declarations Act, Order 19 of the Civil Procedure Rules. The Petitioner contended that the defect is fundamental hence not curable under Article 159 (2) (d) of the Constitution.

1st Respondent's Case

9. The 1st Respondent filed its replying affidavit through Ibrahim Abdi Hassan sworn on 19th March, 2024 who stated he is an officer of the 1st Respondent based in the Investigations and Enforcement Department.
10. The 1st Respondent deponed that it is creature of the Statute, the Kenya Revenue Authority Act (KRA Act) which Section 5 (1), establishes it an agency of the Government for the collection and receipt of all revenue whereas Section

5(2) of KRA Act requires it to administer and enforce all provisions of the written laws set out in Part I & II of the First Schedule to the KRA Act for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws.

11. It was deposed on behalf of the 1st Respondent that under Part I of the First Schedule to the KRA Act, the 1st Respondent is mandated to enforce the **East African Community Customs Management Act, 2004 (“EACCMA, 2004”)**.
12. The deponent stated that 1st Respondent has for many years been experiencing problems in effectively assessing, collecting and accounting for all tax/revenues due to various acts, omissions and/or vices perpetrated by some traders perpetrated through among others dumping of transit goods in Kenya hence evading payment of import duties which would have been payable had they been procedurally imported or declared.
13. The 1st Respondent swore that it was involved in a intergovernmental multi-agency taskforce comprising of Directorate of Criminal Investigation (DCI), National Intelligence Service (NIS) and National Transport and Safety Authority (NTSA) in an operation to impound civilian motor vehicles with security plates which was spearheaded by the National Transport and Safety Authority (NTSA) and that

through this operation it was discovered that not only did the civilian's vehicles have security plates allocated to NIS but also taxes on the said civilian vehicles had not been paid as most of the vehicles had been cleared as transit goods meant for neighbouring countries.

14. It was deposed on behalf of the 1st Respondent that in the year 2023 the NTSA had flagged over fifty (50) civilian vehicles as having been assigned with security plates allocated to the (NIS) and in an operation that ensued, NTSA was able to impound nine (9) vehicles with the rest being at large. Motor vehicle registration KCF 267S registered under the 1st Petitioner's name on the 2nd October 2023 was among those impounded in the operation in which the 1st Petitioner was arrested and booked at the Ruaraka Police station where he recorded a statement. (*Annexure "IAH- 1"*).
15. The 1st Respondent stated that said motor vehicle was then delivered to the customs control of the 1st Respondent who issued to the Officer in Charge Ruaraka Police Station a notice of goods deposited in Customs Warehouse (F89 Form) No.088790 dated 23rd October 2023. The original copy was served on the 1st Petitioner by the 1st Respondent and the same was signed for by the 1st Petitioner. (*Annexure "IAH- 2"*).
16. The 1st Respondent swore that it subsequently requested the Directorate of Criminal Investigation to conduct a

physical verification of the vehicle which was done on the 25th October 2023 and it confirmed that the vehicle was among those which custom duty had not been paid (**Annexure "IAH- 3"- copy of the Verification Report**).

17. The 1st Respondent averred that the Investigations further established that the motor vehicle was imported vide *Customs Transit Entry Number 2020MSA7567150* and *Road Manifest Number T812 No. 2020MSA7567404* both lodged and registered on the 1st Respondent Simba system on *30th June 2020*. The motor vehicle was in transit to South Sudan through Malaba frontier office and was imported by one **Deng Garang Deng of Juba**. (*Annexure "IAH- 4" and "IAH- 5" copy of the Customs Transit- Entry Number and Road Manifest Number respectively*)
18. The 1st Respondent stated that upon discovering that the motor vehicle was diverted into Kenyan market, a search of the registration number was carried out in the Transport Integrated Management System (TIMS) at NTSA which confirmed that the current owner is the 1st Petitioner. (per exhibit "IAH- 6" -*copy of the TIMS Report*).
19. As a result, the 1st Petitioner was interrogated and he stated he had bought the said vehicle from the 2nd Petitioner who was also also questioned as to the ownership of the vehicle and recorded a statement with the KRA Investigation officers on the 1st November 2023 indicating that he had bought the

same from one **Eric Ntaga Mukunya** and later sold it to the 1st Petitioner. (*per exhibit "IAH- 7" is a copy of the 2nd Petitioners Statement*)

20. The 1st Respondent asserted that Section 44 of the Tax Procedures Act authorizes the 1st Respondent to seize goods, and further that constitutionality of the said section that confers the 1st Respondent with the powers of seizure has not been challenged neither has the same been declared unconstitutional.
21. Further, the 1st Respondent explained that the Constitutional rights available to the 1st and 2nd Petitioner under Article 31 (b) and 40 (3) of the Constitution are not absolute and the same may be limited by an Act of Parliament and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.
22. The 1st Respondent affirmed that it duly issued to the 1st Petitioner a notice giving reasons why the motor vehicle was impounded and why the same is still being held.
23. The 1st Respondent contended that the seizure and detention of the motor vehicle was carried out lawfully pursuant to Section 213 of EACCMA, 2004 gives the 1st Respondent power to seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture

under the Act where there is reasonable ground to believe it is liable to forfeiture.

24. Furthermore, the 1st Respondent contended that Section 214 of EACCMA, 2004 has an elaborate procedure on how to deal with anything that has been seized under the EACCMA, 2004 as Section 214 **(4)(a)** provides that where such thing has been seized, the owner may, within one month of the date of the seizure claim such thing by notice in writing to the Commissioner yet the Petitioner did not present any demand or notice to the 1st Respondent concerning the release of motor vehicle KCF 267S. As such, the 1st Respondent contended that the Petition is founded on a fundamental misapprehension of the jurisdiction of this Honorable Court.
25. Further that the Petition fails to meet the threshold for constitutional petition as particulars of the manner of alleged infringement on the Petitioners constitutional rights are not supplied and that the Petition does not raise any constitutional issues.
26. The 1st Respondent filed a 3 a further replying affidavit through **Ibrahim Abdi Hassan** which confirmed the subject motor vehicle was knowingly diverted into the local market hence customed duty was evaded and remains unpaid and its registration had been effected manually in

NTSA TIMS as there was no data showing its transfer from ICMS to TIMS.

27. He stated that based on the market value of the motor vehicle KCF 267S unpaid taxes stand at Kshs.466,657/-. He also confirmed that from the findings of the investigation, the 1st and 2nd Petitioners were innocent purchasers of an uncustomed motor vehicle KCF 267S.
28. The 1st Respondent stated that prosecution of the persons involved in the diversion, sale and irregular registration of the motor vehicle has been recommended as evidenced in the exhibit marked "IAH- 2" (*copy of the letter addressed to the Director of Public Prosecution dated the 2nd December 2024*).
29. He stated the 1st Respondent is ready to release the said motor vehicle KCF 267S subject to the approval by the relevant authorities and payment of unpaid duties and taxes.

2nd Respondent's Case

30. In response to the Petition, the 1st Respondent filed grounds of opposition dated 22/3/2024 in which it opposed the Petition on the following grounds:
 1. THAT this Petition does not meet the test of a constitutional petition laid down in the case of *Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154 and emphasized in the case of Mumo Matemu v Trusted Society of Human Rights Alliance [2014] eKLR*, and on that ground alone, we urge that this

petition should fail. That apart from citing omnibus provisions of the Constitution, the petition has provided neither particulars of the alleged complaints, nor the manner of alleged infringements.

2. THAT the Petitioner is unable to sufficiently prove the nature and manner in which the 2nd Respondent have allegedly violated his rights or any of the provisions of the Constitution.
3. THAT the Petition and the Supporting Affidavit have not specified any wrongdoing on the part of the 2nd Respondent or at all and only mentions the Hon. Attorney General in the description of parties at paragraph 3 of the Petition.
4. THAT this Petition is an abuse of the Court Process and ought to be dismissed as against the 2nd and 3rd Respondents.

Petitioners' submissions

31. J & J Advocates filed submissions written submissions dated 26/3/2024 on behalf of the both Petitioners.
32. Counsel submitted that the 1st Respondent filed an incurable and defective Replying Affidavit which was not commissioned and thus not in compliance with the provisions of the Oaths and Statutory Declarations Act hence urged this Honourable Court to disregard said replying affidavit and strike it out, proceed and allow the Petitioner's Petition as prayed with an award of costs and interest to the petitioner.

33. Counsel reiterated that the 1st petitioner was using his motor vehicle within Nairobi (on 23rd October 2023) when it was seized and detained at Ruaraka police station by the 1st Respondent without any requisite notice nor a valid reason hence the action was a violation of the 1st Petitioner's Constitutional Right as enshrined in Article 40 (3) of the Constitution.
34. That since October 2023, the 1st Respondent' agents, employees and or servants have not given any good reason for impounding the 1st petitioner's motor vehicle nor did they charge the 1st Petitioner with any offence in relation to the motor-vehicle.
35. Counsel argued that the 1st Petitioner does not have control on issuance of number plates in regards to any motor vehicle hence any allegation that the 1st Petitioner's motor vehicle had security plates allocated to it, (NIS), is not his fault nor should his vehicle be impounded because he conducted his due diligence and the Motor Vehicle was clean as per NTSA records.
36. According to Counsel, 1st Petitioner disputes that he owes any tax obligation to occasion the seizure of his motor vehicle as and urged this Honourable Court to find that his dignity was violated plus the loss of his motor vehicle and prayed for an award of Kshs 5million as he is forced to always book Ubers for his mobility.

37. Counsel identified and submitted on four issues, namely
- (i) *Whether this Court is well seized of this matter?*
 - (ii) *Whether the seizure of the 1st Petitioner Motor Vehicle contravened his Constitutional Rights?*
 - (iii) *Whether the Court should strike out the 1st Respondent Replying Affidavit and accompanying documents dated 19th March 2024?*
 - (iv) *Whether the Petitioner is entitled to damages prayed?*
 - (v) *Who should bear the cost of this Petition?*

38. ***As to the issue of whether this court is well seized of this matter;*** Counsel submitted this Court has jurisdiction under Article 165 (3) b of the Constitution to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened". Further, that Article 258 (1) Every person has the Right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention. The Petitioner further contends that he fully complied with all tax obligation as he had conducted his due diligence before purchasing the motor vehicle. He unequivocally states that this dispute or seizure of his motor vehicle has nothing to do with tax obligation by the Respondent and that the 1st Respondent has failed to demonstrate that the

Petitioner had any ta obligation in respect of the motor vehicle he owned. Further the 1st Petitioner clearly states that no valid reasons nor notice has ever been issued to him to date. Counsel thus argued that this Petition raises purely constitutional issues hence this Court is well placed to entertain and determine the Petition as the Petitioners do not have any other venue to air their grievances.

39. The Petitioners placed reliance on the case of **Samura Engineering Limited & 10 Others vs. Kenya Revenue Authority [2012] eKLR** where it was held

" The duty of the court is to determine, on the facts as pleaded and presented, whether or not there has been a violation of the petitioner's rights. It is not to decide whether, in fact, there is another suitable remedy or whether the matter could have been resolved in another forum or whether the matter is merely a civil matter."

40. *On the question of whether the seizure of the 1st Petitioner Motor Vehicle contravenes his Constitutional Rights; Counsel for the Petitioners submitted that the seizure of the 1st Petitioner's Motor Vehicle was done without any Notices to the 1s Petitioner, an action that is arbitrary and unconstitutional. Counsel cited and relied on Articles 31 (b) of the Constitution " Every person has the right to privacy which includes the right to have -b) their possessions seized and Article 40 (3) The state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description. He argued that to the*

extent that sections 44(1) & (2) and 60(1)-(3) of the Tax Procedures Act, 2015 empowers the 1st Respondent to unilaterally and arbitrarily exercise the power search, seizure and forfeiture of goods, the same are unconstitutional considering that Article 31(b) of the Constitution is unequivocal both in wording and spirit hence this Court should not depart from the same because any provision which allows the 1st Respondent to unilaterally and arbitrary seize the tax payers possessions demeans the dignity and the spirit of the Petitioner's Right and freedom as enshrined in the Constitution.

41. According to Counsel, a statute such as the provisions of the Tax Procedure Act cannot retract from clear Constitutional stipulation Right ad was affirmed by the Court of Appeal of Tanzania in the celebrated case of **Ndyanabo vs. Attorney General [2001] EA 495** which while restating the law in the **English case of Pearlberg vs. Varty [1972] 1 WLR 534** held that:

"Until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative"

42. Counsel argued that any statute that limits or intends to limit Fundamental Rights and Freedom is null and Void citing the decision of the Supreme Court in The Matter of the Principle of Gender Representation in the National Assembly and the

Senate, SC Advisory Opinion No. 2 of 2012 where it was held that:

"A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy: and care should be taken not to substitute one for the other."

43. Counsel further relied on **Article 20(2)(3) and (4)** of the Constitution which provides as follows:

(2) *Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.*

(3) *In applying a provision of the Bill of Rights, a court shall-*

(a) *develop the law to the extent that it does not give effect to a right or fundamental freedom; and*

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote-

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

44. Counsel placed further reliance on the cases of *The Senate & Another vs. Hon. Attorney General & Another & 3 Others* Advisory Opinion Reference No. 2 of 2013 [2013] eKLR and *Njoya & 6 Others vs. Attorney General & Others* (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR, to buttress the submission that the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles.

45. Submitting on Section 44(1) & (2) of the Tax Procedures Act, Counsel cited it reproduced it as follows:

(1) This section shall apply to-

(a) any goods in respect of which the Commissioner or authorized officer reasonably believes that the value added tax or excise duty payable in respect of the supply, removal, or import of the goods has not been or will not be paid; or

(b) goods for which excise duty has not been paid, unless the owner of the goods has

made arrangements that have satisfied the Commissioner for the payment of the excise duty, which may include the giving of a security:

- (c) excisable goods subject to excise control that have been moved, altered, or in any way interfered with, except with the permission of the Commissioner; to*
- (d) excisable goods in respect of which, any person, in any matter relating excise, makes or produces a declaration, certificate, application or other document, answer, statement or representation, that is false or incorrect in any particular; or*
- (e) excisable goods in respect of which a refund of excise duty has been unlawfully obtained.*

(2) The Commissioner or an authorized officer may seize any goods to which this section applies

46. According to the Petitioner, these provisions are inconsistent with and violate Article 31 (b) of the Constitution which provides as follows:

Every person has the right to privacy, which includes the right not to have- (a)...

31 (b) their possessions seized;

47. Counsel argued that any limitation is required to comply with Article 24 of the Constitution which provides as follows:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) *the nature of the right or fundamental freedom;*
 - (b) *the importance of the purpose of the limitation;*
 - (c) *the nature and extent of the limitation;*
 - (d) *the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and*
 - (e) *the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.*
- (2) *Despite clause (1), a provision in legislation limiting a right or fundamental freedom-*
- (a) *in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation:*
 - (b) *shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and*
 - (c) *shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.*
- (3) *The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.*

48. Counsel for the Petitioners submitted that the 1st Respondent has not even attempted to show that the

requirements of Article 24 aforesaid were satisfied in the enactment of the said sections. That the Respondent was required to satisfy this Court that the said provisions specifically express the intention to limit the Article 31(b) right or fundamental freedom. Counsel contended that the same do not indicate the nature and extent of the limitation, hence pursuant to Article 24 of the Constitution, such provisions are invalid and cannot have the effect of limiting the rights conferred by Article 31 (b) of the Constitution.

49. Urging for the declaration of unconstitutionality of sections 44(1) and (2) and 60(1) and (3) of the Tax Procedures Act, 2015, relied on the case of Kennedy vs. Ireland [1987] IR 587 cited in Coalition for Reform and Democracy (CORD) & 2 Others vs. Republic & 10 Others [205] KLR where it was held that:

"The dignity and freedom of an individual in a democratic society cannot be ensured if his communication of a private nature, be they written or telephonic, are deliberately, consciously and unjustifiably intruded upon and interfered with."

50. As to whether the Court should strike out the 1st Respondent Replying Affidavit and accompanying documents dated 19th March 2024; Counsel submitted that the 1st Respondent's Replying Affidavit was not been commissioned and argued that it should be struck out as the defect is incurable. Reliance was placed on the case of Pius Njogu Kathuri v Joseph Kiragu Muthura & 3 others [2018] eKLR and Hosea

Mundui Kiplagaŧ -V- Sammy Komen Mwaita & 2 Others (2013) eKLR.

51. As to *whether the Petitioner is entitled to damages*; Counsel submitted that since the 1st Petitioner's Motor vehicle KCF 267S was arbitrarily seized and detained, it was almost an year of being deprived of its use. He argued that the Petitioner was entitled to compensation and cited the case of Rawal, J (as she then was) in Otieno Mak'onnyango vs. Attorney General & Another [2012] eKLR the Court held that it was bound to award be fair and reasonable in awarding damages in view of the unique circumstances of that case. 196. Counsel submitted that the Petitioner seeks an award of Kshs. 5,000,000 for violation of his rights and being a senior citizen who runs business all over the Country has been forced to hire and or use Uber for him to conduct business.

1st Respondent's written submissions

52. The 1st Respondent filed its written submissions through its **Advocate Andambi Chabala**. Counsel adopted the facts in the replying affidavit of the 1st Respondent sworn by Ibrahim Abdi Hassan.
53. On behalf of the 1st Respondent, Counsel identified and submitted on the following issues:
- a) *Whether the Court should strike out the 1st Respondent Replying affidavit and accompanying documents dated 19th March 2024?*

- b) *Whether the 1st Respondent action of seizing and impounding the 131 Petitioners motor vehicle KCF 267S pending confirmation of payment of customs duty and investigation infringes on the Petitioners Constitutional rights secured under Articles 31 and 40 of the Constitution?*
- c) *Whether the seizure and continued detention of motor vehicle KCF 267S was lawfully done?*
- d) *Whether the jurisdiction of this Court has been properly invoked?*
- e) *Whether the Petitioners are entitled to damages and orders sought?*

54. On the question of whether the Court should strike out the 1st Respondent Replying affidavit and accompanying documents dated 19th March 2024; Counsel submitted at the onset that the Replying affidavit sworn on the 19th March 2024 by Ibrahim Abdi Hassan was properly commissioned except that the one served on the Petitioner was faint. He explained that the defect arose purely from oversight of the 1st Respondent's registry officer and having the documents scanned in black and white format. Counsel thus urged the Court not to strike the Replying affidavit and the annexures thereof submitting that the defect was a mere technicality which by dint of Article 159 (2) (d) of the Constitution should not be allowed to defeat the ends of substantive justice for the parties.

55. The 1st Respondent further cited Article 22 (3)(b) which provides that; The Chief Justice shall make rules providing for the court proceedings referred to in this Article, which shall satisfy the criteria that-

(b) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;

56. The 1st Respondent argued that since the suit raises constitutional issues, the justice of the case would best be served if the parties are heard on merit. Counsel submitted that striking out the 1st Respondent replying affidavit and annexures would deny the 1st Respondent an opportunity to defend the suit in contravention of Article 159(2)(d) of the Constitution.

57. On the question of whether the 1st Respondent's action of impounding and detaining the 1st Petitioners motor vehicle KCF 267S pending confirmation of payment of customs duty and investigation infringes on the Petitioners Constitutional rights guaranteed under Articles 31 and 40 of the Constitution; The 1st Respondent submitted that the seizure and detention of the motor vehicle KCF 267S arose from the fact that the said motor vehicle was destined for Juba South Sudan but was instead deceptively diverted into the Kenyan market thus evading payment of custom duty, hence its seizure to confirm payment of duty does not constitute an

infringement of the Petitioners constitutional rights as the power to seize and detain uncustomed goods by the 1st Respondent is authorized by **Sections 210,211,212 and 213** of the **East African Community Customs Management Act 2004 (EACCMA)**. The 1st Respondent thus submitted that its actions were carried out in lawful exercise of its powers conferred by EACCMA and not the Tax Procedures Act as erroneously pleaded by the Petitioners. Counsel reproduced the relevant provisions of **EACCMA** as follows:

Section 210-

'In addition to any other circumstances in which goods are to forfeited under this Act, the following goods shall be liable to forfeiture-

- (a) any prohibited goods;*
- (b) any restricted goods which are dealt with contrary to any condition regulating their importation, exportation or carriage coastwise;*
- (c) **any uncustomed goods; {Emphasis}***
- (d) any goods which are imported, exported or transferred, concealed in any manner, or packed in any package, whether with or without other goods in a manner appearing to be intended to deceive any officer;*
- (e) any goods which are imported, exported or transferred contained in any package of which the entry, application for shipment, or application to unload does not correspond with such goods;*

- (f) *any goods subject to Customs control which are moved, altered, or in any way interfered with, except with the authority of any officer;*
- (g) *any goods in respect of which, in any matter relating to the Customs, any entry, declaration, certificate, application or other document, answer, statement or representation, which is knowingly false or knowingly incorrect in any particular has been delivered, made or produced; and*
- (h) *any goods in respect of which any drawback, rebate, remission or refund of duty has been unlawfully obtained.*

Section 211

- (1) *A vessel of less than two hundred and fifty tons register, and any vehicle, animal, or other thing, made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall itself be liable to forfeiture.*
- (2) *An aircraft or any vessel of two hundred and fifty tons register or more made use of in the importation, landing, removal, conveyance, exportation, or carriage coastwise, of any goods liable to forfeiture under this Act shall not itself be liable to forfeiture but the master of any such aircraft or vessel commits an offence and shall be liable to a fine not exceeding ten thousand dollars; and such aircraft or vessel may be seized and detained until the fine is paid or security given.*
- (3) *Where any vessel, vehicle, animal, or other thing, is liable to forfeiture under this Act, then the tackle, apparel, furniture, and all other gear, used in connection therewith shall also be liable to forfeiture.*

Section 212

- (1) *Where any goods are liable to forfeiture under this Act, then the package in which such goods are, and all the contents of such package, shall also be liable to forfeiture.*
- (2) *Where any goods which are prohibited goods or restricted goods have been shipped for importation without knowledge by the shipper of the prohibition or restriction and before, in the opinion of the Commissioner, the expiration of a reasonable time for such information to be available at the port of shipment, then, notwithstanding this Act, the goods shall not on importation be liable to forfeiture but shall be re-exported, or otherwise disposed of, in such manner as the Commissioner may determine; and pending the re-exportation or disposal of the goods shall be subject to Customs control.*

Section 213

- (1) *An officer or a police officer or an authorised public officer may seize and detain any aircraft, vessel, vehicle, goods, animal or other thing liable to forfeiture under this Act or which he or she has reasonable ground to believe is liable to forfeiture; and that aircraft, vessel, vehicle, goods animals or other thing may be seized and detained regardless of the fact that any prosecution for an offence under this Act which renders that thing liable to forfeiture has been, or is about to be instituted.*
- (2) *Where an aircraft, vessel, vehicle, goods, animal or other thing is seized and detained under this Act by a person other than a proper officer, the aircraft, vessel, vehicle, goods, animal or other thing seized and detained under this Act shall be delivered with full written particulars to the nearest Customs office or to such other place of security as the proper officer may consider appropriate;*

- (3) *Where delivery of an aircraft, vessel, vehicle, goods, animal or other thing is not practical under subsection (2), notice in writing shall be given to the Commissioner at the nearest Customs office, of the seizure and detention, with full particulars of the aircraft, vessel, vehicle, goods, animal or thing seized and detained.*
- (4) *Where a person seizing and detaining a thing liable to forfeiture under this Act is a police officer and that thing is or may be required for use in connection with any court proceedings to be brought otherwise than under this Act, the police officer may, subject to subsection (5) keep that thing in the custody of the police until those proceedings are completed or until it is decided that no proceedings shall be instituted.*
- (5) *Where a thing seized is retained in the custody of the police under subsection (4) the following provision shall apply-*
- (a) *the police officer shall give notice in writing of the seizure and detention, and the intention to retain the thing in the custody of the police, together with full particulars of the thing, to the nearest Customs office;*
 - (b) *an officer shall be permitted to examine that thing and take account at any time while it remains in the custody of the police;*
 - (c) *where the court orders the release of that thing the Commissioner shall assess and collect any duty payable on that thing prior to restoration of the thing to the owner.*
- (6) *Where a person, not being a proper officer, seizes and detains or has custody of the thing seized and detained, fails to comply with the requirements of this section or with any direction of the Commissioner, he or she commits an offence and*

shall be liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding two thousand dollars or to both.

(7) The Commissioner may, at any time prior to the commencement of any proceedings relating to any aircraft, vessel, vehicle, goods, animal or other thing which had been seized under this Act, if he or she is satisfied that it was not liable to seizure, release and return it to the person from whom it was seized. 26.

58. The 1st Respondent argued that Article 31(b) and 40 (3) of the Constitution Respondent is not absolute and the right may be limited as long as the limitation is within the bounds of existing law and is done in a manner that is not arbitrary. The 1st Respondent submitted that the seizure and detention of motor vehicle KCF 267S was done in strict compliance with Sections 210,211,212 and 213 of the EACCMA which limits the right to privacy and property in the manner consistent with Article 24 of the Constitution because the powers given by Sections 210,211,212 and 213 of EACCMA to the 1st Respondent are necessary for it to meet its mandate of ensuring compliance with tax laws and to protect the public interest.

59. The 1st Respondent cited the case of Okiya **Omtatah Okoiti v Attorney General & another [2020] eKLR** where the Court held that the right to privacy can be limited within the law with the aim of protecting the public's interest over the interests of individuals who wish to circumvent the law for their own self-gain.

60. The 1st Respondent submitted that collection of taxes is an important component of the modern State and the Constitution recognizes this fact by making provision for charging and collection of taxes in Chapter Twelve of the Constitution while Sections 210, 211 and 212 of EACMMA ensures imposition and collection of duty through control of movement and storage of imported goods to prevent smuggling and evasion of customs until duty the duty is paid.
61. The 1st Respondent contended that the power to seize and detain goods upon reasonable grounds is part of its powers conferred on the police and KRA officers thus cannot be in contravention to Constitutional rights under Article 31 or 40 of the Constitution. The 1st Respondent relied on **Crywan Enterprises Limited Vs. Kenya Revenue Authority [2013] eKLR** where the Court held inter alia that; *"Without such a power, it becomes easy to evade payment of duties through smuggling. It is a power that falls within the scheme of the Act and without this power the purposes of the Act are diminished. I find and hold that power to seize goods on the basis of reasonable grounds provided in the Act is rationally connected to the purpose of the Act to secure and collect taxes. For without such a power, "once goods go into home consumption, that is, into circulation, it becomes almost impossible to trace them" and also collect taxes."*

62. Over and above those submissions, the 1st Respondent contended that the Petition does not meet the requisite threshold of a Constitutional Petition insisting that the Petitioners did not plead the particulars of how their rights to privacy or property have been infringed, violated or threatened by the 1st Respondent as espoused in the case of *Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272*.

63. Further, the 1st Respondent submitted that no evidence has been adduced by the Petitioners to demonstrate the alleged violations and thus did not discharge the burden of proof as required by Sections 107(1) (2) and 109 of the Evidence Act. In support of this contention, the 1st Respondent placed reliance on the case of **Leonard Otieno Vs. Airtel Kenya Limited [2018]** where the Court held thus;

"It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."

64. The 1st Respondent submitted that the Petitioners motor vehicle was seized by the 1st Respondent after the 1st

Petitioner was issued with a notice of goods deposited in customs warehouse pursuant to **Section 214 of the EACCMA** which the 1st Petitioner duly acknowledged by signing on the notice. As such, the seizure and detention of motor vehicle KCF 2675 was done in accordance with the laid down statutory procedure and the same cannot be termed as unconstitutional or constitute an infringement of the Petitioners Constitutional rights under Articles 31(b) or Article 40(3) of the Constitution.

65. The 1st Respondent submitted that complied with the procedure outlined by EACCMA in impounding and detaining the 1st Petitioner's vehicle, in particular, Section 214 of the EACCMA which provides for the procedure on seizure.

Section 214 of EACCMA states:

- (1) Where anything has been seized under this Act, then, unless such thing was seized in the presence of the owner of the thing, or, in the case of any aircraft or vessel, of the master thereof, the officer effecting the seizure shall, within one month of the seizure, give notice in writing of the seizure and of the reasons to the owner or, in the case of any aircraft or vessel, to the master: Provided that-*
- (a) notice of seizure shall not be given in any case where any person has, within a period of one month, been prosecuted for the offence by reason of which the thing has been seized, or the offence has been compounded under Part XVIII, and if, after any notice has been*

given but before condemnation of the thing in accordance with this Act-

- (i) any such prosecution is brought, then such thing shall be dealt with in accordance with section 215 as if such notice had been given;*
 - (ii) the offence is so compounded, then such thing shall be dealt with in accordance with Part XVIII as if no such notice had been given;*
- (b) where any such thing has been seized in the presence of any person coming within the definition of owner for the purposes of this Act, then it shall not be necessary for the officer effecting the seizure to give notice person coming within such definition;*
- (c) a notice given to any person coming within such definition of owner shall be deemed to be notice to all other persons coming within such definition;*
- (d) where a person coming within such definition of owner is not known, then it shall not be necessary for the officer effecting the seizure to give notice to any person.*
- (2) Where any goods which are of a perishable nature or are animals are seized, the Commissioner may direct that such goods shall be sold forthwith, either by public auction or by private treaty, and that the proceeds of the sale shall be retained and dealt with as if they were the seized goods.*
- (3) Where any thing liable to forfeiture under this Act has been seized, then-*
- (a) if any person is being prosecuted for the offence by reason of which the thing was seized, the thing shall be detained until the*

determination of such prosecution and dealt with in accordance with section 215;

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

(4) Where any thing liable to forfeiture under this Act has been seized, then, subject to subsection (1) (a) and subsection (3).

(a) the owner may, within one month of the date of the seizure or the date of any notice given under subsection (1), as the case may be, by notice in writing to the Commissioner claim such thing.

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

(6) The Commissioner may permit such thing to be delivered to the person making a claim, in this Part referred to as the claimant under subsection (4), subject to the claimant giving security for the payment of the value of the thing, as determined by the Commissioner in the event of condemnation of the thing

66. The 1st Respondent submitted that in exercising the seizure of motor vehicle KCF 267S it adhered to the statutory dictates of Section 214 of the EACCMA as the Petitioner was served with the notice of goods deposited in customs warehouse and the Petitioner duly signed for the receipt of the notice under their hand *and that* that the reasons for

seizure of the motor vehicle were explained to the 1st Petitioner as evidenced by the notice of goods deposited in customs warehouse that was issued on 23/10/2023 and it is also clear that the 1st Petitioner recorded a statement in regard to how they had acquired the said motor vehicle.

67. As to whether the detention of the motor vehicle continues to be unlawful, the 1st Respondent submitted that, currently, the investigation has unravelled how a motor vehicle destined for Juba South Sudan was deceptively diverted in Kenya without payment of the requisite customs duty.
68. On whether the jurisdiction of this Court was properly invoked, Counsel submitted that **Section 214 of the EACCMA** provides for the manner the Petitioners can reclaim the motor vehicle, that is; they can make a claim pursuant to Section 214(4) and the 1st Respondent may allow the seized motor vehicle to be delivered to the Petitioners pursuant to satisfying the requirements of Section 214(6) of EACCMA. The 1st Respondent submitted that no claim pursuant to Section 214(4) has been made by the 1st Petitioner and no security has been presented by the 1st Petitioner with regard to the unpaid customs duty on the motor vehicle as required by Section 214(6).
69. The 1st Respondent submitted that this Court's jurisdiction was invoked prematurely as there existed alternative legal machinery available to the Petitioners pursuant to Section

214(4) of the EACCMA. Further the Petitioners that the Petitioner could seek recourse through a civil claim instead of Constitutional Petition hence the petition as brought infringes on the doctrine of Constitutional avoidance and ripeness.

70. The 1st Respondent argued that under Section 214(4) of the EACCMA the Petitioner was entitled to lodge a claim for the forfeited goods by writing a claim to the 1st Respondent and the goods may be permitted to the Petitioners subject to the conditions under Section 214(6). Further, Section 229 of the EACCMA authorises the Petitioners to seek a review of the decision or omission of the 1st Respondent while Section 230 enables the Petitioners to move to the Tax Appeals Tribunal.
71. The 1st Respondent thus faulted the Petitioners for invoking the Constitution to resolve a dispute by avoiding the laid down statutory mechanisms provided under EACCMA. The 1st Respondent relied on the case **of KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling)**, where the Court stated as follows:

"In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional

avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause."

72. Further reliance was placed on the Court of Appeal case of **Speaker of National Assembly v Karume [1992] KLR 21** where the Court stated thus;

"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

73. In regard to the Petitioners' claim for general damages and compensation for illegal seizure and detention of the motor vehicle to a tune of Ksh.5,000,000. The 1st Respondent contended that by pleading a specific sum of Kshs. 5,000,000/- that was no longer a claim for general damages but special damages which should have been specifically proved. 81. Counsel relied on the case of **South Nyanza Sugar Company Ltd v Fredrick Ogolla [2015] eKLR** where Justice Majanja placing reliance on the case of **Charles C. Sande Vs Kenya Cooperative Creameries Ltd NRB CA Civil Appeal No.154 of 1992** (UR) held that special damages must be pleaded and proved.
74. On the prayer for the restoration of the motor vehicle, the 1st Respondent submitted that investigations have confirmed that custom duty was not paid as the motor

vehicle was destined for Juba, South Sudan but diverted into the Kenyan market. The 1st Respondent submitted that it is clear from the provisions of Regulation 104(4) of the EACCMA Regulations that an offence was committed and the government in the process lost revenue. As such, the 1st Respondent argued that this Court cannot thus be asked to sanction, condone and or aid and abet the conduct of allowing uncustomed goods to remain in Kenya without duty having been paid. Consequently, according to the 1st Respondent, issuing a prohibitory and restraining order against the seizure of an uncustomed motor vehicle would be contrary law and would facilitate the continuous loss of revenue and dumping of goods in the country.

2nd Respondent's submissions

75. The 2nd Respondent filed its written submissions dated 28th May, 2024 through the Principal State Counsel, Stephen Terrell.
76. The 2nd Respondent narrowed its submissions to two major issues: *a. Whether the Petition meets the threshold of a Constitutional Petition and,*

b. Whether the Respondents have violated the Petitioners rights.
77. In regard to the Petition not meeting the test of a constitutional petition as laid down in the case of *Anarita Karimi Njeru v Republic (No.1) [1979] KLR 154* and

emphasized in the case of Mumo Matemu v Trusted Society of Human Rights alliance [2014] eKLR, Counsel Terell argued that despite the Petitioner making citation of Articles 10, 23, 25(C), 31(b), 40(3), 47, 50(A,B), 73, 165, and 258(1) of the Constitution in the the Petition, he provided little or no particulars as to the allegations and the manner or the nature of the alleged infringements against the Respondents. Counsel contended that the Supporting Affidavit of Peter Macharia Thiongo dated 16th February 2024 does not make reference to any wrongdoing in regards to the seizure of his motor vehicle, by the 1st Respondent.

78. Counsel relied on the case of Kenya Bus Services Ltd & 2 others v Attorney General & 2 others [2005] eKLR, where it was held that respondents have no cause of action against the Interested parties at all because there was no contravention shown even on a prima facie basis under s 84 of the retired Constitution and that for contravention to exist, the requirements set out in the following cases had to be met:

i) **in MATIBA v ATTORNEY GENERAL** HC Misc Appl 666 of 1990

"An applicant in an application under s 84(1) of the constitution is obliged to state his complaint, the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this

court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement."

- (ii) In **AMERICAN CONSTITUTIONAL LAW 2nd Edition by Lawrence Tribe** at pg 67 the author puts the same position this way:

"a litigant must now demonstrate regardless of the actual existence of claimed injury or its subjective importance an individualized harm imparting specifically upon him and of a tangible concrete nature."

- (iii) In **ANARITA KARIMI NJERU v R (No 1) 1979 KLR 154 Trevelyan and Hancox J**) held:

"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains the provision said to be infringed and the manner in which they are alleged to be infringed."

- (iv) Finally in **CYPRIAN KUBAI V STANLEY KANYONGA MWENDA - NAIROBI - HC MISC 612 of 2002** unreported KHAMONI J struck out an application and went on to make a finding as follows:

"An applicant moving the court by virtue of section 60,65 and 84 of the constitution must be, precise and to the point not only in relation to the section, but also to the subsection and where applicable the paragraph or subparagraph of the section out of 71 to 83, allegedly contravened plus relevant act of that contravention so that the respondent knows the nature and extent of the case to respond to enable the respondent prepare

accordingly and also to know the exact extent and nature of the case it is handling..."

79. As to whether the Respondents violated the Petitioners' rights; the 2nd Respondent reiterated that the 1st Respondent had justified its actions that were chronologically and reasonably taken, including service of requisite legal notices based on the enabling statutes and that the Petitioners have not repudiated the evidence of service of the said notices.
80. Accordingly, Counsel contended that under Article 24(1)(c) of the Constitution, a Right or fundamental freedom in the Bill of Rights may be limited provided the limitation is reasonable and justifiable in an open and democratic society based on nature human and dignity, equality and freedom, taking into account all relevant factors, including- the extent of the limitation.
81. The 2nd Respondent castigated the Petitioners and argued that they are guilty of material disclosure which, if there had been disclosure, would have turned the question before the court from a Constitutional Petition to a civil claim that should not be heard as a Constitutional Petition as if there was material disclosure, it would have triggered the principal avoidance. In that regard, Counsel placed reliance on *Apollo Mboya vs The Attorney General and National Employment Authority Nairobi Constitutional Petition Number E335 of 2023(unreported)* where the Court, cited with approval the

case of *Kiriro Wa bench Ngugi & 19 Others vs Attorney General & 2 Others* (2020) eKLR where it was held as follows: "105. We shall now turn to the Constitutional Avoidance Doctrine. The doctrine is at times referred to as the Constitutional Avoidance Rule. Black's law Dictionary, 10th Edition at page 377 defines it as: The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion. 106. The doctrine interrogates whether there are other ways of resolving a dispute outside a constitutional petition. The Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others* Pet.14A, 14B & 14C of 2014 [2014] eKLR held: The principle of avoidance entails that a Court will not determine a constitutional issue when a matter may properly be decided on another basis." Lastly is the Ripeness Doctrine. The doctrine focuses on the time when a dispute is presented for adjudication. The Black's Law Dictionary 10th Edition [Supra] at page 1524 defines ripeness as: The state of a dispute that has reached and not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made 108. Courts should therefore frown upon disputes that are hypothetical, premature academic which have not fully matured into justiciable controversies."

82. Further, the 2nd Respondent contended that the 2nd Respondent ought to be non-suited as the case against it is

untenable in view of the fact that the 1st Respondent, which is established under Section 3 of the Kenya Revenue Authority Act, is a body corporate with perpetual succession and a common seal, and thus capable in its corporate name of suing and being sued; taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; the furtherance borrowing or lending money; doing or performing all other things or acts for of the provisions of this Act, which may be lawfully done or performed by a body corporate.

Analysis and Determination

83. From the pleadings and submissions before this Court, the issues falling for determination can be summed up as follows: competence of the Petition, justiciability, admissibility of the replying affidavit of 19/3/2024 by the 1st Respondent, joinder of the 2nd Respondent as a Party in this Petition, and the questions as to whether there was violation of the Constitution, if so, whether the reliefs sought should be granted. They may thus be more specifically distilled as follows:

1. ***Whether the Replying Affidavit of the 1st Respondent dated 19th March, 2024 is defective and if so, whether it ought to be struck out together with the related annexures.***
2. ***Whether the Petition as drawn satisfies the threshold of a Constitutional Petition***

- 3. Whether the Petition is maintainable regard being had to the doctrines of Exhaustion of remedies and Constitutional avoidance.**
- 4. Whether the 2nd Respondent is a necessary Party in this suit in the light of provisions of Section 3 of the Kenya Revenue Authority Act.**
- 5. Whether the manner of impounding and subsequent detention of the 1st Petitioner's motor vehicle KCF 267S by the agents of the 1st Respondent violated the Petitioners fundamental rights to privacy under Article 31 (b) and to protection of property under Article 40 (3) of the Constitution.**
- 6. Whether the Petitioners are entitled to the reliefs sought.**

84. I will first address issue number 1 because it touches on admissibility of evidence which is a preliminary issue then proceed to deal with issues numbers 2 and 3 as they raise fundamental preliminary questions regarding the competence of the instant Petition, and are, if resolved in the affirmative capable of disposing the Petition without the need for the Court to interrogate the substance of the Petition. If the Court finds in the negative, it will then proceed to determine the Petition on its merits.

Whether the Replying Affidavit of the 1st Respondent dated 19th March, 2024 is defective and if so, whether it ought to be struck out together with the related annexures.

85. The Petitioner in the both in his Supplementary affidavit sworn on 22/3/2024 and in his written submissions urged this Court disregard the Respondent's Replying affidavit on grounds that it had not been commissioned by an authorised person as required by the Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules. The Petitioner contended that the defect is fundamental hence not curable under Article 159 (2) (d) of the Constitution.
86. The 1st Respondent strenuously disputed this contention by the Petitioners and stated that the Replying affidavit sworn on the 19th March 2024 by Ibrahim Abdi Hassan was properly commissioned save that the Commissioning stamp on the affidavit served on the Petitioner was faint. He explained that the defect arose purely from having the documents scanned in black and white format. Counsel thus urged the Court not to strike the Replying affidavit and the annexures thereof submitting that faintness was a mere technicality which by dint of Article 159 (2) (d) of the Constitution should not be allowed to defeat the ends of substantive justice for the parties.
87. Section 5 of the Oaths and Statutory Declarations Act, Cap 15 States as follows:

5. Particulars to be stated in *jurat* or attestation clause

"Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state

truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

88. The affidavit and any annexures thereof constitute critical evidential material which the Court relies on to determine any facts in contention. The Commissioner for oaths is required to provide official certification that the deponent of affidavit not only personally appeared before him but also executed the oath to ascertain the facts contained in the affidavit and further indicate the time and place when such oath was administered. This is intended to prevent impersonation, or fabrication of such as by backdating it.
89. The foundation of this requirement is thus to preserve the integrity of the evidence and trial hence is not a mere legal technicality. Failure to comply with that requirement thus undermines the authenticity and evidential value of such affidavit and/or annexures.
90. In the instant case, I have carefully and penetratingly scrutinized the 1st Respondent’s replying affidavit sworn on 19/3/2024. Despite the Petitioner making heavy weather that the affidavit was not commissioned, there are unmistakable but evidently faint stamp markings on the attestation part of the affidavit and given the explanation by the 1st Respondent that the process of serving the affidavit on white and black format was the reason for the compromised the visibility of the attestation stamp, I am

satisfied that the attestation was done hence the issue here now is not whether attestation was done or not, but the quality of the mark evidencing attestation which in my view is a technicality that does not go into the substance. The objection is thus about the quality of the attestation mark and not the lack of attestation which is a technicality which the Court need not give much regard to in the light of Article 159 (2) of the Constitution.

91. I now turn to the next issue.

Whether the Petition as drawn satisfies the threshold of a Constitutional Petition

92. The 1st and the 2nd Respondent contended that the Petitioners made general allegations without detailing the particulars regarding the manner of violation of their rights and fundamental freedoms. The Respondents contended that despite making citation of Article 31 (b) and 40 (3) and alleging they were violated, the Petitioners did not plead particulars of wrongdoing in relation to the seizure of the said motor-vehicle KCF 267S so as to illuminate the alleged violation.

93. It must be underscored that the consideration of whether a Petition meets the threshold required in pleading a Constitutional Petition focusses on the scrutiny of the allegations that are pleaded to determine if they reasonably manifest the violation of the Articles of the Constitution

allegedly violated by the Respondent and as such, the Court is not concerned at this point with whether the allegations are true or not true as it is not evaluating the evidence.

94. According to the celebrated case of **Anarita Karimi Njeru v R 1979 eKLR**, a proper Petition is the one that discloses the provisions of the Constitution alleged to have been violated and the manner the alleged violations occurred. The Court held:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

95. This was reiterated in **Japheth Ododa Origa v Vice Chancellor University of Nairobi, Academic Registrar, University of Nairobi & B.M Waweru [2018] KEHC 4861 (KLR)** where the Court stated:

“15. Precision in pleading is vital in Constitutional petitions because it enables the opposite party to fully understand the case they face and be in a position to adequately respond to it. It also enables the Court to decipher the issues brought before it for adjudication. It helps in avoiding surprises and ambiguities in the litigation but more importantly it shows the link between the aggrieved party, the

constitutional provisions at play and the possible infringement. This was well stated by the Supreme Court in the case of Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR thus:-

“[349] Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Annarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”

96. In the instant case, despite the 1st and 2nd Respondent contending that the Petition is non-specific, the Petitioners have identified Article 31 (b) and 40 (3) of the Constitution which they allege were violated by the actions of the 1st Respondent in arbitrarily and without giving reasons, seizing and detaining the 1st Petitioners’ motor vehicle KCF 267S on 23/10/2024.

97. The complaint is anchored on 'arbitrariness and lack of valid reasons for seizing and detaining the motor vehicle 'of which the Petitioners now seek redress. This in my view shows that their grievance is tied to a clearly disclosed incident, which involves specific conduct of the 1st Respondent that the Petitioners allege violated specific constitutional articles. This factual narration which the Petitioners links to Constitutional Articles allegedly violated by the conduct complained of satisfies the threshold required in pleading a Constitutional Petition. Whether or not the Petitioners have proof to establish the allegations complained of or, whether the Petition is affected by justiciability principles are different matters as they are outside the scope of satisfactoriness of a pleading.

Whether the Petition is maintainable regard being had to the doctrines of Exhaustion of remedies and Constitutional avoidance.

98. The doctrine of exhaustion of remedies requires that if a person has a grievance against the decision or action of a public body or organization, he should first utilize the internal dispute resolution processes in that organization before seeking Court's intervention. Courts invoke judicial restraint and decline jurisdiction where a party overlooks the

internal dispute resolution mechanisms and approaches the Court directly to discourage unnecessary litigation.

99. This doctrine was articulated by the Supreme Court in **Waity v Independent Electoral & Boundaries Commission & 3 others [2019] KESC 54 (KLR)** as follows:

“[63] Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so, parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The 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 the Courts.”

100. The Supreme Court reaffirmed the same principle in **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) v 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)** by stating thus:

“...We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

[118] In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of 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 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.

[119] Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation

underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action."

101. In the instant case, despite the Petitioners denial, it is manifest from the evidence on record, that following the seizure and detention of the motor vehicle KCF 267S, the 1st Respondent, through the Officer in Charge, Ruaraka Police Station, issued Notice of goods deposited in customs warehouse dated 23/10/2023 (form F89) to the 1st Petitioner. The issuance of this formal notice clearly shows root cause of the seizure and detention of the motor vehicle was taxation related issue and thus the matter ought to have been governed by relevant procedures provided in the relevant tax law as this regime of the law is quite rich and substantially developed through the legislation. This being a dispute that related to customs duty, the matter fell under the East Africa Community Customs Management Act has provided of grievance settlement machinery arising from the enforcement of the Act.

102. In this regard, Section 214 (4) of East African Community Customs Management Act. 2004 states:

'Where any thing liable to forfeiture under this Act has been seized, then, subject to subsection (1) (a) and subsection (3).

(a) the owner may, within one month of the date of the seizure or the date of any notice given under subsection (1), as the case may be, by notice in writing to the Commissioner claim such thing.

214 (6) provides thus- *The Commissioner may permit such thing to be delivered to the person making a claim, in this Part referred to as the claimant under subsection (4), subject to the claimant giving security for the payment of the value of the thing, as determined by the Commissioner in the event of condemnation of the thing.*

103. This is not the end. If the person is not satisfied with the decision, under Section 229 (1) it is provided thus:

'(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 commissioner's decision or omission lodge an application for review of the decision or omission.'

104. Further statutory redress is provided in Section 230 as follows:

230. (1) A person dissatisfied with the decision of the commissioner under section 229 may appeal to a tribunal established in accordance with section 231.

(2) A person intending to lodge an appeal under this section shall lodge the appeal within forty-five days after being served with the decision, and shall serve a copy of the appeal on the Commissioner.

105. It is manifest that there exists a clearly defined statutory path which the Petitioners could have utilized to challenge the decision of the 1st Respondent which they totally overlooked and instead, instituted this Petition. Having regard to the foregoing statutory provisions, I agree with the 1st and 2nd Respondent’s contention that the jurisdiction of this Court was invoked prematurely by the Petitioners.
106. In the circumstances, I feel compelled to exercise judicial restraint by deference to the established statutory mechanism which was the primary avenue through which a dispute of this nature should have been processed for resolution. It is my finding that the Petition offends the doctrine of exhaustion of remedies.
107. This finding is thus sufficient to dispose this Petition at this juncture and without the need to proceed to any other issue.
108. The upshot is that the Petition is dismissed with costs to the 1st and 2nd Respondents.

Dated, signed and delivered virtually at Nairobi this 16th day of April, 2026.

.....

L N MUGAMBI
JUDGE