

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR NO.E254 OF 2025

EQUIP AGENCIES LIMITED.....APPLICANT

VERSUS

THE COMMISSIONER OF CUSTOMS AND BORDER CONTROL.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

JUDGEMENT

1. The Applicant approached this court vide a Notice of Motion dated 7th August 2025, the Applicant seeks the following orders;

1) An Order of Certiorari be and is hereby issued to remove into this Honourable Court for purposes of quashing the decision by the Respondents, issued and/or published on 24th July 2025 purporting to auction and dispose of the Applicant's goods described under the following references:

LOT:0120/EMVCWH/24, LOT:0406/EMWCWH/24, LOT:0211/EMWCWH/24, LOT:0207/EMVCWH/24, LOT:0122/EMK/CWH/24, LOT:0110/EMK/CWH/24, LOT:0502/EMK/CWH/24, LOT:0213/EMK/CWH/24, LOT:0401/EMVCWH/24, LOT:0113/EMWCWH/24, LOT:0108/EMK/CWH/24, LOT:0212/EMVCWH/24, LOT:0506/EMWCWH/24, LOT:0119/EMVCWH/24. LOT:0208/EMWCWH/24, LOT:0118/EMK/CWH/24.

2) An order of Prohibition be and is hereby issued restraining the Respondents, their agents, officers or auctioneers from proceeding with or conducting any public auction, sale or disposal of the Applicant's said goods, or otherwise dealing with them in any manner adverse to the Applicant.

3) The costs of this application be provided for.

4) Any other and/or further relief that this Honourable Court be pleased expedient so to grant.

2. The Application is premised on the grounds of it and the averments of Divyesh Indubhai Patel in the Supporting Affidavit. He deponed that he is a Director of the Applicant, a duly incorporated company engaged in import, warehousing and distribution of general merchandise and is the legal and beneficial owner of various consignments of goods imported into Kenya and currently under the control of the Respondents herein. He averred that 24th July 2025 he came across a public auction notice published on the Respondents' platform indicating that the Applicant's goods referenced under several LOT numbers were scheduled for public auction on the 25th July 2025, the next day.

3. The deponent averred that the goods scheduled for auction are listed as follows:

LOT:0120/EMVCWH/24,LOT:0406/EMWCWH/24,LOT:0211/EMWCWH/24,LOT:0207/EMVCWH/24,LOT:0122/EMK/CWH/24,LOT:0110/EMK/CWH/24,LOT:0502/EMK/CWH/24,LOT:0213/EMK/CWH/24,LOT:0401/EMVCWH/24,LOT:0113/EMWCWH/24,LOT:0108/EMK/CWH/24,LOT:0212/EMVCWH/24,LOT:0506/EMWCWH/24,LOT:0119/EMVCWH/24,LOT:0208/EMWCWH/24, LOT:0118/EMK/CWH/24.

4. He urged that the Applicant had not received any prior notice, seizure memo, or demand letter from the Respondents warning of non-compliance or notifying it of the intention to auction the said goods. Further, that there was no communication whatsoever indicating a breach, forfeiture, or need for redemption.

5. The deponent averred that the sudden publication of the auction notice without any formal communication or demand is unlawful, arbitrary, and procedurally unfair. In this regard. The Respondents failed to comply with the requirements of the East African Community Customs Management Act, and Fair Administrative Action Act, both of which require notification and an opportunity to be heard. Furthermore, the timeline given less than 24 hours between publication and scheduled auction denied the Applicant any meaningful or reasonable opportunity to respond, regularize its position, or

seek redress. This was a blatant violation of our rights under the provision of Articles 47 and 50 of the Constitution.

6. He further deponed that the Applicant has a legitimate expectation that state authorities, particularly revenue enforcement agencies, would comply with both constitutional and statutory safeguards before undertaking extreme enforcement actions such as public auction. He urged that in the premises, the decision to auction without notice or a hearing also violates the Applicant's right to property under Article 40 of the Constitution, and the underlying principles of natural justice, particularly the right to a fair hearing.
7. The deponent stated that the goods in issue were imported in the ordinary course of the Applicant's business and are held at the Respondents' premises pending clearance which the Applicant was prepared to facilitate once contacted. He annexed and marked as "DIP-2" invoices, bills of lading and commercial documents demonstrating ownership and import history to that effect. Consequently, the Applicant argues that if the auction is allowed to proceed, the Applicant would suffer irreparable loss and serious commercial harm as the goods form the backbone of current trading cycles and represent significant capital investment. He urged the court to grant the Application in view of the foregoing.

The 2nd Respondents' case;

8. The 2nd respondent filed a Replying Affidavit dated 24th September 2025, sworn by Wycliffe Musili, an officer of the second respondent. He deponed that under section 5(2) of the Kenya Revenue Authority Act, Cap. 469, the 1st Respondent is required to administer and enforce all provisions of the written laws set out in Part I & II of the First Schedule to the Kenya Revenue Authority Act, Cap. 469 for the purposes of assessing, collecting and accounting for all revenues in accordance with those laws. Further, that under Part I of the First Schedule to the Kenya Revenue Authority Act, Cap. 469, the 1st Respondent enforces the East African Community Customs Management Act, 2004 and the Regulations made thereunder including the East African Community Customs Management Regulations, 2010.
9. Additionally, that the 1st Respondent is also appointed under section 5(1) of the East African Community Customs Management Act, 2004 (hereinafter "the

EACCMA”) and is responsible for the management and control of the Customs including the collection of, and accounting for, Customs revenue in the Republic of Kenya.

- 10.** He deponed that he was aware that the Applicant imported to Kenya 56 Containers of several assorted medical equipment and items (hereinafter to be referred to as “the Goods”) on several dates between July 2023 and December 2023. It is its case further, that upon importation, the Applicant neither entered nor removed the Goods from the vessel which imported the said Goods contrary to section 34 of the EACCMA. He urged that under section 34(1) of the EACCMA, the Applicant was required to enter and clear the Goods in the said 56 Container within twenty one days after the commencement of discharge or on arrival at the Port of Discharge of the vessels in which such Goods were imported.
- 11.** He stated that the Applicant having failed to enter and clear the goods within 21 days as required under section 34(1) of the EACCMA, he caused the said Goods to be removed to a Customs warehouse pursuant to section 34(4) of the EACCMA pending entry, clearance or such further action by the Applicant. Further, that upon removing the Goods to, and depositing them at, a Customs warehouse, the Applicant had up to thirty (30) days to enter, clear and remove the Goods from the Customs Warehouse. However, the Applicant neither entered, cleared nor removed the Goods from the Warehouse. Upon expiry of the 30 days and the Applicant having neither entered, cleared nor removed the Goods from the Customs Warehouse, he concluded that the Applicant was no longer interested in entering and clearing the Goods thus abandoning them to be dealt with in a manner which the 1st Respondent considers fit including offering the Goods for sale by public auction.
- 12.** The deponent averred that he consequently prepared a notice which the 1st Respondent issued to the Applicant on 11th April 2024 by way of publication of the Goods, in the Kenyan Gazette Notice No. 4452 of 12th April 2024 under Vol. CXXVI—No. 48 NAIROBI, for sale by way of public auction pursuant to section 42(1) of the EACCMA. This is set out in the copy of the said Kenya Gazette Publication of 12th April 2024. He pointed out that in the said Kenyan Gazette Notice No. 4452 of 2024, the 1st Respondent notified the Applicant that unless its imported 56 Containers earmarked for public auction are removed from the

Customs Warehouse within 30 days from the 12th April 2024, the goods shall be considered abandoned to the 1st Respondent for sale by public auction.

- 13.** He urged that upon expiry of the 30 days i.e. on 13th May 2024, 14th May 2024 and 15th May 2024, the Applicant still failed to enter and clear the Goods despite the express notification in Gazette Notice No. 4452 of 2024. Further, that whereas the statutory timelines (30 days) for the Applicant to lawfully remove the Goods from the Customs Warehouse lapsed on 13th May 2024, the Respondents gave the Applicant up to July 2025 (a period of more than a year) to enter the Goods for home consumption and pay Customs duties due. Even after the extended timelines, the Applicant never took any steps to lawfully remove the Goods from the Customs Warehouse. Even to this date, at the filing of this Application, the Applicant has not entered the Goods for home consumption as required under section 34(1) of the EACCMA.
- 14.** The deponent averred that after 15th May 2024, upon expiry of the statutory period of notice, he offered several Goods including the sixteen (16) of the fifty-six (56) Containers imported by the Applicant in an online public auction which were scheduled to take place on 25th July 2025 pursuant to section 42(1) of the EACCMA. On that date the members of the Public successfully bid and purchased thirteen of the sixteen Containers. Lots no 0113/EMK/CWH/24,0212/EMK/CWH/24 and 0502/EMK/CWH/24 did not have successful bids and were scheduled to be re-offered for sale between 28th August 2025 and 30th August 2025.
- 15.** He urged that on 29th July 2025, he received a Court Order from the Applicant, issued in Nairobi High Court Judicial Review No. E222 of 2025 Equip Agencies Limited vs The Commissioner of Customs and Boarder Control and Kenya Revenue Authority, staying the Respondents' intended public auction of 28th August 2025 and 30th August 2025. He then removed the remaining Lots from the intended Auction List and the said Goods are still lying in the Customs Warehouse awaiting clearance by the Applicant or further Orders by this Honourable Court.
- 16.** The deponent averred that it's the sale of the 13 Containers and the intended sale of the 3 remaining Containers by way of public auction that has precipitated the filing of this Application which seeks the judicial review Orders of Certiorari and Prohibition. He responded to the Applicants' Notice of

Motion Application and Paragraphs No. “3 – 15” of the Applicant’s Supporting Affidavit as follows: Contrary to the Applicant’s allegations, at Paragraphs “a) – c)” of the Notice of Motion Application and Paragraphs No. “3 – 6” of the Supporting Affidavit, that it was not given prior written notice before the sale of 25th July 2025 by way of public auction, he reiterated the averments in the Replying Affidavit and urged that the Applicant was notified on 12th April 2024 of the intended sale by public auction through the Gazette Notice No. 4452 of 2024.

- 17.** Further, that the said Gazette Notice No. 4452 of 2024 was issued pursuant to section 42 of the EACCMA as read with section 34 of the EACCMA and, that the Applicant had breached the provisions of section 34(1) of the EACCMA which required the Applicant to enter the impugned Goods for home consumption within 21 days and pay the customs duty due. Similarly, the Applicant had breached the provisions of section 42(1) of the EACCMA and directions in the Gazette Notice No. 4452 of 2024 which required the Applicant to lawfully remove the impugned Goods from the Customs Warehouse and enter them for home consumption within 30 days of 12th April 2024 and pay the customs duty due.
- 18.** He urged that the Applicant has failed to give any reason why it failed or has failed to enter the Goods for home consumption as required under section 34(1) of the EACCMA, a move which would have avoided the predicament which the Applicant is at the moment.
- 19.** Additionally, he deponed that section 113 of the EACCMA does not allow the 1st Respondent to issue a demand notice or impose import duty where goods have not been entered since the Applicant has never complied with section 34(1) of the EACCMA. He denied the allegations that the Respondents violated or failed to comply with the provisions of the EACCMA and the Fair Administrative Actions Act.
- 20.** He deponed that contrary to the Applicant’s allegations, at Paragraphs “d) – g)” of the Notice of Motion Application and Paragraphs No. “7 – 10” of the Supporting Affidavit, the Applicant has not disclosed to this Court that the impugned Goods were imported to Kenya on several dates between 9th August 2023 and 21st September 2023. Pursuant to section 34(1) of the EACCMA, the

Applicant was required to clear the last imported Goods in issue on or before 12th October 2023 which translates to more than two years ago. Therefore, the Applicant has had an ample time of 2 years to “regularize its position”, enter the Goods for home consumption and remove them from the Customs Warehouse to avoid the risk of being auctioned by the 1st Respondent.

- 21.** Secondly, that the Applicant had an opportunity on April – May 2024, when the Respondent issued the Gazette Notice No. 4452 of 2024, to salvage from the public action the impugned Goods which had been warehoused for non-compliance with section 34(1) of the EACCMA. Instead, the Applicant chose to sit on its rights and opted to allow the 1st Respondent to invoke and exercise its statutory mandate under section 42(1) of the EACCMA which allows for auction of goods which have remained in the Customs Warehouse for more than 30 days. From 13th April 2024, the effective date of the Notice of Goods to be sold at Customs Warehouse, the Applicant has had more than 12 months to enter the impugned Goods for home consumption in Kenya and remove them from the Customs Warehouse.
- 22.** He reiterated that the Applicant has not taken any step to enter, clear and remove the remaining Goods from the Customs Warehouse and further, urged that the above chain of events defeats the Applicant’s allegation that the Respondents gave the Applicant insufficient opportunity to “regularize its position.”
- 23.** He urged that even if there was a legitimate expectation, such an expectation cannot override the express provisions of law including sections 34(1) and 42(1) of the EACCMA and the Customs Procedures. He denied the contents of Paragraphs No. “11 – 15” of the Supporting Affidavit, and stated that based on the Customs Laws and Procedures and factual issues, the judicial review orders of Certiorari and Prohibition as sought by the Applicant are contra statute and thus should not issue. That the 13 of the impugned 16 Containers have already been sold on 25th July 2025 by way of public auction pursuant to section 42(1) of the EACCMA. Thus they are no longer available for judicial review considering that the Applicant served the Orders on the Respondents on 29th July 2025.

24. He urged that the remaining Containers/Goods continue occupying space at the Customs Warehouse, as it accumulates the warehouse rent and other charges, thus denying other users space and place of storage of goods pending clearance. That part of the Consignment imported by the Applicant are perishable in nature and thus the continued delaying in disposing them will render them no longer fit for human use or consumption due to expiry and obsolescence. He stated that it is therefore in the interest of Justice, public good and order that an order do issue to discharge, vary, or set aside the interim orders of stay issued on 25th July 2025. He urged that it was in the interests of justice that the Application be allowed.

Applicants' Submissions

25. Counsel urged that it is imperative to note that the Respondents contend that the Applicant ought to have invoked the provisions of Section 229 of the East African Community Customs Management Act (EACCMA) before approaching this Honourable Court and that the present proceedings offend the doctrine of exhaustion. That the said argument is misconceived both in fact and in law. The Applicant urged that: the provisions of Section 229 of EACCMA is inapplicable to the impugned decision; and, even if applicable, it does not constitute an adequate or effective remedy. Further, that this matter falls within the well-recognized constitutional exceptions to the doctrine of exhaustion as settled by the superior courts.

26. Counsel urged that the classical formulation of the doctrine was set out by the Court of Appeal of Kenya in the case of Speaker of the National Assembly v James Njenga Karume (1992) eKLR, which principle has been reaffirmed in the post-2010 constitutional era, but with important qualifications. He cited Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (2015) eKLR in this regard. He pointed out that the Court was clear that exhaustion is a rule of judicial restraint not an absolute bar to jurisdiction.

27. Counsel submitted that under the provisions of Section 229 EACCMA provides for review of a "decision or omission of the Commissioner on matters relating to customs." That provision is designed for disputes relating to: Classification of goods; Valuation; Assessment of duty; and Imposition of taxes or penalties whereas the present dispute does not concern: Any assessment decision; any valuation dispute; any classification ruling; or any demand for additional duty.

He urged that the impugned decision concerns disposal of goods allegedly deemed abandoned under Section 42 EACCMA. In view of the foregoing, the Respondents have not demonstrated: What specific reviewable “decision” under Section 229 existed; Whether Section 229 applies to statutory abandonment; or whether such review would suspend the intended auction.

- 28.** Counsel urged that the jurisprudence of both the Court of Appeal and the Supreme Court of Kenya is clear that exhaustion admits exceptions. He cited *Republic v National Environment Management Authority ex parte Sound Equipment Limited (2011) eKLR*, and *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR*. He emphasized that the Supreme Court thus clarified that where constitutional rights are implicated, the High Court’s jurisdiction is not ousted.
- 29.** Counsel cited the provisions of Section 9(4) of the Fair Administrative Action Act and urged that the present case constitutes exceptional circumstances because: The auction was scheduled within 24 hours of publication; No individualized notice was issued; No hearing was afforded; The Applicant’s property rights under Article 40 were immediately threatened; and the substratum of the dispute would have been permanently destroyed.
- 30.** Counsel submitted that a remedy that cannot prevent irreparable loss is not effective and cited *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others (2021) eKLR* in this regard. Further, he stated that the supervisory jurisdiction of this Court under Articles 23 and 165 of the Constitution cannot be subordinated to statutory mechanisms where constitutional violations are alleged. He urged that in *Krystalline Salt Limited v Kenya Revenue Authority (2019) eKLR*, the Court of Appeal recognized that where a statutory remedy is inadequate to address the grievance raised, recourse to judicial review remains available. Further, that the Court underscored that statutory mechanisms do not automatically bar the High Court’s jurisdiction where legality and procedural fairness are in question.
- 31.** Counsel urged that the Applicant’s case raises: Violation of Article 47; Violation of Article 40; Breach of natural justice; and Irrationality and disproportionality. That these are constitutional legality questions, not merely customs assessment disputes. Further, that Section 229 does not provide an automatic

stay of auction; The Respondents have not demonstrated that review would suspend disposal; and that the auction was imminent and irreversible. To this end, the alternative remedy was therefore neither adequate nor efficacious.

- 32.** Counsel submitted that in light of the foregoing authorities, Section 229 EACCMA is inapplicable to disposal under Section 42; No effective alternative remedy has been demonstrated; Constitutional violations are directly implicated; and the matter falls squarely within recognized exceptions to exhaustion. Counsel maintained that the Court is therefore properly seized of jurisdiction.
- 33.** Counsel urged that it is worth noting that the Respondents' decision to auction the Applicant's goods, communicated through a Gazette Notice dated 24th July 2025 scheduling the auction for 25th July 2025, violated Article 47 of the Constitution and the Fair Administrative Action Act, 2015. That the violation manifests in four principal respects: Failure to issue prior and adequate notice; Failure to afford the Applicant an opportunity to be heard; Failure to provide reasons; and Adoption of an unreasonable and disproportionate procedure. He cited Article 47(1) and (2) of the Constitution and urged that the Supreme Court in *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR emphasized that administrative bodies must comply with constitutional standards of fairness. He stated that statutory compliance alone is insufficient; administrative action must meet constitutional thresholds.
- 34.** Counsel urged that Section 4(3) of the Fair Administrative Action Act requires that where administrative action is likely to adversely affect rights, the administrator shall give the affected person: Prior and adequate notice of the nature and reasons for the proposed action; An opportunity to be heard and to make representations; Notice of a right to review or internal appeal; and a statement of reasons. That the Respondents did none of the above. Additionally, he stated that a mass Gazette publication scheduling auction within 24 hours cannot satisfy Section 4(3).
- 35.** Counsel submitted that the right to be heard (*audi alteram partem*) is now constitutionally entrenched and cited *Judicial Service Commission v Mbalu Mutava & another* (2015)eKLR in this regard. He submitted that in the present

case, the Applicant was never invited to explain, regularize, redeem, or respond before the drastic step of auction was taken. The Respondents cannot rely on “deemed abandonment” to extinguish the constitutional right to be heard. Statutory power must be exercised in conformity with constitutional safeguards.

- 36.** Counsel urged that the Gazette Notice denies meaningful opportunity to react; Frustrates access to justice under Article 48; and is manifestly unreasonable. He cited *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others* (2016) eKLR and urged that a 24-hour notice for disposal of commercial cargo worth significant value cannot pass the test of reasonableness. He submitted that Article 47(2) expressly guarantees the right to written reasons where rights are adversely affected and cited the Supreme Court in *Kenya Revenue Authority v Export Trading Company Limited* (2018) eKLR which underscored that public bodies must give reasons for decisions affecting rights and that such obligation is grounded in constitutional accountability. He additionally cited *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* (2021)eKLR, and urged that therefore, the Respondents: Waited over a year from alleged abandonment; Selected only 16 out of 56 containers; Scheduled auction with 24-hour notice; and Failed to engage the Applicant. That the procedure adopted was disproportionate to the objective of revenue collection and warehouse management.
- 37.** Counsel urged that even if Section 42 EACCMA permits disposal of abandoned goods, such power must be exercised in conformity with the Constitution. He cited *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* (2014) eKLR and urged that Section 42 cannot be invoked as a shield against Article 47 compliance.
- 38.** Counsel cited Article 40(1) and Article 40(2) (a) of the Constitution and urged that whilst the present matter does not concern compulsory acquisition, Article 40(2) expressly prohibits arbitrary deprivation. Further, that the key question therefore is whether the Respondents’ conduct amounted to arbitrariness. He cited *Attorney General & another v Zinj Limited* (2021)eKLR and *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others* (2021)eKLR, and urged that Arbitrariness therefore includes: Absence of

procedural fairness; Lack of proportionality; Unreasonable or capricious action; Abuse of statutory power; Selective or unexplained enforcement.

- 39.** It is the Applicants; case that the Respondents purported to rely on Section 42 of the EACCMA to deem the goods abandoned. However, statutory authority does not immunize unconstitutional conduct. He cited Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others (2016) eKLR and urged that a decision that deprives a person of valuable commercial cargo without: Personal notice, a hearing, written reasons, and a reasonable redemption opportunity. To this end, the said conduct is constitutionally arbitrary.
- 40.** Counsel submitted that proportionality is now a constitutional requirement under Articles 10, 24 and 47 and further, stated that in Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014)eKLR, the Supreme Court affirmed that constitutional adjudication requires assessment of proportionality where rights are limited. He urged that selective enforcement without transparent criteria offends Article 10 values of accountability and transparency and cited Kenya Revenue Authority v Export Trading Company Limited (2018) eKLR, in this regard. That to this end, Revenue considerations cannot override: Due process, Procedural fairness, and Constitutional protection of property. True public interest lies in lawful governance. Counsel urged that the impugned auction was therefore constitutionally infirm and liable to be quashed.
- 41.** Counsel submitted that the reliefs of Certiorari and Prohibition are anchored in: Article 23(3) (f) of the Constitution, Article 47 of the Constitution, the Fair Administrative Action Act, 2015 and Sections 8 and 9 of the Law Reform Act. That for the avoidance of doubt, Judicial review remedies are no longer confined to the narrow common law grounds of illegality, irrationality and procedural impropriety. They now operate within a constitutional framework. He cited Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014)eKLR and Suchan Investment Limited v Ministry of National Heritage & Culture & 3 others (2016) eKLR in this regard. Further, that Certiorari issues to quash a decision that: Is made without jurisdiction; Exceeds statutory authority; violates the Constitution; is procedurally unfair; and is irrational or unreasonable. He cited Kenya National

Examinations Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 others (1997) eKLR, on the scope of Certiorari.

42. Counsel submitted that it is worthy to note that the impugned decision to auction the Applicant's goods is amenable to certiorari because: It was undertaken in violation of Article 47; No individualized notice was issued; No hearing opportunity was afforded; The decision was arbitrary and disproportionate; and It amounted to unconstitutional deprivation under Article 40. That a decision reached in violation of constitutional guarantees is ultra vires the Constitution. He maintained that the auction decision, having been reached in breach of constitutional standards, is null and void ab initio and therefore liable to be quashed.
43. Counsel submitted that where there is threatened continuation or repetition of unlawful conduct, prohibition is appropriate. Therefore, the Applicant is entitled to prohibition because: The Respondents may proceed to complete or perfect the sale; they may conduct similar arbitrary auctions in respect of remaining goods; they may rely on the same unconstitutional procedure again. That the violation demonstrated is systemic not incidental. Consequently, without prohibition: The Respondents retain discretion to repeat the impugned process; and The Applicant remains exposed to future unconstitutional action.
44. Counsel urged that the impugned auction decision was unconstitutional, unlawful and procedurally unfair; the decision is amenable to and liable for quashing by Certiorari; and the Respondents should be prohibited from implementing, enforcing, or repeating the impugned process. He submitted that the Applicant has satisfied the legal threshold for the grant of orders of Certiorari and Prohibition and urged the Court to: Quash the impugned decision; Prohibit its implementation or repetition; Affirm the supremacy of the Constitution; and Grant the reliefs sought with costs.

Respondents' Submissions

45. The respondent filed submissions dated 15th December 2025. Counsel for the respondent submitted that the Applicant has not exhausted the available remedies provided under the EACCMA. That in making this Argument, the Respondents rely on the following grounds:

- (i) The Applicant has not sought to review the 1st Respondent's decision to auction the Goods pursuant section 229(1) of the EACCMA.
- (ii) The Applicant has not utilized the opportunities available under sections 34 and 42 of the EACCMA to enter goods for home consumption.
- (iii) The Applicant has not sought a Review of the 1st Respondent's Decision to Auction the Goods Pursuant Section 229(1) of the EACCMA

- 46.** Counsel urged that the 1st Respondent's decision to publish the impugned Goods in the Gazette and offer them for public auction is a decision capable of being reviewed under section 229(1) of the EACCMA. He reproduced the relevant provisions and cited *Njeri v Commissioner of Customs & Border Control* [2024] KEHC 1642 (KLR), where the Court expounded what amounts to a Decision.
- 47.** Counsel urged that from the facts set out in the Respondents' Replying Affidavit, it is undisputed that the Applicant failed to enter the impugned Goods for home consumption within 21 days of importation. Further, that the Applicant's failure is contrary to section 34(1) of the EACCMA. Thus, the Respondent removed the Goods from the importing vessel to the Customs Warehouse. Further, the Appellant failed to lawfully remove the impugned Goods from the Customs Warehouse and enter them for home consumption within 30 days of deposit. Consequently, the Respondent made a decision to offer the said goods for public auction vide Gazette Notice No. 4452 of 2024 pursuant to section 42(1) of the EACCMA. Counsel urged that this is a decision based on the facts and the law.
- 48.** Counsel urged that it goes without much argument that the 1st Respondent's Decision is within the meaning of section 229(1) of the EACCMA. Therefore, pursuant to section 229(2) of the EACCMA, the Applicant was required to lodge an Application for review with the Commissioner and state the grounds of review. He cited *Republic v National Transport and Safety Authority & 2 others; Bhavin Motors Limited & another (Interested Parties); Executive Super Rides Limited (Exparte)* [2022] KEHC 11831 (KLR) in this regard.
- 49.** Counsel submitted that to the extent that the Respondent's Decision in the Gazette Notice No. 4452 of 2024 remains unchallenged or reviewed, it goes

without saying that the Application before Court is premature. Simply put, the Applicant should first exhaust the available remedies under section 229(1) of the EACCMA.

50. Counsel urged that the second ground is that there were at least three opportunities for the Applicant to redeem the impugned goods from being offered for public auction. As explained at Paragraphs No. 10, 11, 12, 14 and 15 of the Respondent's Replying Affidavit, the Applicant took no steps to redeem the goods. That the first opportunity is under section 34(1) of the EACCMA which grants the Applicant 21 days upon importation to enter the impugned Goods for home consumption and pay the customs duty due. Further, that it is worth pointing out that the impugned Goods were imported on diverse dates between July 2023 and December 2023 and as at the time of publication of the Goods for public auction on 12th April 2024, the Applicant was yet to enter the Goods for home consumption. Even at the time of filing these submissions, the Appellant is yet to comply with section 34(1) of the EACCMA.

51. Counsel submitted that due to the Applicant's non-compliance, the 1st Respondent removed the Goods to a Customs Warehouse as mandated under section 34(4) of the EACCMA. That again, the depositing of the Goods in the Customs Warehouse gave the Applicant a second opportunity of another 30 days to lawfully remove the goods from the Warehouse. He cited Section 42(1) of the EACCMA in this regard.

52. Counsel posited that the third opportunity was given to the Applicant on 12th April 2024, when the 1st Respondent published the Gazette Notice No. 4452 of 2024. The 1st Respondent gave Notice as follows:

"Pursuant to the provisions of section 42 of the East African Community Customs Management Act, notice is given that unless the under mentioned goods are entered and removed from the custody of the Customs Warehouse Keeper, ICDN within thirty (30) days of this notice, they may be sold by public auction on the 13th May, 14th May and 15th May, 2024. Interested buyers may view the goods at the specific locations indicated on 9th May and 10th May, 2024, during office hours."

53. Despite all these opportunities and the Notices, the Appellant was unresponsive. At the time of filing this Application, the Applicant is yet to write

to the Respondents to stop the auction or remove the remainder of the impugned goods from the Customs Warehouse. It follows, that the Applicant has not exhausted the available remedies. Further, before moving this Honourable Court, the Applicant was required, at the very least, to justify the reason for bypassing the avenues available under sections 34(1), 42(1) and 229(1) of the EACCMA. He cited Republic v National Transport and Safety Authority & 2 others; Bhavin Motors Limited & another (Interested Parties); Executive Super Rides Limited Case (Supra), and urged that the Applicant's Application is premature and thus should be struck out if not dismissed.

- 54.** On whether the Judicial Review Orders of Certiorari and Prohibition should issue, Counsel urged that the first issue on the jurisdiction of the Court is dispositive of the Application herein. Therefore, this Court need not proceed further to consider whether the Judicial Review Orders should issue to bar the Respondents from selling or offering for sale the impugned Goods. On this issue, Counsel invited the Court to consider the Respondents' averments and responses to the Application at Paragraphs No. 25, 26 and 27 of the Respondent's Replying Affidavit. That whereas the Applicant alleges that the Respondents made unilateral decision to auction the impugned Goods without prior notice, there is no proof to support the assertions. To the contrary, on 11th April 2024 and pursuant to section 42(1) of the EACCMA, the 1st Respondent issued the Applicant with Notice for sale of the said Goods by way of public auction through publishing Gazette Notice No. 4452 of 12th April 2024 - Vol. CXXVI—No. 48 NAIROBI.
- 55.** Counsel posited that it is inconceivable for the Applicant to allege that it was given less than 24 hours to react whereas the record shows that the Applicant, from 12th April 2024 – 24th July 2025, had more than 12 months to remove the impugned Goods from the Customs Warehouse or the Auction List. That the Gazette Notice is a public document and thus the Applicant cannot claim ignorance. Counsel placed reliance on Republic v National Transport and Safety Authority & 2 others; Bhavin Motors Limited & another (Interested Parties); Executive Super Rides Limited Case (Supra), where this Court while determining a similar issue affirmed the above position and maintained that it follows that the 1st Respondent gave the Applicant sufficient notice of the intended auction. Therefore, the Respondents did not violate the Applicant's rights under Articles 40, 47, 48 and 50(1) of the Constitution of Kenya, 2010.

Consequently, the Order of Certiorari to quash the 1st Respondent's decision to offer for sale and auction the impugned Goods should be declined for want of merit.

- 56.** On the prayer for the Judicial Review Order for Prohibition, Counsel urged that the processes leading to the offering for sale or the public auction of the impugned Goods were done in strict compliance of the law. Therefore, the Applicant has not offered any sufficient reason to warrant issuance of an order of Prohibition. Firstly, the 1st Respondent had issued a notice to the Applicant through the Gazette Notice No. 4452 of 12th April 2024. The Notice expressly stated that unless the Applicant removes the impugned Goods from the Customs Warehouse within 30 days, the Goods would be offered for public auction. Thus, Respondents' right to auction the Goods crystallised.
- 57.** That the impugned Goods having been published in the Gazette Notice for public auction and the Applicant having failed to lawfully remove the Goods from the Warehouse, there was nothing that prohibited the 1st Respondent from proceeding with the sale. He cited *Satwant Singh Dhanjal & 2 others t/a Paramount Hauliers v Kenya Revenue Authority* [2017] KECA 402 (KLR) and *Satwant Singh Dhanjal & 2 others v Kenya Revenue Authority* [2005] KEHC 3178 (KLR) in this regard.
- 58.** Secondly, prohibiting the 1st Respondent from proceeding with the sale of the impugned Goods will be tantamount to interfering with the statutory mandate to dispose the Goods by way of public auction when section 42 of the EACCMA demands. Counsel cited *Republic v National Transport and Safety Authority & 2 others; Bhavin Motors Limited & another (Interested Parties); Executive Super Rides Limited Case* (Supra) once again.
- 59.** Counsel urged that thirdly, the Order of Prohibition and Certiorari are no longer available since they have been overtaken by events i.e. by the Applicant's failure to remove the Goods from the warehouse or auction list, publication of the Gazette Notice for public auction and the auction of the 13 Containers of the impugned Goods. Thus this Honourable Court is being invited to issue orders in vain.

60. Counsel submitted that in light of the above, the Applicant has not challenged the Gazette Notice which authorized the 1st Respondent to sell the impugned Goods by way of public auction. Thus, the order of Certiorari and Prohibition will be of no value since there is a valid and legal statutory notice to dispose the impugned Goods which remains unchallenged. Counsel prayed that the Application be dismissed with costs.

The Respondents' Supplementary Submissions

61. The Respondents filed Supplementary Submissions in response to the Applicant's written submissions. He urged that at paragraphs no. 19 – 35 of its Written Submissions, the Applicant has for the first time invoked section 9(4) of the Fair Administrative Actions Act, Cap. 7L arguing that exceptional circumstances exist to bypass section 229 of the EACCMA which provides a statutory mechanism for resolving Customs' disputes. He urged that the Applicant's arguments are not only misconceived but also not pleaded in the Applicant's pleadings. The Applicant never gave reasons for bypassing remedies under section 229 of the EACCMA; be it in the application for leave in HCJR/E222/2025 or the substantive Application. Further, that it is trite law that Parties are bound by their pleadings and that submissions are not pleadings.

62. Counsel posited that in paragraph no. 36 of its Written Submissions, the Applicant mischievously conflates two distinct events: (i) the statutory notice of public auction issued under section 42(1) of EACCMA vide Gazette Notice No. 4452 of 12th April 2024, giving the Applicant 30 days to enter the goods; and (ii) the invitation for publication auction, which occurred on 24th July 2025 when the specific lots were listed on the iBid online platform for sale (after expiry of statutory notice of sale).

63. Counsel urged that at Paragraphs no. 43 and 44 of its Written Submissions, the Applicant has challenged the Respondent's Gazette Notice No. 4452 of 12th April 2024 on grounds that there was no individualized Written Notice. This issue has been raised only in the submissions but not pleaded in the Applicant's Application or the supporting Affidavit. Further, at paragraphs no. 57 and 78 – 83 of its Written Submissions, the Applicant alleges for the first time that the selection of only 16 out of 56 containers was arbitrary, selectively applied, and unexplained. These allegations constitute new Facts/Case introduced through submissions after the close of affidavit

evidence, which is procedurally impermissible in absence of leave of this Honourable Court.

64. Counsel urged that written submissions are not evidence and cannot take the place of pleadings or affidavit evidence. Parties are strictly bound by their pleadings and any factual allegations not raised therein cannot be introduced at the submissions stage so as to circumvent the rules of procedure. He placed reliance on *Moi v Muriithi & another* [2014] KECA 642 (KLR) and *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] KECA 155 (KLR).
65. Counsel urged that by introducing these allegations at submissions, the Applicant has prejudiced the Respondents who have been denied a reasonable opportunity to respond or adduce further evidence to address the claims. To allow such allegations to stand would occasion a grave miscarriage of justice and reward procedural impropriety. He prayed that the offending paragraphs in the submissions be disregarded.

Analysis and determination

66. The following are the issues for determination:
- 1) Whether the court has jurisdiction.
 - 2) Whether the application has merit.
 - 3) Who shall bear the costs.

Whether the court has jurisdiction

67. In order to answer this issue the court addresses the question whether or not a decision was made by the Respondents.
68. It was the Respondents' case that the Applicant did not exhaust the available remedies provided under the EACCMA. In making this Argument, the Respondents relied on the following grounds:
- i) *The Applicant did not seek to review the 1st Respondent's decision to auction the Goods pursuant section 229(1) of the EACCMA.*
 - ii) *The Applicant did not utilized the opportunities available under sections 34 and 42 of the EACCMA to enter goods for home consumption.*

69. Section 229(1) of the EACCMA provides as follows:

“229. (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.

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

70. In, **Njeri v Commissioner of Customs & Border Control[2024] KEHC 1642 (KLR)**, this Honourable Court expounded what amounts to a Decision and held as follows:

“9. The starting point is that for a party to invoke the procedure of customs dispute resolution mechanism, there must be a decision made by the Commissioner or an omission by the Commissioner, against which the applicant may make an application to review. A decision is defined in the Black’s Law Dictionary (8th edition) as a judicial or agency determination after consideration of the facts and the law. The first question to answer is whether there was therefore a decision made by the Commissioner in this case that the appellant disagreed with.”
[Emphasis added]

71. From the facts set out in the Respondents’ Replying Affidavit, it is undisputed that the Applicant failed to enter the impugned Goods for home consumption within 21 days of importation. The Applicant’s failure is contrary to section 34(1) of the EACCMA according to the respondent.

72. The Respondent argued that it removed the Goods from the importing vessel to the Customs Warehouse. It also argued that the Appellant failed to lawfully remove the impugned Goods from the Customs Warehouse and enter them for home consumption within 30 days of deposit. Consequently, the Respondent argued that it made a decision to offer the said goods for public auction vide Gazette Notice No. 4452 of 2024 pursuant to section 42(1) of the EACCMA.

- 73.** It is this court's finding and I so hold that the 1st Respondent's Decision is within the meaning of Section 229(1) of the EACCMA as a result of which the Applicant should have lodged an Application for review with the Commissioner before moving to court.
- 74.** This court is of the informed view that the fact that the Respondent removed the goods from the importing vessel to the Customs Warehouse created a dispute.
- 75.** The subsequent decision to offer the said goods for public auction vide Gazette Notice No. 4452 of 2024 pursuant to section 42(1) of the EACCMA led to what amounted to customs dispute that triggered the Applicant to file the suit.
- 76.** The applicant should have invoked section 229(1) of the EACCMA.
- 77.** The Applicant urged that the provisions of Section 229 of EACCMA is inapplicable to the impugned decision; and, even if applicable, it does not constitute an adequate or effective remedy.
- 78.** Further, the applicant argued that this matter falls within the well-recognized constitutional exceptions to the doctrine of exhaustion as settled by the superior courts.
- 79.** Section 42 of the EACCMA as read with Section 34 of the EACCMA calls upon the Applicant to enter the impugned Goods for home consumption within 21 days and pay the customs duty due.
- 80.** Section 42(1) of the EACCMA and the directions in the Gazette Notice No. 4452 of 2024 required the Applicant to remove the impugned Goods from the Customs Warehouse and enter them for home consumption within 30 days of 12th April 2024 and pay the customs duty due.
- 81.** Clearly this is a case that revolves around the issue of section 34(1) of the EACCMA and the dispute around the legality of the Applicant to lawfully remove the impugned Goods from the Customs Warehouse and enter them

for home consumption within statutory timelines and to pay the customs duty due.

82. Section 229 EACCMA provides for review of a “decision or omission of the Commissioner on matters relating to customs.” That provision is designed for disputes relating to: Classification of goods; Valuation; Assessment of duty; and Imposition of taxes or penalties.

83. In, **Republic v National Transport and Safety Authority & 2 others; Bhavin Motors Limited & another (Interested Parties); Executive Super Rides Limited (Exparte) [2022] KEHC 11831 (KLR)**, this Honourable Court when determining a similar application affirmed this position. The Court found and held:

“29. The foregoing provisions of the law warrant no explanation. The applicant is aggrieved by a decision made by the Commissioner to advertise and auction his vehicle. After the gazettelement, before the auction, and even after the auction the applicant never invoked the mechanism for review provided under the foregoing provisions. The question is whether this court is divested of jurisdiction on account of the doctrine of exhaustion of remedies.

37. ... the impugned decision constitutes an administrative action as defined in section 2 of the FAA Act. Therefore, an internal remedy must be exhausted prior to Judicial Review, unless the applicant can show exceptional circumstances to exempt him from this requirement. Flowing from the above analysis of the law, it is my conclusion that this judicial review application offends section 9 (2) of the FAA Act. On this ground alone, this Judicial Review application is dismissed.” [Emphasis added].

84. The Respondent’s Decision in the Gazette Notice No. 4452 of 2024 should have been referred to the available alternative redress avenue.

85. In its Written Submissions, the Applicant for the first time invoked section 9(4) of the Fair Administrative Actions Act, Cap. 7L arguing that exceptional

circumstances exist to bypass section 229 of the EACCMA which provides statutory mechanism for resolving Customs' disputes.

86. The court is in agreement with the Respondents that these submissions were not pleaded in the Application or at the leave stage in HCJR/E222/2025.
87. Parties are bound by their pleadings and submissions are not pleadings and the applicant cannot advance new arguments in the submissions.
88. The court disagrees with the applicant's argument that the provisions of Section 229 of EACCMA is inapplicable to the impugned decision.
89. The Court of Appeal of Kenya in the case of **Speaker of the National Assembly v James Njenga Karume (1992)eKLR**, the Court held and stated as hereunder:

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

90. In **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others (2015) eKLR**, the Court of Appeal stated:

“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 fora of last resort...”

91. Section 229 EACCMA provides for review of a **“decision or omission of the Commissioner on matters relating to customs.”**
92. The applicant argued that the impugned decision concerns disposal of goods allegedly deemed abandoned under Section 42 EACCMA and that there is no reviewable “decision” under Section 229.
93. The court is in agreement with the applicant that under the provisions of Section 9(4) of the Fair Administrative Action Act provides thus:

“Notwithstanding subsection (3), the High Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy...”

94. The court however respectfully disagrees with the applicant’s argument that the present case constitutes exceptional circumstances because: The auction was scheduled within 24 hours of publication; No individualized notice was issued; No hearing was afforded; The Applicant’s property rights under Article 40 were immediately threatened; and the substratum of the dispute would have been permanently destroyed.

95. In **Krystalline Salt Limited v Kenya Revenue Authority (2019) eKLR**, the Court of Appeal recognized that where a statutory remedy is inadequate to address the grievance raised, recourse to judicial review remains available.

96. In the instant case the applicant has not demonstrated how the statutory remedy is inadequate to address the grievance raised.

97. In the case of **Dawda K. Jawara vs Gambia**, the court held that:

“A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality] ... the Governments assertion of non-exhaustion of local remedies will therefore be looked at in this light ...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”

98. The Supreme Court in the case of **NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) (24 February 2023) (Judgment) Petition 16 of 2019** discussed a similar issue thus;

(i) Whether the 1st respondent was required to exhaust the internal dispute resolution mechanism under the NGO Coordination Act.

[152] This ground is based on Regulation 8 of the Non-Governmental Organizations Coordination Regulations, 1992 (NGO Regulations) which essentially deals with the “approval of names” of proposed organizations. Prior to an application for registration being made, the Director may approve the proposed name if it is desirable; or reject it, if it is identical to an existing name and is likely to bring confusion; or if such name, is in the opinion of the Director, repugnant to or inconsistent with any law or is otherwise undesirable.

[153] This process is strictly-speaking a reservation of name task similar to Section 48 of the Companies Act (Reservation of a company name). It has been the appellant’s argument from the High Court to this Court, that once the 1st respondent was notified that the proposed names were undesirable, the next course of action, instead of proceeding to the High Court, would have been to invoke Section 19 of the NGO Act, under which,

“19. (1) Any organization which is aggrieved by decision of the Board made under this Part may, within sixty days from the date of the decision, appeal to the Minister.

(2) On request from the Minister, the Council shall provide written comments on any matter over which an appeal has been submitted to the Minister under this section.

(3) The Minister shall issue a decision on the appeal within thirty days from the date of such an appeal.

(3A) Any organization aggrieved by the decision of the Minister may, within, twenty-eight days of receiving the SC PC 51written decision of the Minister, appeal to the High Court against that decision and in the case of such appeal-

(a) the High Court may give such direction and orders as it deems fit; and

(b) the decision of the High Court shall be final”. [my emphasis].

[154] The 1st respondent and all the parties opposed to the appeal have argued that the decision not to reserve the names was made by the Director and not the Board (the appellant). That being the case, the decision in question did not qualify to be taken through the appellate process envisaged under Section 19 aforesaid. Both the High Court and the majority in the Court of Appeal agreed.

[155] The doctrine requiring exhaustion of internal administrative remedies is an innovative way of correcting, reviewing or appealing administrative decisions using the very administration itself. This gives the administrative body a chance to correct its own errors, if any. In addition, it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

[156] Presently, the law governing exhaustion of administrative remedies is codified in Section 9 of the Fair Administrative Action Act, which demands that the courts shall not review an administrative action or decision unless the internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. The courts may, however, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

[157] From a long line of decisions spanning the spectrum of the three superior courts, the law is now firmly settled in this country that where there exists an alternative method of dispute resolution established by legislation, the courts SC PC 52 must exercise restraint in exercising their jurisdiction and give deference to such dispute resolution bodies. It is equally common factor that this doctrine was applicable before the promulgation of the Constitution of Kenya in 2010 and remains relevant under it today. It accords with Article 159 of the Constitution which encourages alternative means of dispute resolution. See William Odhiambo Ramogi & 3 others v. Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties), High Court

Constitutional Petition Nos. 159 of 2018 & 201 of 2019; [2020] eKLR; and Speaker of National Assembly v. Njenga Karume [2008] 1KLR 425, in a long line of many others.

[158] This Court has in the case of Albert Chaurembo Mumba & 7 others v. Maurice Munyao & 148 others, SC Petition No. 3 of 2016; [2019] eKLR, reviewed several past decisions on this subject, and essentially agreed with the ratio decidendi developed in those cases over the years. See also similar pronouncement on this doctrine by this Court in United Millers Limited v. Kenya Bureau of Standards, Director, Directorate of Criminal Investigations & 5 others, SC Petition (Application) No. 4 of 2021; [2021] eKLR.

[159] By the provisions of Section 9(4) aforesaid, the courts may, in exceptional circumstances and on application, exempt a party from the obligation of exhausting any remedy if the court considers such exemption to be in the interest of justice. In Fleur Investments Limited v. Commissioner of Domestic Taxes & another, Civil Appeal No. 158 of 2017; [2018] eKLR, the Court of Appeal found in the passage below that there were exceptional circumstances to exempt the appellant from exhausting internal dispute resolution channels of the respondent;

“... Whereas courts of Law are enjoined to defer to specialised Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a SC PC 53 bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly”.

[160] The question to which I now must turn after setting out the foregoing principles, is whether the petition filed in the High Court by

the 1st respondent was incompetent for failure to comply with the provisions of Section 19 aforesaid.

[161] It is common factor that the impugned decision was made at the stage of a request to the Director for reservation of a name and not registration. Only decisions made by the Board under Part III of the Act are appealable to the Minister by dint of section 19. Those are decisions that relate to refusal to register an organization, cancellation of a certificate issued to an organization, among others.

[162] For the foregoing reasons, I, like the majority and Ibrahim, SCJ come to the same conclusion that a dispute arising from the reservation of a name is not one of the decisions envisaged to attract internal dispute resolution mechanism provided for under Section 19. Reservation of name is a step toward the registration of an organization, but it does not constitute registration. The answer to this issue is in the negative; that the 1st respondent was not required to exhaust the internal dispute resolution mechanism under section 19 of the NGO Coordination Act.

99. The applicant did not exhaust the alternative redress mechanisms that are provided for under the Act.

Whether the applicant is exempted

100. Section 9(2) and (4) of Fair Administrative Actions Act stipulates that:

“(2) The High Court or a subordinate court under Sub section (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.

(4) notwithstanding sub section (3), the High Court or a subordinate court may, in exceptional circumstances and on application by the Applicant, exempt such person from obligation to exhaust any remedy if the court considers such exemption to being the interest of justice.”

101. In the case of **Mary Wambui Munene v. Peter Gichuki King'ara and Six Others, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR**, the court held:

“...that the question of jurisdiction is a “pure question of law,” and should be resolved on a priority basis.”

102. Section 9 (3) The Fair Administrative Action Act 2015 states that:

“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). (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.”

103. The applicant did not demonstrate how the redress mechanism was inadequate or ineffective. The Applicant did not seek leave from the court to file the suit herein.

104. It is this court's finding that the Applicant is not exempted from the Application of the doctrine of exhaustion.

105. Having found as I have above, this court has to down its tool in like with the principles as settled in the Supreme Court Case of **Dickson Ngigi Ngugi v Commissioner of Lands S.C Petition No. 9 of 2019 [2019] eKLR**, wherein it was observed that

"Jurisdiction goes to the root of any cause or dispute before a court of law. A court must exercise restraint to avoid overstepping its constitutional role in order to maintain its legitimacy. If a court has no jurisdiction, a judgment rendered therein does not adjudicate the dispute. It does not bind the parties, nor can it be made the foundation of any right. It is a nullity without life or authority. In short, it is coram non iudice and amounts to a nullity because, as Nyarangi, JA famously said in the locus classicus, Owners of the Motor Vessel "Lillian S" y

Caltex Oil, (Kenya) Ltd [1989] KLR 1, "jurisdiction is everything. Without it, a court has no power to make one more step".

Costs;

106. In Halsbury's Laws of England, 4th Ed Re-Issue (2010), Vol. 10, para. 16:

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice" [emphasis supplied].

107. In **Joseph Oduor Anode v. Kenya Red Cross Society, Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR Odunga, J.** thus observed:

"...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion ..." [emphasis supplied].

108. The Civil Procedure Act (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):

"Subject to such conditions and limitations' as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out

of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order” [emphases supplied].

109. The applicant shall shoulder the costs.

Disposition;

110. The applicant has not made out a case fit for the grant of the orders within the principles of judicial review.

Order;

111. The suit is hereby struck out with costs.

Dated, Signed and Delivered at Nairobi this 7th Day of May 2026

.....
J. CHIGITI (SC)
JUDGE