SDV Transami Kenya Limited v Commissioner of Customs Services; Energy Investments Limited (Interested Party) (Civil Appeal 225 of 2015) [2021] KECA 105 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KECA 105 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 225 OF 2015

MSA MAKHANDIA & PO KIAGE, JJA

OCTOBER 22, 2021

BETWEEN

SDV TRANSAMI KENYA LIMITED .... APPELLANT

AND

COMMISSIONER OF CUSTOMS SERVICES .... RESPONDENT

AND

ENERGY INVESTMENTS LIMITED .... INTERESTED PARTY

(An appeal from the Judgment of the High Court of Kenya at Nairobi (Warsame, J.) dated 28th March, 2012 in HC Misc. Application No. 81 of 2011))

JUDGMENT

JUDGMENT OF MAKHANDIA, J.A

1 The appellant vide a judicial review application dated 27th April, 2011 moved the trial court for orders to wit: Certiorari to remove into the High Court for purposes of it being quashed the decision and order of the respondent dated 1st April, 2011 and consequently the demand dated 30th December, 2010 in so far as it was made against and relates to the appellant; prohibition to prohibit the respondent from demanding the tax claimed in the decision dated 1st April, 2011 and consequently the demand dated 30th December, 2010 in so far as it was made against and relates to the appellant; and costs of the proceedings.

2 The application was based on grounds that: On 30th December, 2010 the respondent sent the appellant a demand seeking to recover tax for the sum of Kshs. 123,968,690.94. Discontented with the demand, the appellant lodged an application with the 1st respondent on 4th January, 2011 seeking to review the said decision in accordance with Section 229 (1) and (2) of the *East African Community Customs*

Management Act hereinafter, "the Act". That Section 229(4) of the Act required the respondent to communicate its decision in respect of the application for review within 30 days. The respondent failed to communicate as required and as such the respondent was deemed to have allowed the application under Section 229(5) of the Act; in the premises the respondent had no jurisdiction to claim the tax, penalties and interest as it was deemed that it had allowed the application for review; the appellant without prejudice to the foregoing claimed that the respondent was acting unreasonably and in excess of its jurisdiction by demanding the tax, penalties and interest and by threatening to institute recovery measures; that the respondent was acting inconsistently and in breach of the legitimate expectation created by the post clearance audit report issued pursuant to Sections 235 and 236 of the Act which verified that the tariff classification and the computation of duty was correctly done; that the respondent had no jurisdiction to demand or alternatively was acting in excess of its jurisdiction in demanding tax arising from a demand made by the Commissioner for Investigations and Enforcement who had no jurisdiction under the Act to enforce the provisions of the Act, make a demand in his or her own name for payment of tax or carry out a post clearance audit or any other investigation under the Act; that the respondent was acting unreasonably and without any consistency in first demanding the tax from the appellant, the owner of the goods and then both the owner of the goods and the appellant, then finally interpreting a contract between the appellant and the owner of the goods to which the respondent was not a party and absolving the owner of the goods from liability in contravention of the clear provisions of Section 147 of the Act; by concluding that the appellant was negligent and absolving the owner of the goods of any liability, that the respondent acted in excess of its jurisdiction and in contravention of the Act which supersedes the contract; and that payment of tax had been made directly by the owner of the goods in accordance with the directive issued by the respondent who had conducted a post clearance audit report made hence the respondent acted unreasonably in pursuing the appellant for tax.

3 A brief history of the case is that the appellant is an authorized customs agent under Sections 147 and 148 of Act whereas the respondent is an employee of the *Kenya Revenue Authority* (KRA) established under Cap 469, and is appointed as such under Section 13(2) and Section 5(1) of the said Act.. The interested party won the tender and was contracted by the Kenya Power and Lighting Company (KPLC) to supply aluminium conductors by an agreement dated 12th November, 2008. The interested party made extensive inquiries locally and in particular with SDV PLC International Freight Forwarding Company and established that the appellant was a reputable clearing agent. The interested party also made inquiries with KRA and established that the appellant enjoyed authorized economic operators' status as KRA's duly appointed customs agent before it entered into an agreement with the appellant dated 10th February, 2009. By the agreement the appellant was to provide clearing, forwarding and handling services as well as deal with the logistics and clearing of the entire consignment it was importing to be delivered to KPLC on the interested party's behalf. The appellant then opened import declaration forms and advised the interested party on the import duty payable and proceeded to clear various goods on behalf of the interested party and paid certain import duties which it declared was payable in accordance with the correct tariffs. However, an investigation by the respondent disclosed that the appellant declared the wrong tariff and as such more taxes were due and payable to KRA.

4 In a demand letter dated 6th May, 2010 the respondent notified the appellant and interested party that the aluminium conductors were classified under tariff 7614 and not 7605 as was done by the appellant and called upon the appellant to pay the under-declared taxes of Kshs. 103,419,275.48. In a letter dated 21st May, 2010 the Commissioner of Investigations & Enforcement of the 1st respondent stated that the finding/decision agreed with item description under the correct prevailing rates of taxes were applied on import declaration contained in the audit report of 19th January, 2010. That notwithstanding, the

respondent maintained that the demand in the letter of 6th May, 2010 still stood and in a letter dated 16th November, 2010 demanded tax of Kshs. 103,419,275.48 from the interested party.

5 Aggrieved, the appellant lodged an application dated 4th January, 2011 with the respondent requesting that the demand dated 30th December, 2010 be reviewed pursuant to the provisions of Sections 229(1) and (2) of the Act. The appellant did not receive any decision from the respondent within the time frame stipulated in Section 229(4) of the Act but rather received a demand for payment of tax of Kshs. 123,968,690.94 on 1st April, 2011 from the respondent. The demand was made against appellant only and not against interested party.

6 The appellant's case was that it was mandatory under Section 229(4) for the respondent to communicate its decision in respect of an application brought under Sections 229(1) and (2) within a period of 30 days failure of which the respondent will be deemed to have allowed the application for review. That having failed to communicate its decision within the stated period, the respondent had no jurisdiction to claim the tax, penalties and interests as claimed in its decision dated 1st April, 2011 as in doing so the respondent acted unreasonably and in excess of its jurisdiction in threatening to institute recovery measures. The appellant claimed that the respondent acted inconsistently and in breach of the legitimate expectation created by the post clearance audit report it issued pursuant to Sections 235 and 236 of the Act which verified that the tariff classifications and computation of duty was correctly worked out. That the respondent acted unreasonably in pursuing the appellant for taxes when the owner of the goods was a disclosed principal known to the respondent.

7 The respondent's case on the other hand was that the Commissioner of Investigations & Enforcement carried out an investigation and found that the appellant used the wrong tariffs to clear the goods of the interested party. The respondent had powers to carry out investigations into any matter in order to establish whether correct taxes and revenue were paid. That after the investigations it was established that the correct taxes not paid was in excess of Kshs. 103,000,000 That Sections 147 and 148 of the Act allowed the respondent to demand taxes either from the agent or the principal and in this case there was a contract between the agent and the principal and the agent was found to have been negligent. That the appellant admitted to have used the wrong tariff in its letter dated 13th January, 2011 hence acted against the law.

8 The interested party's case was that the Court should define whether the demand of 1st April, 2011 was a request for review pursuant to Section 229(1) as there was a previous application under the same provision made on 2nd June, 2010 which was rejected by the respondent on 17th October, 2010. The interested party also wanted the court to determine whether the respondent was entitled to review the application by its letter of 4th January, 2011 thus the sending of multiple demands for taxes creating a fresh right of appeal. The interested party urged the court to consider the implications of Section 147 of the Act as to whether an agent is deemed to be owner of goods for purposes of Sections 147 and 148 of the Act and if so, if the appellant was absolved from liability then the interested party should similarly be absolved from liability.

9 The learned Judge in his decision found that KRA was duty bound by law to investigate all claims and information received from any source to the effect that any party had evaded the lawful payment of taxes and it was pursuant to the said mandate that the Commissioner of Investigations & Enforcement carried out investigations to establish whether the appellant had used the correct tariff in clearing aluminum conductors/cables belonging to the interested party. That the respondent requested more time to review the appellant's objection to its demand on 30th June, 2010 as it required collection of the samples of the goods that were being imported by the interested party. That the respondent's valuation tariff section reviewed the matter further and arrived at the same conclusion as that of

the Commissioner of Investigations & Enforcement that the appellant had used the wrong tariff to clear the goods. That the ruling was based on samples collected from various importers and invoices provided. That on 6th May, 2010 the respondent informed the appellant that it had reviewed the customs entries process and the correct tariffs were not used in assessing the correct revenue payable in respect of goods it cleared on behalf of the interested party and made a demand for payment of the accruing taxes. That the interested party denied liability and directed the respondent's claim to the appellant who was their clearing agent. That the decision as to the amount and the correct tariff was made on 17th August, 2010 and anything thereafter revolved around the entity liable or responsible for the payment. That the dispute was not whether the amount was due and payable but who was responsible to KRA for payment as the appellant had agreed and acknowledged a wrong tariff was used resulting in underpayment of taxes.

10 The learned Judge further noted that Section 229(1) of the act deals with a decision or omission of the Commission on matters relating to customs and that the decision or omission must be prejudicial to the interests and rights of a particular individual hence a party is affected by a detrimental decision or omission made by the Commissioner or any of his agents. That the application for review made on 4th January, 2011 was not seeking to review a decision or omission but it was seeking to review a demand for payment made by the respondent. According to the learned Judge, what the appellant sought from the respondent was that payment of accrued taxes was to be made by the interested party who was the importer of the goods. That where any obligation has been incurred for the payment of any duty, such obligation shall be deemed to be an obligation to pay all duties which are or may become payable or recoverable under the provisions of the Act. Section 146(1) of the Act provides that where the owner of any goods is required or authorized to perform any act, then such act unless the contrary appears may be performed on its behalf by an authorized agent. That under Sections 147 and 148 of the Act, the respondent is empowered to hold the agent liable for the payment of any duty to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform. That it was also clear that an owner of any goods who authorizes an agent to act for him shall be liable for the acts and declaration of such duty by authorized agent. Consequently, the respondent was perfectly right in making a demand against the applicant and the interested party as it did in the letter dated 30th December, 2010. That under Section 236 of the Act, the respondent is empowered to carry out a field audit and any short collection/levy discovered is payable as prescribed under Section 135 of the Act. The taxes due on import are payable by the importer and the agent is only responsible for declarations hence any fine arising from incorrect declaration by the agent where detailed description of the goods and correct values are given by the importer is met by the agent. That in the letter dated 4th January, 2011 the appellant was seeking to apportion liability between the importer and itself. However, the respondent had no jurisdiction to determine who should shoulder all responsibilities or the greatest liability hence the letter dated 4th January, 2011 was not a review within the meaning of Section 229 of the Act as it cannot be said that the respondent made a decision or an omission relating to custom matters by demanding short levied taxes from the agent and the importer jointly and severally. The respondent had statutory duty, authority, jurisdiction and/or powers to make such a demand under Sections 147 and 148 of the Act.

11 The learned Judge went on to further observe that the respondent having responded seeking for more time to conduct a valuation and finally arriving at a decision concluding that the tariff classification given by the appellant was incorrect on 17th August, 2010 was within the time frame provided by Section 229(5) of the Act. The demand letter dated 30th December, 2010 was a follow up to the previous demand made upon the applicant and the interested party. Once the respondent had communicated in August 2010 that tax was due, it was incumbent upon the appellant to lodge an appeal within the stipulated or specified period under Section 229 and since it was not done, it was not

open or available to the appellant to lodge an appeal 5 months after the offensive decision was made. That it was not within the jurisdiction and powers of the respondent to entertain an appeal outside the time allowed. The learned Judge concluded that there was no valid appeal lodged by appellant under Section 229 of the Act and the respondent cannot be condemned for violating the law when there was no basis to do so; it was not within the powers of the respondent to decide who was liable to pay the taxes; the respondent was allowed to make a choice or election in terms of Sections 147 and 148 of the Act as there was no evidence to show that in demanding taxes from the appellant and interested party it acted capriciously and in violation of the law; the respondent treated the appellant and interested party in a dignified manner by asking them to sort out the payment due between themselves; it was perfectly right for the respondent to proceed against the appellant or the interested party in the absence of bad faith and illegality in its decision; the respondent did not make a phantom judgment against the appellant in a manner to warrant intervention of this court as a decision cannot be said to have been made in error simply because the respondent demanded taxes due and payable from the agent and importer; the appellant was not condemned unheard as it participated in the decision from the start to the end; and that an order of certiorari cannot issue to quash the letters dated 30th December, 2010 and 1st April, 2011 as there is no bad faith or ulterior motives or unreasonableness that was committed by the respondent in addressing the two letters to the appellant and interested party; an order of prohibition cannot issue to prohibit the Commissioner of Customs from demanding taxes which is acknowledged to be outstanding and due by the appellant and interested party as an order of prohibition can only issue to prevent a contemplated decision and not one which has already been made. (See: *Kenya National Examination Council Civil Appeal No. 226 of 1999).*

12 The learned Judge further concluded that it was not the business of the court to apportion liability between the appellant and interested party or to review the merits of the decision by the respondent. The court was concerned with the decision making process and there was no single evidence to show that the process followed by the respondent was contrary to the principle of legitimate expectation and natural justice. Before the decision was made, the respondent involved the appellant and interested party. Consequently, the learned Judge dismissed the appellant's application with costs.

13 Dissatisfied with the judgment, the appellant lodged the present appeal in which 11 grounds were raised to wit, that the learned Judge erred in law and fact by: finding that the letter dated 4th January, 2011 was not an application for review within the meaning of Section 229 of the Act; finding that the respondent did not violate Section 229 of the Act; declining to issue orders of certiorari against the respondent; making a decision in contravention of public policy as it protects the errant tax payer on whom the primary duty to pay tax falls; failing to issue the writs sought thereby making an agent liable for acts of a disclosed principal in contravention of the Constitution; declining to issue orders of prohibition against the respondent; finding that the respondent had demanded the short levied taxes in accordance with Section 135(1) of the Act; failing to take into account and consider the evidence adduced on behalf of the appellant; failing to appreciate submissions by the appellant and finding in favour of the respondent and awarding it costs; and that the findings of the learned Judge are insupportable in law or on the basis of the evidence adduced.

14 The appeal was heard by way of written submissions with limited oral highlights. The appellant submitted that it had lodged an application for review of the demand dated 30th December, 2010 on 4th January, 2011 in writing and stated the grounds upon which it was opposing the respondent's decision well within the stipulated time under Section 229 of the Act. That the respondent did not reject the appellant's application and never requested for any further information from the appellant and no decision was ever received from the respondent within 30 days of making the application as required and as such the application for review was deemed to have been allowed. With regard to certiorari, the appellant stated that judicial review proceedings are meant to review decisions which are incompatible

with the law rather than adjudicate on the merits of the issue in dispute. (See:*Nelson Kinyua Wambutu v County Government of Nyeri & Another* [2016] eKLR). That it was clear the appellant made the application for review within the prescribed time and the application was deemed to be allowed by operation of the law and it follows that the respondent had no jurisdiction to demand payment of tax in its decision dated 1st April, 2011. That the respondent's decision to continue demanding for tax even after the application for review was allowed by operation of law was repugnant to the provisions of the Act and ought to have been quashed. The appellant relied on the case of *Republic v Kenya Revenue Authority ex-parte Yaya Towers Ltd* [2008] eKLR in support of this proposition.

15 The appellant went on to submit that it was a mere agent of the interested party as the goods subject to the tax dispute belonged to the said interested party. In the demand dated 30th December, 2010 the respondent demanded payment from both the appellant and the interested party which prompted the appellant to apply for review in compliance with the Act. However, the respondent departed from its earlier decision and on 1st April, 2011 and solely demanded payment from the appellant thereby exonerating the interested party who was the owner of the goods. That under Sections 147 and 148 of the Act the respondent had no authority to exonerate the interested party from liability to pay outstanding taxes and by these actions the respondent acted in breach of Sections 147 and 148 of the Act which was clearly ultra vires, unlawful and illegal. That this decision was unfair and abused the appellant's rights under Article 47(1) of the Constitution.

16 The appellant took the view that the respondent acted in excess of its jurisdiction by demanding tax after an application for review had been allowed by operation of law and also demanding tax from the appellant only thus acting beyond its powers and as such an order of prohibition ought to have been issued to protect the rights of the appellant. The appellant maintained that outstanding tax should be legally claimed from both the appellant and the interested party especially given that the respondent had earlier approved tax paid in respect of the goods before applying a different tariff retrospectively. The appellant faulted the learned Judge for failing to fully appreciate its evidence and submissions noting that the case was based on clear provisions of the law and the application of statutes and the Constitution would clearly result in a decision granting judicial review orders . The appellant contended that each party ought to have borne its own costs as opposed to the same being awarded to the respondent. Lastly, the appellant urged that the appeal be allowed.

17 The respondent on its part submitted that its letter of 6th May, 2010 was to communicate its audit findings to which the appellant objected to on 2nd June, 2010. The respondent responded to the letter on 30th June, 2010 before finally making a decision on 17th August, 2010 that the appellant had used the wrong tariffs. The respondent argued that the request for review was not requested for on 4th January, 2011 and that its final ruling was not issued on 30th December, 2010 as alleged. The respondent was in agreement with the learned Judge's finding on the issue in the impugned judgment and urged this Court to uphold the same.

18 The respondent denied any breach or violation whatsoever of Section 229 of the Act as the letter of 4th January, 2011 was not an application for review within the meaning of the Act and the letter of 30th December, 2010 was merely among the various correspondences that ensued after the initial demand. The respondent further hailed the learned Judge for finding that the 4th January, 2011 letter did not seek to review a decision or omission but rather sought to review demand for payment and that it was not the responsibility of the respondent to determine who between the appellant and the interested party should bear the greatest liability for to do so would be acting beyond the provisions of Sections 147 and 148 of the Act.

19 The respondent further submitted that the learned Judge was right in refusing to issue an order of certiorari on the basis that the letters issued on 30th December, 2010 and 1st April 2011 were lawfully issued. In support of this proposition the respondent relied on the case of *Sanghani Investment Ltd v Officer in Charge Nairobi Remand & Allocation Prison* [2007] 1 E.A 354. That the case of *Republic v Kenya Revenue Authority ex-parte Yaya Towers Ltd* (supra) relied upon by the appellant was not applicable as it was overturned by this Court on appeal and in any event the facts and circumstances therein were totally different from the present case. The respondent went on further to submit that taxes were lawfully demanded from the appellant and that an order of prohibition was powerless against a decision which had already been made before such an order is granted. (See: *Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR) That an order of prohibition operates as to the future to prevent unlawful acts by public bodies or authorities hence the respondent did not commit any unlawful act or exceed its authority when it demanded for taxes. That there was no evidence of unreasonableness, bad faith, malice or illegality in the demand. The respondent reiterated that Sections 147 and 148 of the Act empowered it to hold both the appellant and the interested party not only liable for payment of any duties to which the goods were liable but also for the performance of all acts in respect of such goods. That it acted within the law in demanding taxes from the appellant under Section 147 of the Act and did not breach any provisions of the Constitution and that the appellant failed to demonstrate which provisions of the Constitution had been infringed as was held in the case of *Anarita Karimi Njeru v the Republic* [1979] eKLR. The respondent maintained that it had not misapplied Section 135(1) of the Act. That the learned Judge considered the evidence and submissions by the appellant as was it was referred to in the impugned judgment. Lastly, the respondent submitted that costs follow the event and that the learned Judge was right in awarding the same to the respondent who had proved its case against the appellant. The interested party did not submit either orally or by way of written submissions.

20 This is a first appeal and as such we have re-analyze and re-evaluate the evidence presented before the High Court as demanded of us by Rule 29(1) of the rules of this Court. In several authorities of this court this has command restated with words to the effect that It is well settled law that the duty of the first appellate court is to re-evaluate the evidence tendered in the lower Court both on points of law and facts and come up with its own findings and conclusions. In the case of *Kamau v Mungai* [2006] 1 KLR 15 the court stated that:

> "Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that."

21 I have carefully considered the record and grounds of appeal, the impugned judgment, the rival written submissions by counsel and the law. The issues for determination are whether the letter dated 4th January, 2010 was an application for review within the meaning of Section 229 of the Act as is closely intertwined with whether the respondent violated the said Section 229; whether the respondent demanded tax within the meaning of Section 135(1) of the Act; the nature of the relationship between the appellant and the interested party and who was liable to pay taxes, penalties and interest in this case; and whether the prayers for certiorari and prohibition were merited and ought to have been granted.

22 It is trite that judicial review orders are discretionary. Therefore, whenever this Court is called upon to interfere with the exercise of judicial discretion, as is the case before me, I must exercise caution. It would be wrong for this Court to interfere with the exercise of the learned Judge's discretion merely

because this Court would have arrived at a different decision. In *Mbogo v Shah* [1968] EA 93 the Court as follows:

> "I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

23 It is common ground that the respondent in the letter dated 19th January, 2010 informed the interested party that after post clearance audit it was observed that the import entry forms were properly filed and the tariff declaration agreed with the item description hence the correct prevailing rates of taxes were applied on the import declarations. It is also not in dispute that on 6th May, 2010 the respondent after reviewing the interested party's custom entries informed the appellant that it had declared the wrong tariff when it itemized/classified the interested party's goods under tariff 7605 instead of tariff 7614 leading to the wrong assessment of taxes and as a result, the respondent demanded undeclared taxes of Kshs. 103,419,275.48. What is in dispute is the process of demanding the short levy taxes and which party should be held responsible for payment of the same between the appellant and the interested party.

24 The appellant argued that the respondent had violated Section 229(5) by failing to respond to its application for review dated 4th January, 2011 within 30 days while the respondent contended that the said application was not within the meaning of Section 229(1). Section 229 of the Act provides inter alia that:

> "229 (1) A person directly affected by the decision or omission of the Commissioner or any other officer on matters for review 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.
>
> (3) Where the Commissioner is satisfied that, reasonable owing to absence from the Partner State, sickness or other reasonable cause, the person affected by the decision or omission of the Commissioner was unable to lodge an application within an application within the time specified in subsection (1), and there has been no unreasonable delay by the person in lodging the application, the Commissioner may accept the application lodged after the time specified in subsection (1).
>
> (4) The Commissioner shall, within a period not exceeding thirty days of the receipt of the application under subsection (2) and any further information the Commissioner may require from the person lodging the application, communicate his or her decision in writing to the person lodging the application stating reasons for the decision.
>
> (5) Where the Commissioner has not communicated his or her decision to the person lodging the application for review within the time specified in subsection (4) the Commissioner shall be deemed to have made a decision to allow the application."

25 As aforementioned, the respondent upon conducting a post clearance audit noted the mistake in tariff classification by the appellant and demanded payment of undeclared taxes, penalties and interest from both the appellant and the interested party on 6th May, 2010. The appellant sought to review the demand in accordance with Section 229 (1) of the Act. The respondent sought more time to conduct investigations and made its decision that wrong tariffs had been used on 17th August, 2010. Even though Section 230 provides for a dissatisfied party to appeal to the tax appeals tribunal, the appellant chose not to appeal the decision and instead there are various correspondences on record showing that parties tried to resolve the matter amicably. It is clear that the letter dated 30th December, 2010 by the respondent made reference to the previous correspondences between the parties and also included a demand for penalties and interest thus the demand was for Kshs. 123,968,690.94. This is the letter that prompted the appellant's application for review. The learned Judge while addressing the issue held that the respondent's decision on 17th August, 2010 was within the time frame provided by Section 229(5) of the Act and the demand letter dated 30th December, 2010 was a follow up to the previous demand made upon the applicant and the interested party. I find no justifiable reason to interfere with this finding as it is clear from the foregoing that the respondent had already conducted investigations and concluded that the wrong tariff was declared. There being no appeal preferred by the appellant, I find that they were satisfied with the decision made by the respondent. In as much as the decision by the respondent directly affected the appellant, demanding a further review of a decision that had already been reviewed was frivolous and untenable. Be that as it may, parties continued to exchange correspondence as was noted in the respondent's final demand for short levy dated 1st April, 2011 when the respondent demanded payment solely from the appellant in accordance with the agreement between the appellant and the interested party.

26 As regards the authority to demand short levy by the respondent, Section 135 of the Act provides that:

> "135 (1) Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.
>
> (2) Where a demand is made for any amount pursuant to sub-section (1), the amount shall be deemed to be due from the person liable to pay it on the date on which the demand note is served upon him or her, and if payment is not made within thirty days of the date of such service, or such further period as the Commissioner may allow, a further duty of a sum equal to five percent of the amount demanded shall be due and payable by that person by way of a penalty and a subsequent penalty of two percent for each month in which he or she defaults."

27 As I have already established that duty was short levied when the appellant declared wrong tariffs, the respondent correctly demanded taxes, penalties and interest from the respondent as provided for by the law. Therefore, the respondent being a relevant/proper officer had the jurisdiction and authority to demand the short levy.

28 With regard to which party the respondent should demand the short levy from, the nature of the relationship between the appellant and the interested party developed as per their agreement dated 10th February, 2009. Clause 14 of the agreement specifically stated that:

> "Nothing in the agreement shall render or be construed as rendering the SDV as EIL's agent or the agent of EIL's nominee for any purpose whatsoever and SDV shall have no authority to and will not enter into any contract, make any representation, give any warranty or incur any liability on behalf of EIL or EIL's nominee nor will SDV pledge EIL's credit."

29 However, under the East African Community Customs Management Act this relationship is defined as an agency since the appellant was authorized to perform certain acts on behalf of the interested party. Section 146 of the Act states that:

> "146 (1) Where under the provisions of the Customs laws the owner of any goods is required or authorized to perform any act then such act, unless the contrary appears, may be performed on his or her behalf by authorized agent."

30 The interested party engaged the appellant to clear, forward, handle services, deal with logistics and clear imported consignments on its behalf. In addition to the above duties, the appellant was obligated under clause 9 of the agreement to

> "obtain an assessment of customs duty, VAT, IDF fees and excise duty payable on each consignment as classified in the Act and applicable schedules set out in the Customs & Excise Act and issue an invoice to the interested party who would ensure that the invoice is settled within the time specified under the agreement. The appellant was also to assist in every way possible to ensure the interested party is notified of its payment obligations under this clause without any delay." It was while performing its duties under the agreement that the appellant declared wrong tariffs which resulted in undeclared taxes."

31 The respondent in their letter dated 1st April, 2011 relied on Clause 25 of the agreement seeking payment of the short levy solely from the appellant. The clause states that:

> "The parties shall indemnify one another and shall keep each other indemnified from and against all losses, claims, costs, demands and demands arising hereunder except those which one party may sustain or incur as a result of any fraudulent act or omission, willful default or negligence of the other party or any of its employees or representatives."

32 The learned Judge held that it was not the duty of the court to apportion liability between the parties or the merits of the decision rather main concern was the decision making process. We not that since the agency relationship between the affected parties was donated by statute, it will only be fair and in the interest of justice to determine the party to bear liability in this instance. Sections 147 of the Act states as follows with regard to the liability of an agent:

> "147. A duly authorized agent who performs any act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of such goods, and shall, accordingly, be personally liable for the payment of any duties to which the goods are liable and for the performance of all acts in respect of the goods which the owner is required to perform under this Act: Provided that nothing herein contained shall relieve the owner of such goods from such liability."

33 While Section 148 of the Act provides for the liability of the owner for acts of a duly authorized agent as follows:

> "148. An owner of any goods who authorizes an agent to act for him or her in relation to such goods for any of the purposes of this Act shall be liable for the acts and declarations of such duly authorized agent and may, accordingly, be prosecuted for any offence committed by the agent in relation to any such goods as if the owner had himself or herself committed the offence:
>
> Provided that- (i) an owner shall not be sentenced to imprisonment for any offence committed by his or her duly authorized agent unless the owner actually consented to the commission of the offence;
>
> (ii) nothing herein contained shall relieve the duly authorized agent from any liability to prosecution in respect of any such offence."

34 From the foregoing, we find that both the appellant and the respondent were liable to pay the short levy. The appellant having been deemed the owner of the goods by virtue of Section 146 and the interested party for being liable for the acts and declarations of its duly authorized agent under Section 147.

35 On whether the prayers for certiorari and prohibition were merited. It is trite that in order to succeed in an application for judicial review, the applicant must establish the issues as stated in *Pastoli v Kabale District Local Government Council & Others*, [2008] 2 EA 300 in which the court observed thus:

> "In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, miscellaneous application number 643 of 2005 (UR). Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re an Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph "E". Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

35 It is evident from the foregoing that the respondent power to demand taxes, penalties and interest from the appellant and the interested party by virtue of clause 135 of the Act. It has not been established that the process of making the said decision was tainted with illegality, irrationality or procedural impropriety. The letter dated 30th December, 2010 was correctly addressed to the parties. It was established that the declaration of the tariff by the appellant was wrongful. However, it was not proved

that the declaration was fraudulent, willful or due to negligence so as to exonerate the interested party from its obligations to pay taxes under the agreement.

36 In the case of *David Oloo Onyango v Attorney-General* [1987] eKLR this Court rendered itself thus:

> "There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice."

37 The appellant cannot claim not to have been heard in view of the several correspondence exchanges.

38 In *Kenya National Examinations Council v Republic Ex parte Geoffrey Gathenji Njoroge*: Civil Appeal No. 266 of 1996 this Court stated that:

> "Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings... Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

39 What was sought to be prohibited had already and therefore prohibition was correctly denied. All the whole the learned Judge stated that the decision by the respondent did not warrant the court's intervention since the decision cannot be said to have been made in error simply because the respondent demanded taxes due and payable from the agent and importer and that certiorari cannot issue to quash the letters dated 30th December, 2010 and 1st April, 2011 as there was no bad faith or ulterior motives or unreasonableness that was committed by the respondent in addressing the two letters to the appellant and interested party. That an order of prohibition cannot issue to prohibit the Commissioner of Customs from demanding taxes which is acknowledged to be outstanding and due by the appellant and interested party as an order of prohibition can only issue to prevent a contemplated decision and not one which has already been made. I entirely agree with these postulations. The upshot is that the appeal is bereft of merit and is accordingly dismissed with costs to the respondent.

40 As Kiage JA agrees, it is so ordered.

41 This judgment is delivered under Rule 32of the Court of Appeal Rules as Hon. Mr. Justice Githinji, JA has already retired.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA

I have had the benefit of reading in draft judgment of my learned brother, Makhandia, JA. As I am in full agreement with the reasoning and conclusions therein, there is nothing that I can add with any utility.

The appeal should be disposed of as Makhandia, JA proposes.

DATED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021

P. O. KIAGE

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JUDGE OF APPEAL