IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, NAMBUYE & MAKHANDIA, JJ.A)

CIVIL APPEAL NO. 148 OF 2013

BETWEEN

TOTAL KENYA LIMITED.....APPELLANT

AND

KENYA REVENUE AUTHORITY.....RESPONDENT

(Being an appeal from the Judgment and Orders of the High Court of Kenya at Nairobi (D. S. Majanja, J.) dated 8th May, 2012

in

High Court JR. No. 449 of 2001)

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JUDGMENT OF THE COURT

Total Kenya Limited "*the appellant*" has lodged this appeal against the judgment and decree of the High Court (Majanja J.) dated 8th May 2012. The judgment and decree followed judicial review proceedings initiated by the appellant in which it sought to quash by way of an order of certiorari, a decision made and communicated by the Commissioner of Customs and Exercise, Kenya Revenue Authority "*the respondent*" by a letter dated 8th February 2001. In the letter, the respondent demanded from the appellant the total sum of Kshs 23,407,724/= being unpaid duty of Kshs 3,352,181/= and compound interest of Kshs 18,436,990/=. The duty demanded was in respect of a consignment of 21 cases of prime burners imported by the appellant and was made pursuant to sections 163 and 225A (1) of the Customs and Exercise Act "*the Act*". The appellant further sought an order of Prohibition to prohibit the respondent from attaching, intervening, confiscating, disposing or in any other manner interfering in its affairs or conduct of business and particularly by attaching its property or funds in a bid to recover the aforesaid duty, interest and or penalties. The appellant finally sought costs of the proceedings.

The facts leading to the proceedings according to the appellant were that, after receiving the said demand letter, it responded to it by forwarding to the respondent documents in support of their contention that the duty demanded had infact been fully paid. The documents consisted of a copy of the Import Entry No. 0130 relating to the consignment together with receipt No. D 199720 issued to its clearing and forwarding agent, **Veritas Agencies Limited** "*the agent*" by the respondent upon payment of the duty. The agent had been registered by the respondent as the appellant's clearing and forwarding agent at the material time. As far as the appellant was concerned, it was the duty of the agent to clear its imported goods by paying the necessary duties and taxes and thereafter raise its invoice with the appellant for settlement and which was done in the circumstances of this appeal. The appellant also questioned the *bonafides* of the demand coming almost 6 years after the event and then requiring payment within 14 days.

The respondent wrote to the appellant two more letters dated 23rd February and 21st March, 2001 respectively demanding a copy of the receipt issued on payment of the duty in respect of the Import Entry No. 0130. Further, the respondent raised the possibility that the consignment could have been released from the warehouse without payment of duty since the appellant had failed, neglected or refused to submit proof of payment and insisted on the satisfaction of the demand within 7 days.

Responding to those letters, the appellant vide a letter dated 5th April, 2001 forwarded a copy of the Import Entry No. 0130, the agent's invoice dated 4th July, 1995 and receipt No. D199720 issued by the respondent. However, by a letter dated 24thApril, 2001 the respondent informed the appellant that the import entry and the receipt aforesaid were all forgeries and demanded payment forthwith. Undeterred, the appellant by a letter dated 25th April 2001 requested the respondent to give it a period of at least 21 days to investigate the forgery claims. However, the respondent was only willing to indulge it for seven days and warned that there would be no further indulgence. It was then that the appellant initiated the judicial review proceedings leading to this appeal.

In the proceedings the appellant alleged that the respondent had acted in violation of sections 158, 164, 165, 214 and 225 of the Act in demanding the duty. It further claimed that the respondent had made the demand in excess of jurisdiction or want of it. It accused the respondent of not serving on it a written notice as required by law informing it of the non- compliance with the provisions of the Act or complaints made against it. It averred that the respondent was clearly in breach of the rules of natural justice when it failed to accord it a reasonable opportunity to be heard before resorting to the enforcement mechanisms under the Act. Consequently, it termed the demand unfair, arbitrary, oppressive and or unreasonable. That in any event, the demand was time barred by virtue of section 158(1) of the Act. Further, that there was no explanation why the respondent had taken in excess of six years to discover the alleged forgery and or the basis upon which the consignment was released in July 1995.

The respondent's defence was that after internal investigations, it had discovered that the Import Entry No. 0130 tendered by the appellant as proof of payment of duty in fact related to goods imported by a company called **Datini Mercantile Limited** and not the appellant. Further, that the import entry was in respect of grain milling and dairy machines as well as cultivators and not for the prime burners that the appellant had imported. Accordingly, the payment made, if at all, was in respect of duty of the aforesaid farm machines and not the prime burners. The respondent denied breach of the rules of natural justice in its demand and averred that it had accorded the appellant sufficient time to investigate the forgery and comply with the demand. It maintained that the appellant was liable to pay the duty pursuant to the provisions of section 165 of the Act. That the Act stipulated under section 166 that the appellant was liable for the acts of its agent and that pursuant to section 158(1) of the Act, the respondent was mandated to recover or levy duty even after five years where there had been fraud such as was the case here.

After consideration of the facts, evidence and the law, Majanja, J. dismissed the motion holding that;

> ***" ....28. On the basis of the material before the court, l am satisfied that there was a reasonable basis for the finding of fraud on the Total's part in failing to pay duty or at any rate in presenting fraudulent payment. The person referred to under section 158 (1) is the person liable to pay the tax and not the agent as contended by Total.***
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> ***29. Though a clearing agent is licenced by the Commissioner under section 164, the agent remains the agent for the taxpayer and the taxpayer cannot evade his liability on the basis of fraudulent acts of the clearing agent. Section 166 of the Act underpins this liability. Even though section 165 of the Act imposes liability to the agent***
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> ***33. The right to be heard is a fundamental right and basic right and cannot be taken away however hopeless one's case. It cannot be cured by holding that the decision would be right or proper.....***
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> ***34. The question whether there has been a breach of natural justice must be determined in the light of the facts of the case.....***
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> ***35. The issue of duty was first raised in the letter dated 8th February 2001. There was subsequent correspondence between the parties on the issue leading to the demand on 24th February 2001. Total responded by a letter dated 25th April 2001 and 4th May 2001, Total was granted an extension of seven days to respond to the queries before the respondent began to enforce the collection of duty. This is what precipitated these proceedings.***
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> ***36. I agree with counsel for the respondent that the exchange of correspondence in this instance provided the applicant an opportunity to be heard and to present its case. That opportunity was afforded from time the first demand was issued on 18th February 2001 and this opportunity was available until at least 4th May 2001***
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> ***37. I therefore hold that in the circumstances of this case there was no denial of natural justice***
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> ***Conclusion***
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> ***38. On the basis of the material before me, l find and hold that the acts of the respondent were within the provisions of the law and were not unreasonable excessive, arbitrary or oppressive.***
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> ***The Notice of Motion dated 10th May 2001 is therefore dismissed with costs to the respondent....".***

Dissatisfied with the judgment and the decree, the appellant as already stated proffered the instant appeal impugning the whole judgment on eight grounds to wit; that the learned judge erred in failing to find that the allegations of fraud were made against its agent and not the appellant; respondent did not have the statutory right to demand the duty after the expiry of five years in terms of section 158(1) of the Act; proviso deliberately sought to exonerate a taxpayer from the acts of fraud of its agent; that while it took the respondent more than six years to detect the alleged fraud, the respondent demanded immediate payment of duty within seven days without giving the appellant sufficient time which was against the tenets of natural justice and the right to be heard; to appreciate sufficiently that the ambit of the doctrine of *ultra vires* and natural justice were very wide and that the respondent had breached them; misdirected himself in interpreting the proviso to section 158 (1) of the Act to mean that a taxpayer would still be liable to pay duty even where the fraud was committed by the agent; by holding that the only evidence before him was payment of the duty in question by the appellant to its agent while, on the contrary there, was receipt evidence showing payment of the duty by the appellant's agent to the respondent, and, finally that the judge considered extraneous and irrelevant factors thus arriving at a wrong and erroneous decision.

During the pre-hearing conference before the Deputy Registrar of this court, Parties consented to the disposal of the appeal by way of written submissions with limited oral highlights. Pursuant to the consent, the appellant and respondent filed and exchanged their respective written submissions. At the formal hearing of the appeal, **Mr Thangei** and **Ms Odundo**, learned counsel for the appellant and respondent respectively, briefly orally highlighted the submissions.

In its written submissions and oral highlights the appellant pointed out that it was not in dispute that the duty was demanded from it courtesy of a demand letter dated 18th February 2001 by the respondent, when, the events leading to the demand happened way back in July 1995, a period in excess of six years. According to the appellant's interpretation of section 158 (1) of the Act, the respondent could only levy such duty after the expiry of five years on the basis of established fraud on the part of the taxpayer itself, rather than or as opposed to its agent. The section *inter alia* provides:

> ***"(1) Where 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 so short levied or erroneously refunded, as the case may be:***
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> ***Provided that the proper officer shall not make any such demand after five years from the date of the short levy or erroneous refund unless the short levy or erroneous refund had been caused by fraud on the part of the person who should have paid the amount short levied or to whom the refund was erroneously made"***

Based on its own interpretation of the provision, the appellant submitted that the judge erred in failing to invoke the proviso aforesaid and instead allowed the appellant to collect duty after the expiry of five years despite lack of evidence imputing fraud on its part. The appellant further submitted that it could or ought not to have been condemned to pay the duty, more so after five years and on such short notice. It impugns the statement in the judgment that seemed to attribute fraud on its part for failing to pay duty. It was the appellant's contention that it paid the required duty through its agent which was receipted by the respondent and therefore there was no basis for the judge to find that on the material before him there was reasonable basis for finding fraud as proved against it for the none payment of duty. In any event according to the appellant, failure to pay duty *per se* was not in itself fraud.

The appellant further argued that liability of a principal under sections 169 and 166 of the Act did not extend to liability arising out of fraud of an agent as contemplated by section 158 (1) of the Act. The appellant's view was that Parliament's intention was to restrict the respondent to demanding duty from its licenced agents within a period of five years after which it then became time barred. That it was the respondent who had the capacity to detect the alleged fraud as it solely had in its custody all the necessary documentation and therefore shifting such burden to a taxpayer was unreasonable and impractical. This reasoning was anchored on the fact that once a principal pays the duty to its agent for onward transmission to the respondent, it had no means of knowing if such duty ends up with the respondent.

It was also submitted on behalf of the appellant that it was denied an opportunity to be heard and to present its case. It urged that it was only accorded a 10 day period to respond to the allegations of fraud yet the respondent had taken in excess of six years to detect the alleged fraud. In its view, the right to be heard was thereby fundamentally breached, more so, considering that each case had to be considered on its own facts and merits. The appellant accused the respondent of failing to furnish it with the necessary or relevant documents so as to assist it to ably respond to the allegations of fraud and termed the refusal a clear violation of his right to be heard. The finding by the judge that there was no breach of the rules of natural justice on the mere basis that there was exchange of correspondence between the parties was also faulted. The appellant also reverted to "*oxygen*" or "*double O2*" principle to push its case. The principle enjoins this court to dispense proportionate, equitable and substantive justice. **Nairobi Civil Appeal No. 53 of 2010**; **African Safari Club vs Safe Rentals Ltd and Edward Muriu Kamau & Another v National Bank Ltd (2009) eKLR** were cited in support of the above proposition.

In conclusion, the appellant submitted that the demanded duty and interest all totalling to Kshs 23,407,724/= had been paid, yet the respondent was still demanding further interest and penalties on the same that had escalated to Kshs 133,000,000/=. It termed such demand capricious and unreasonable and urged us to reject the demand. It therefore prayed for the appeal to be allowed with costs.

Opposing the appeal and expressing support for the judge's findings, the respondent submitted that the consignment was to be warehoused in an upcountry bonded warehouse to wit; Express Bond No. 44, Nairobi, pending payment of duty. However, it came to realise that the said consignment was never delivered or received in the said bonded warehouse. In those circumstances, the respondent was mandated by section 163 (1) of the act to require the person who had given security under the bond to pay the same within fourteen days of the notice. The provision is in these terms:

> ***"Where the conditions of a bond have not been complied with then the commissioner may by notice in writing forthwith require the person who has given security under it to pay to the commissioner the amount of the security within fourteen days' of the notice; and on failure to comply with the notice, the commissioner may enforce payment of the security as though it were duty due and unpaid"***

That it was on that basis that it requested from the appellant proof of payment of the duty and upon being furnished with the same, it discovered that the documents evidencing payment supplied by the appellant as aforesaid were but forgeries. The respondent further pointed out that there was no evidence adduced by the appellant to counter its assertion that duty had not been paid, nor evidence in proof of payment of duty. It was submitted that the appellant could not evade its duty liability on the basis of the fraudulent acts of its agent and supported the judge's finding that there was reasonable basis for the conclusion of fraud on the part of the appellant for failing to pay duty. The respondent laid emphasis on the fact that judicial review proceedings are concerned with the decision making process as opposed to the merits of the decision itself. That as such, it asserted, the judge correctly arrived at the decision within the confines of judicial review. It also maintained that an order of Prohibition could not issue as the decision sought to be prohibited had already been made and was now pending execution.

In response to the allegations that it acted in breach of the rules of natural justice, it conceded that an investigative body had the obligation to act fairly and such fairness depends on the nature of the investigations and the consequence which it may have on the person affected. It relied on the case of **Selvarajan v Race Relations Board (1976) 1 ALL ER 12** and **Russell v Duke of Norfolk (1949) 1 ALL ER 109** for the proposition. It considered the duty to act fairly the same as the duty to abide by the rules of natural justice. In this case the appellant had been accorded through correspondence an opportunity to be heard and therefore there was no breach of the rules of natural justice.

Regarding the demand for Kshs 133,000,000/= in penalties and interest, the respondent maintained that the appellant was liable in terms of section 225A of the Act. The penalties attracted a 3% interest payment per month until payment in full. This was however the position till the year 2008, when the Finance Act, 2008 came into force and capped interest chargeable on an unpaid duty at 100% of the duty originally demanded. The said Finance Act was not retrospective in its application and was therefore inapplicable to the case at hand.

Whether the judge considered extraneous matters in arriving at the decision, it was the submission of the respondent that, to the contrary, the judge limited himself to the issues, facts and law while taking into consideration the scope of judicial review, and thereby arrived at a proper decision.

The issues for determination in this appeal as we see it are whether: the respondent's decision to demand duty from the appellant was illegal, unreasonable, *ultra vires* the Act , made in breach of the rules of natural justice and therefore liable to the judicial review orders of certiorari and prohibition; the judge considered extraneous matters in his determination and finally whether the respondent is entitled to recover from the appellant a further Kshs 133,000,000/= in penalties and interest.

The first determination must be whether there was fraud on the part of the appellant, as to invite the respondent to invoke section 158 (1) of the Act to demand duty from the appellant even after the expiry of five years. The demand letter, coming after five years from the date when the duty was due could only be legitimate in the event that the none payment of the duty was caused "*by the fraud on the part of the person who should have paid the amount short levied*" as per the proviso.

The person who should have paid the duty in the instant appeal was the appellant. However, the appellant had contracted the agent who had been registered by the respondent as the appellant's agent at the material time. The appellant's contention was that there was no basis for the judge to impute fraud on its part. After all it had tendered evidence to demonstrate payment of the duty through its agent. On the basis of the evidence tendered by the respondent to counter that of the appellant, we are unable to agree with the appellant's contention. And this is why. Upon demand for payment of duty by the respondent, the appellant submitted a copy of the Import Entry No. 0130 and receipt No 199720 regarding the consignment paid by its agent to the respondent as proof that it had paid the demanded duty. However, the respondent's investigations disclosed an entirely different story. That, in fact, the import documents as well as the receipt were all forgeries since they related to a different consignment altogether, that of grain milling and dairy machines as opposed to the prime burners that were the subject of the demand. Added to this was the fact that the consignment was meant to be warehoused in an upcountry bonded warehouse in Nairobi pending payment of duty as required but this was not to be. Those revelations were never countered by the appellant at all. Though the appellant maintained that it did pay the duty, it was however self evident from the uncontested evidence of the respondent that, that was not the case. Well, it was possible that the appellant may have remitted to its agent the duty payable for the consignment for onward transmission to the respondent but the agent failed to do so and instead converted the same to some other use. It then schemed to come up with documents that were clearly forgeries to assuage the appellant's concerns.

In those circumstances and in terms of section 165 of the Act which is to the effect that, ***"A duly authorized agent who performs an act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of the goods and shall accordingly be 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 thereof is required to perform under this Act; but nothing herein contained shall relieve the owner of the goods from that liability"*** *(emphasis provided)*, the appellant was bound to pay the duty. This provision thus does not exonerate the appellant from the acts of the agent as argued by the appellant. The appellant was at all material times the owner of the goods and hence the attachment of liability for the acts of its agent. It is trite that allegations of fraud, being of a serious nature so as to even attract penal consequences must be specifically pleaded and the particulars thereof given. The standard of proof required has been said to be higher than that in ordinary civil cases, namely proof upon a balance of probabilities; but such proof is certainly not beyond reasonable doubt as in criminal cases. See **Kinyanjui Kamau v George Kamau Njoroge (2015) eKLR** and **Bruce Joseph Bockle v Coquero Limited (2014) eKLR**.

In this case there is no doubt at all that the respondent in its replying affidavit to the motion brought to the fore, in great details and specificity the allegations of fraud. It should be noted that the proceedings were initiated by the appellant and not the respondent. It could only thus raise the issue of fraud in its replying affidavit. As already stated, the appellant did not controvert any of the assertions of fraud alleged against it by the respondent in the replying affidavit. The judge cannot therefore be faulted for finding that fraud had been proved. Interestingly the appellant did not bother to enjoin in the proceedings its agent who was in a better position to counter, if at all, the allegations of fraud attributed to it as the appellant by the respondent. It was not enough for the appellant to merely proclaim that *"...once a principal pays the duty to its agent, it has no way of knowing if such duty ends up with the respondent"*. Accordingly the appellant's interpretation of the proviso to section 158 (1) of the Act that the duty could only be levied in the event that the person liable to pay (the appellant) was personally found to have been fraudulent is clearly erroneous and a misinterpretation of the provision. The judge in our view properly held that the person liable to pay the duty was the appellant as the principal, since fraud had been established which then allowed the respondent to levy duty beyond the five-year stipulated period.

Thus, the appellant has not persuaded us regarding its submission that the liability of a principal under sections 165 and 166 of the Act did not extend to liability arising out of fraud of an agent as set out in section 158 (1) of the Act. Of course the appellant maintained throughout the proceedings that in the event that fraud was established, then such fraud should be apportioned to the agent. What we are saying, however, is that we're not persuaded that the words *"...the person who should have paid the amount short levied"* in the proviso do not refer to the principal, the appellant in the circumstances of this case. We doubt that, that could have been the intention of parliament. If anything, sections 165 and 166 of the Act seem to buttress the position that even in a scenario where fraud was perpetuated by the duly authorised agent, the owner of the goods or the principal still remains liable. The provisions are in these terms:

> ***"165. A duly authorized agent who performs an act on behalf of the owner of any goods shall, for the purposes of this Act, be deemed to be the owner of the 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 thereof is required to perform under this Act; but nothing herein contained shall relieve the owner of the goods from that liability.***
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> ***166. An owner of the goods, who authorizes an agent to act for him in relation to those goods for any of the purposes of this act***

shall be liable for the acts and declarations of the duly authorized agent and may accordingly be prosecuted for an offence committed by the agent in relation to the goods as if the owner had himself committed the offence."

These provisions were extensively examined by **Korir J**. In the persuasive **High Court Case, H.C. Misc. Appl. No 54 of 2010**; **Republic v Kenya Revenue Authority Ex-parte African Boot Company Limited**, in terms:

"A look at the above quoted part XI of the Act clearly shows that the Commissioner of Customs only licences customs agents. The agents however act on behalf of importer of goods. The person who appoints the agent to carry out a particular transaction is the importer. That means the customs agent becomes the agent of the importer and not the Commissioner of Customs. The respondent does not, therefore, foist a particular customs agent on a taxpayer. The taxpayer is the one who goes out to look for a particular agent to clear goods on his behalf.

Counsel for the respondent provided a good analogy when he told the court that just like the Law Society of Kenya licences advocate to practice law, the Kenya Revenue Authority through the Commissioner of Customs Licences Customs Agents to clear goods and baggage which have been imported into the country. If a lawyer becomes rogue and misappropriate the client's money, the client cannot turn to LSK for compensation. The same case applies here so that when a customs agent engages in fraudulent activities, the importer cannot ask Kenya Revenue Authority for compensation. The importer has to forebear the loss with fortitude and find a way of recovering money misappropriated from the customs agent."

Just as in this case, the appellant's agent was involved in fraudulent activities which the appellant was vicariously liable. The appellant was therefore obligated to pay the duty and thereafter pursue and or recover its misappropriated funds from its agent.

Given the foregoing it cannot therefore be said that the respondent exceeded jurisdiction, acted without jurisdiction, *ultra vires*, arbitrarily, illegally, unreasonably, unjustly or breached the law when it demanded the payment of the duty from the appellant even after the time limit of five years since fraud had been established and proved against the appellant and or its agent.

The appellant also complained that the respondent violated the rules of natural justice by not according it sufficient time to respond to the allegations of fraud attributed to it and by not according it opportunity to be heard. The oft cited case of **Ridge v Baldwin (1964) AC 40** considered the elements of natural justice and concluded by stating that they included the right to be heard by an unbiased tribunal; the right to have sufficient notice of the charges or misconduct and the right to be heard in answer to those charges. The respondent conceded that indeed an investigating body was under duty to act fairly and that such fairness required or depended on the investigations and the consequences which it may have on the person affected by it. See **Selvarajan v Race Relations Board** (supra). The appellant contended that it was only given seven to ten days to respond to the allegations of fraud which by measure of any standard was short and unreasonable. However, on the evidence on record this claim is not entirely correct. As found by the judge, the opportunity to be heard was accorded to the appellant right from 8thFebruary 2001 when the demand was made to at least 4th May 2001 when shortly thereafter the appellant mounted the suit. The judge too was alive to the fact that it was not possible to lay down rigid rules as to when the principles of natural justice ought to apply and the scope and extent of their application. As stated in the case of **Russell v Duke of Norfolk** (supra);

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth....The investigating body is however, the master of its procedure. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against the man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only..."

In the circumstances of this case, the appellant cannot claim not to have been heard. We agree with counsel for the respondent and the trial judge that the exchange of correspondence in this instance, provided the appellant an opportunity to be heard and to present its case. That opportunity was afforded from the time the demand was made in February and was still available in May when the appellant filed the suit. The appellant never took advantage of that window of opportunity. The appellant cannot then turn around and claim breach of the rules of natural justice and want of hearing by the respondent.

The upshot of all the foregoing is that the judge was right in denying the appellant the judicial review orders of certiorari and prohibition and cannot be faulted or impugned since the threshold for the issuance of such orders had not been attained. In any event, the respondent had established that the appellant had not warehoused the consignment in the upcountry bonded warehouse pending payment of the duty which was in breach of the law. That act of omission or commission automatically kicked in the provisions of section 163 of the Act. It mandated the respondent to demand payment of duty within a period of fourteen days of the notice failing which the respondent was required to take measures to recover the duty as though it was due and unpaid. So that whichever way one looks at this matter, the appellant's goose was already cooked.

On the question whether the judge considered extraneous matters in arriving at his decision, we have not discerned any evidence in support of that complaint. It should be appreciated that each party in its written submissions before the High Court framed their respective issues for determination by the judge. The appellant framed two issues whereas the respondent framed three. The issues were really one and the same though framed or put differently. Having carefully considered the issues framed by both parties as well as the evidence, the judge concurred with the parties on the framed issues and addressed them conclusively though within the scope of judicial review. It is instructive that the appellant in its written submissions has not pointed out any of the extraneous consideration(s) that influenced the judge's determination.

Coming to the proportionate, equitable and substantive justice also referred to as the "oxygen" or "double O2" principle advanced by the appellant in support of the appeal, all we can say is that this was not one of the grounds advanced by the appellant in support of its case in the High Court. It cannot raise it now in this appeal for the first time. We are by dint of Rule 104 of the rules of the court, to confine the determination of issues and/or matters that fall for determination by the court appealed from only.

Finally, though the respondent argues that the appellant was deemed to have knowledge of fraud by its agent as it did not contest the allegations of fraud and therefore ought to pay Kshs 133,000,000/=, in our view, it would be onerous, unfair and wholly unjustified to condemn the appellant to pay such grossly huge and colossal sum which translates to 100% increment in further penalties and interest on that basis when the principle sum demanded by the respondent has already been settled and acknowledged by the respondent. The matter has been in the court corridors since 2001 and to ask the appellant to pay the amount is tantamount to punishing it for seeking judicial intervention. It would be oppressive, unconscionable, punitive and unjust.

The upshot of all the foregoing is that the appeal lacks merit and is accordingly dismissed with costs to the respondent. However, the respondent is barred from demanding of the appellant payment of the sum of Kshs 133,000,000/= in penalties and further interest.

Dated and delivered at Nairobi this 12th day of October, 2018.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR