IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, MWILU & AZANGALALA, JJ.A.

CIVIL APPEAL NO. 34 OF 2008

BETWEEN

KENYA REVENUE AUTHORITY.....APPELLANT

AND

HABIMANA SUED HEMED……...……1ST RESPONDENT

ATTORNEY GENERAL……..……2ND RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Osiemo, J) delivered on 27th February 2006

in

H.C.C.C. NO. 364 of 2001)

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JUDGMENT OF THE COURT

1. **Introduction**

The Kenya Revenue Authority (the appellant) is a statutory body established as a body corporate under the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya, with perpetual succession, a common seal and is capable of suing and being sued.

Habimana Sued Hemed (1st respondent) has described himself in his pleadings as a person residing and conducting business "at Nairobi and outside of the Republic of Kenya". From his testimony in Court, it transpired that he was a Rwandese national engaged in the transport business and used to transport goods across the boarders from Mombasa to Kigali, Congo, Uganda, Tanzania, and other great lakes landlocked countries.

The 2nd Respondent, on the other hand, is the Honourable Attorney General of the Republic of Kenya, and is also a member of the Board of directors which is the governing body of the appellant established under Section 6 of the Kenya Revenue Authority Act (cap 469 Laws of Kenya).

2**. Background and brief facts**

From the pleadings and evidence adduced before the High Court, the 1st Respondent was contracted to transport 2 X 40 feet containers imported by M/s Zayed Ahmed, from Mombasa. These were container No. MAEU 231779-5 and container No. MAEU 713264-4 each containing STC 520 bales of second hand clothes and shoes.

The cargo was being cleared by a customs agent by the name of Trade-Point Freighters of P.O. Box 18527 Nairobi. The cargo was mounted on the trucks after the customs clearing agent had fulfilled all the customs formalities and was cleared to move the cargo in transit after having made the Transit Custom Cargo Manifest, Form C35A, Entry Serial Number 2282 relating to truck registration No. HZ 3213C /KV6710C and Transit Custom Cargo Manifest Form C35A, Serial No 2283 dated 15th September, 1998 for truck HZ 2693C/KV 3471C with Transit Entry C34 No. 1685 of 21st August, 1998. The authority to transport the cargo was granted by the appellant after the Clearing & Forwarding agent had executed sufficient security under Transit Bond No. GBNSB 4318/97.

It was the 1st respondent's evidence that the goods were transported in accordance with the law, procedures and regulations set out by the appellant, and that the goods exited from Kenya through the Isebania border point as confirmed by the appellant's Road Customs Declaration Forms C35A Nos 2282 and 2283 under the appellant's Customs Transit Entries (inwards) Nos. 1562 and 1685 duly executed by the appellant's Proper Officer at the Isebania Border point, confirming the exit of the goods from Kenya.

The 1st respondent testified that on 19th October, 1998, one of the trucks started developing mechanical problems after Mai Mahiu and the driver parked it off the road. They were found there by police officers who told them of the insecurity in the area at night, and prevailed upon them to drive the trucks to Tigoni Police Station for safe custody. The trucks were then driven to the Tigoni Police station voluntarily. His testimony was that they were neither arrested, seized, nor detained at the police station for any wrong doing.

It was his testimony that on receiving information that the trucks had been seized, he presented himself to Tigoni Police station to find out what had happened. It was then that he was served with copies of the seizure notices which he produced before Court as exhibits. He also told the Court that on enquiring about the whereabouts of his lorries, he was informed that they had been detained at Jomo Kenyatta International Airport (JKIA). He wrote to the appellant and the 2nd respondent praying for the release of his trucks but his letters did not elicit any response. Such letters were sent on 28th October, 1998, 13th April 1999, 10th June, 1999 and 16th September, 2001. He also lodged Notices of claim with the Appellant as provided for under the Customs and Excise Act (Cap 472 laws of Kenya) within 30 days from the time he got copies of the seizure notices. The notice of claim dated 27th November 1998, was not responded to and so the 1st Respondent was not informed within 2 months whether his claim was successful or not, as provided for under section 200 of Cap 472. After waiting for the response in vain he filed the plaint dated 8th August, 2001.

No.55650 PC Thomas K. Sigei, who testified as DW2 before the High Court testified that he was one of the Police Officers escorting the said trucks from Athi River weigh bridge police station to Isebania Border Post as was the practice. He confirmed to the Court that the trucks broke down on the way and so he and other officers escorted them to the Tigoni police station where they were parked. The witness told the court that the containers were intact when they handed them over to the officer on duty at the police station who then entered them in the Occurrence Book. He was emphatic that the trucks had not then been impounded, and they were not under seizure as at the time they took them to the police station.

From the evidence adduced before the trial Court, the drivers of the trucks had with them copies of Road Customs Transit Declaration Forms, C 35 number 2282 and Transit Entry Form C 36 Number 2283 both of 15th September 1998, together with Customs Transit Entry (Inwards) C 34 number 1562 and number 1685 both dated 15th August, 1998 which are indicated as Plaintiff's exhibit 5. These forms had been duly executed in accordance with the Customs laws and regulations by the appellant. The authenticity of these documents was later reaffirmed when they were certified as true copies of the entries on 26th May, 2001

by the appellant's officer at the Isebania border confirming that the trucks had indeed crossed the border into Tanzania.

Third Party Witness (TPW) 4 Zebedeo Onguti told the Court that he went to the Isebania border where he interviewed a customs officer who had made the entry in the register, one Samwel Otieno Oyoo, who confirmed to him that he was on duty on 9th October, 1998 and the goods passed through the border to Tanzania having been cleared by a KRA officer, one Mr. Musyoka, the examining officer and collector and entry made in the taxation register of 19th October 1998, document No. 13 indicating that the trucks passed through the border point. He also confirmed to the Court that the seals were intact when he saw the trucks at the Police station.

The said Samwel Pritt Otieno Oyoo, an officer of the appellant working at the Isebania Entry/Exit point, in a charge and caution statement taken by **TPW4** denied forging the register and reiterated that the entries he had made were genuine. According to Mr. Onguti, Mr. Oyoo had confirmed that the goods had passed through the boarder to Tanzania, and that they had been escorted by appellant's officers, including a Mr Musyoka, who was an examining officer.

Samuel Macharia, (DW5), an employee of the defendant, was on 28th October 1998, accompanied by **DW4**, Joseph Kanyitta Mugwanja, a Senior Superintendent of Police to Tigoni Police Station. His evidence was that he found the two trucks at the police station with their seals still intact. On enquiring where the owners were, he learnt that the trucks had been left there by Police Officers from Athi River Police Station under unclear circumstances, and that the whereabouts of the owners were unknown. Both trucks were confirmed to be empty. Mr. Macharia then decided to seize the 1st Respondent's trucks together with containers mounted on them, by issuing two notices of Seizure D. No. 031804 and D. No. 031805.

Both notices of seizure were addressed to Mr. Said Hamadi C/O O.C.S. Tigoni Police Station and stated that Truck No. HZ 2693C/KV 3471C with container No. MAEU 231779-5 DK 4310 mounted on it and Truck No. HZ 3213C /KV6710C with container No. MAEU 713264-4 mounted were empty.

The notices of seizure informed that the trucks were seized as they were liable to forfeiture on the grounds that they were suspected to have been used to convey uncustomed goods contrary to **section 196** as read with **section 184 of the Customs** and **Excise Act Cap 472 of the Laws of Kenya.**

Some people were arrested and taken to court where they were charged with several offences related to the said incident. We do not need to get into the nitty gritty of the said criminal charges but it suffices to state that the 2nd respondent herein entered a *nolle prosequi* dated 18th May, 1999 and the charges in question were dropped. The 1st respondent's trucks were however not released to him even as at the time of filing the plaint in March 2001, and were only released after the Court issued orders following a contested application by the 1st respondent filed on 11th July, 2002.

In his plaint, the 1st respondent sought the following orders as against **Kenya Revenue Authority** (appellant), and the **Attorney General** (2nd respondent).

a. *An immediate release of the two trucks/trailers Reg No. EZ 2693 C – KN 3471 and HZ 3213 C – KN 6710 C;*

b. *Payment of loss of income ;*

c. *General damages;*

d. *Costs of and incidental;*

e. *Interest thereon at the rate of 36% on loss of income from 28th October, 1998 until judgment and*

payment in full.

In paragraph 9 of the plaint, the plaintiff averred that his two trucks were being used for commercial purposes for transporting goods from Mombasa to Rwanda at the rate of 7,500US dollars per trip and used to make 4 trips in one month making a total of US dollars 60,000 per month.

In defending the claim, the appellant, through the firm of Twahir Alwi Mohamed Advocates filed a statement of defence dated 19th March, 2001 and denied liability. According to the appellant, the 1st respondent's trucks were seized because they were conveying uncustomed goods; and the seizure giving rise to the cause of action herein, was not therefore unlawful.

The appellant thus urged the court to dismiss the 1st respondent's claim with costs. On its part, the 2nd respondent filed its statement of defence dated 25th April 2001, and denied liability. It also raised the issue of the 1st respondent's failure to comply with the mandatory provisions of **section 13A of the Government Proceedings Act, Cap 40 of the Laws of Kenya**. It urged the court to dismiss the 1st respondent's claim with costs.

When the matter was listed for hearing, the 2nd respondent raised an objection *in limine* stating that the 1st respondent had failed to comply with the mandatory provisions of the Government Proceedings Act which required statutory notice to be served on the Attorney General before a suit is instituted against the Government.

The preliminary objection was heard by Mbaluto, J (as he then was), who in dismissing the same held that the issue could not be determined by way of preliminary objection, and that it was upon the 1st respondent to prove service of the notice at the hearing of the main suit. The issue was therefore deferred to be urged when the suit came up for full hearing. That ruling was rendered on 16th November 2001.

In an interesting turn of events, before the suit was fixed for hearing, the 1st respondent filed a notice of withdrawal of suit against the 2nd respondent pursuant to

Order XXIV Rule 1 & 2(2) of the Civil Procedure Rules (repealed), opting instead to proceed against the appellant as a sole defendant, an application that was allowed.

The appellant however decided that the 2nd respondent could not be let off the hook that easily and moved the Court by way of chamber summons dated 4th July, 2002 seeking to bring the Attorney General back to the proceedings as a Third Party, citing the need for apportionment of liability with the third party, so that the 3rd Party would indemnify the appellant in the event that damages are awarded against it. The application was allowed and so the 2nd respondent was dragged back to the proceedings, as a third party.

Eventually when the suit was determined in favour of the 1st respondent, the Attorney General found himself in the unfamiliar status of a respondent against an appellant, in whose Board of Directors he sits. We shall revert to this issue later when we address the issue of service of statutory notice on the 2nd respondent under the Government Proceedings Act.

3. **1st respondent's case**

Before the trial court, the 1st respondent testified and called two other witnesses in support of his claim. As stated earlier, he wrote several letters to the appellant and 2nd respondent asking for the release of his lorries. He produced before the court the letters dated 28th November, 1998, 13th April 1999, 10th June, 1999 and 16th January, 2001. He told the court that he had even offered to deposit Kshs 20 million as security for the release of his trucks to enable him continue with his business to no avail. He maintained that the goods crossed to Tanzania at Isebania on 10th October, 1998 as was evidenced by the documents

produced in court as Exh no. 5 and which we have referred to earlier on in this judgment. Those documents were authenticated by **TPW4,** MR Zebedeo Onguti, who went all the way to Isebania to carry out investigations into the matter.

On the issue of damages or loss suffered, he told the court that his trucks used to carry 45 tons each and he used to charge US 250 per ton, but from Mombasa to Congo, he used to charge US $ 11,150 for each vehicle and would be left with US $ 7,500 for each motor vehicle after deducting the expenses. He would make four trips per month which would translate to a profit of US $ 60,000 per month for the trucks. He said that he would also make US $ 6000 per trip per vehicle on the return trip to Congo, making a total of US dollars 24,000 plus the 60,000 totaling US $ 84,000 per month.

Rogers Kaleve (PW2) told the court that he was the 1st respondent's transport manager. He corroborated the 1st respondent's evidence to the effect that they used to make US dollars 7,500 per one way trip and 6,000US dollars on the return trip to Congo.

His evidence on the figures corroborated that of his employer's. We should point out however, that during the hearing of this appeal, there was a discrepancy in figures pointed to us at page 291of the record indicting US $ 17,500 instead of 7500. This was nonetheless sufficiently explained by learned counsel for the first respondent as a typographical error. We note that the said figure appears only once, and the totals are actually pegged on 7,500 and so we agree that the said figure was not an exaggeration or contradiction, but a genuine typographical error which was sufficiently explained. His other witness was **Peter Kinyua Mundechu (PW3)**. His evidence was quite non-contentious and was to the effect that he used to source business for the 1st respondent on commission basis. A total of eight (8) witnesses testified for the appellant, while the 2nd respondent who was the 3rd party called a total of seven witnesses.

We have touched, albeit briefly, on the evidence of some of the witnesses earlier.

4. **Appellant's case**

Basically the appellant's witnesses' evidence was as follows:-

P.C. Patrick Lemetek (DW1) was one of the Police Officers who escorted about 20 transit trucks from Mariakani Weigh Bridge to Athi River weighbridge on 20th September, 1998. The 1st respondent's two trucks which are subject of this appeal were among the twenty trucks. He told the court that the two trucks developed mechanical problems. They were repaired and continued on their journey. On 21st

September 1998, he and other officers escorting them handed them over to police officers at the Athi River Weigh Bridge; among them was **DW2 – P.C Thomas Sigei.**

He narrated to the Court how he and others escorted the trucks from Athi River upto the point they drove them to Tigoni Police Station at about 6.30 pm after the trucks developed other mechanical problems at Maai Mahiu. He had the trucks details and circumstances entered in the Occurrence Book, and left for Athi River. He confirmed to the Court that the trucks were not impounded and they were not under seizure. He handed over the documents pertaining to the trucks to the OCS, one IP Mutiso.

When he saw the trucks again on 28th October, 1998 or 29th October 1998, they were empty and the seals had been removed. Some police officers from Tigoni Police Station were arrested and charged with several offences but he never got to testify in the case as the same was withdrawn before he could testify.

DW3 (David Kimeli Ngetich – SP) informed the court that he was the one in charge of the police officers who were doing escort duties for trucks carrying transit goods. He was called on 23rd October 1998 and informed that there was a problem with some of the trucks which his officers had escorted earlier and they were parked at Tigoni Police Station. He proceeded there. He told the court that when the containers were opened, they were found to have been empty. He did not investigate the matter but stated that he was informed by the late IP Mutua that the goods had been stolen from the police station, but that

evidence would certainly be hearsay as the said Mutua did not testify to that effect. We had earlier on covered the evidence of

DW4 Joseph Kanyitta Mugwaja and **DW5 Samuel Karanja Macharia** and it does not bear repeating the same. It was Mr. Macharia's evidence that after issuing the Seizure Notices, he left the matter in the hands of Mr. Zebedeo Onguti.

DW6 IP John Wafubwa was working at KRA in the revenue protection services on secondment. His evidence was to the effect that he joined the investigating team of M/s. Onguti, Ngetich, Macharia and CIP Mugwanja at Tigoni Police Station and was present when the Seizure Notices were issued. He was also present when the trucks were opened and confirmed to be empty. He also signed the Seizure Notices which according to him were sent to the owner of the trucks. He then left the investigations to Zebedeo Onguti **(TPW4)** and his team.

Zebedeo was the main witness for the third party. He was a Senior Deputy Commissioner of Police. His evidence was essentially a summary of what the other witnesses stated. He told the Court that he perused the O.B. entry No. 16 of 20th October, 1998 to confirm the circumstances under which the said trucks had been detained at the police station. He told the Court that as at the time he saw the trucks, the seals were intact. However, when they opened the containers, they found them to be empty. Zebedeo Onguti confirmed that he interviewed and also recorded a statement from Samwel Otieno Oyoo, an officer of the appellant, at the time working at the Isebania border point, who confirmed that the Declaration Entry Forms had been processed by Mr. Musyoka, the Examining officer and collector on 9th October, 1998.The register also confirmed that the goods and trucks had passed through the Isebania customs border point to Tanzania.

On his part, **TPW6** CIP Peter Mabeya, told the Court that on the instructions of the DCIO Kiambu, he proceeded to Tigoni police station 25th October, 1998, where he confirmed the presence of the two trucks which had foreign registration numbers. In the course of investigations, he proceeded to Western Kenya and on arrival at Eldoret went to Sosiani Hotel where he found 4 trucks registration numbers KAC 182F, KAC 184F KAC 064Z and KAC 423B. It was his evidence that the 4 trucks were carrying second hand clothes, and he therefore arrested them together with their drivers and turn boys on suspicion of transporting transit goods which had been diverted to the local market.

From both the charge sheet and the evidence on record, on completion of the criminal investigations, seven (7) persons on the 16th December, 1998 appeared before the Principal Magistrate's Court at Kiambu in criminal cases Nos 2498 and 2511 of 1998, where they were charged with stealing goods on transit contrary to section 279 (C) of the Penal Code, Cap 63 of the Laws of Kenya. As stated earlier on in this judgment, the details of that case do not concern us for purposes of this judgment, and we shall not therefore delve into the same. This is more so because the 2nd respondent entered a *nolle prosequi* dated 18th May 1999, in the criminal case and there were therefore no findings of culpability made against any of the parties herein.

5. **Summary of Judge's findings.**

After considering this evidence adduced before the Court and the written submissions filed by learned counsel for the respective parties, the learned Judge rendered a153 page judgment which is now the subject of this appeal.

In the judgment, the learned Judge found that the acts of the appellant *"of searching seizing and detention of the Plaintiff's trucks were unlawful and without legal foundation or just cause"*

The Learned Judge found the claim on loss of income proved and awarded, under prayer (b), US$ 84,000 per month, or its equivalent in Kenya shillings, to be calculated from 28th October 1998, till August 2002, when the trucks were released; Ksh5, 000,000 as general damages with interest at the rate of 18% from 28th October, till payment in full; and costs of the suit.

6. **The Appeal**

Aggrieved by that judgment, the appellant filed this appeal in which it has proffered 18 grounds of appeal as hereunder:–

1. *The learned Judge erred in law and in fact by awarding the 1st respondent herein special damages, which damages were neither specifically pleaded nor proved.*

2. *The learned Judge erred in law and in fact by failing to determine apportionment of liability, if any, as between the 1st respondent and the 2nd respondent herein.*

3. *The learned Judge erred in law and in fact by failing to find that the 1st respondent herein irregularly instituted the proceedings in the superior court contrary to the provisions of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya and the Government Proceedings Act, Cap 40 of the Law of Kenya.*

4. *The learned Judge erred in law and in fact by failing to find that the proceedings as instituted were fatally defective for being contrary to the provisions of Section 3(2)(a) of the Kenya Revenue Authority Act, Cap 469 of the Laws of Kenya as read together with Section 16 of the Government Proceedings Act, Cap 40 of the Laws of Kenya.*

5. *The learned Judge erred in law and in fact in making a finding that the 1st respondent submitted a claim under the provisions of Section 200(4) of the Customs and Excise Act, without any evidence to that effect.*

6. *The learned Judge erred in law and in fact in awarding the 1st respondent damages and costs contrary to the provisions of Section 212(3) of the Customs and Excise Act, Cap 472 of the Laws of Kenya.*

7. *The learned Judge erred in law and in fact by introducing, in his judgment, extraneous evidence, which was never adduced at the hearing by the appellant, the 1st respondent or the 2nd respondent.*

8. *The learned Judge erred in law and in fact in failing to find that the Kenya Police Force under Section 14 of the Police Act, Cap 84 shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders and the enforcement of all laws and regulations with which it is charged.*

9. *The learned Judge erred in law and in fact in not finding that evasion of payment of customs duty is a crime under the Customs and Excise Act, Cap 472 of the Laws of Kenya, which invites police intervention.*

10. *The learned Judge erred in law and in fact in holding that the Customs and Excise Act is not one of those laws and regulations with which the police force is charged and further holding that a Police Officer or any other investigative agency cannot enforce and or purport to perform the functions of a proper officer and yet Sections 173 and 174 of the Customs and Excise Act, Cap 472 recognizes an "Officer" also to include a Police Officer.*

11. *The learned Judge erred in law and in fact in holding, without any basis, that it is settled law that where other statutes are in conflict with tax law, the tax law prevails.*

12. *The learned Judge erred in law and in fact in holding that the powers and duty to investigate matters under the Customs and Excise Act are the exclusivity of the Commissioner or Officers appointed under Section 3 of the Customs and Excise Act.*

13. *The learned Judge erred in law and in fact in holding that Section 70 of the Finance Act 1998 was unconstitutional and therefore null and void, when the constitutionality or otherwise of Section 70 of the Finance Act 1998 was not before him for determination, and when again the learned Judge was not sitting as a Constitutional Court.*

14. *The learned Judge erred in law and in fact in holding that efforts to get the appellant's investigations file in respect of the two trucks produced before the court failed while in fact evidence was led to the effect that the appellant or its officers were never involved in any investigations, but the 2nd respondent's officers did.*

15. *The learned Judge erred in law and in fact by concluding that there existed no statutory duty authorizing the appellant or anyone else to search, seize or detain the 1st respondent's trucks.*

16. *The learned Judge erred in law and in fact by finding that once the appellant authorizes or orders or accepts that a thing be done in a certain manner, that decision authority or order cannot be interfered with by the police and more so in view of Section 233 of the Customs and Excise Act.*

17. *The learned Judge erred in law and in fact in holding that the appellant's Commissioner General is a Director of the Appellant's Board.*

18. *The learned Judge erred in law and in fact in holding that the goods ceased to be unaccustomed goods after the appellant demanded and received consideration equal to the taxes which would have been due for the goods that the plaintiff was transporting.*

When the appeal came up for hearing on 24th November, 2014 the court gave directions that the appeal be disposed of by way of written submissions with leave given for counsel to highlight their submissions. The submissions along with the list of authorities were duly filed and the matter came up for highlighting on 13th May, 2015. On that date, learned counsel Mr. Julius Juma held brief for Mr. Steve Lingunya for the appellant while Mr. Mbiriri Nderitu held brief for Dr. Kariuki Muigua for the 1st respondent, and Mr. Waigi Kamau appeared for the 2nd respondent.

Due to the complexity of the matter, the several provisions of both the KRA Act (Cap 469, Law of Kenya) and Cap 472 relied upon, which have been amended severally since 1998 when the cause of action herein arose, and which learned counsel needed to take us through, we were unable to cap the highlighting as earlier on directed and this turned out to be a considerably long appeal.

7. **Appellant's submissions**

In urging the appeal, Mr. Juma condensed the 18 grounds of appeal into six broad categories. On the first cluster, he submitted that the proceedings before the High Court proceeded in contravention of the KRA Act, the Customs and Excise Act and the Government Proceedings Act. That category covered grounds 3, 4, and 13 of the memorandum of appeal. He urged that **Section 3(2) of the KRA Act** (as amended) imports the provisions of Government Proceedings Act (Cap 40) into the KRA Act. The said amendments, incorporated vide Act No.5 of 1998 states that:-

> *"Any legal proceedings against the authority arising from the performance of the functions or the exercise of any of the powers of the authority under Section 5 shall be deemed to be legal proceedings against the Government within the meaning of the*
>
> *Government Proceedings Act."*

It was the appellant's contention both in the High Court and in this Court that the proceedings before the High Court were not compliant with **Section 13A of the Government Proceedings Act** and therefore, they were a nullity. We shall deal with this after considering the submission on this very important issue by learned counsel for the respondents. We may however wish to point out here that the learned Judge is

faulted for declaring **section 3(2) (a) of the KRA Act** as amended by **Section 70 of the Finance Act** unconstitutional. The main reason learned counsel for the appellant cudgeled this finding is because the same was made before the promulgation of the Constitution of Kenya 2010.

Again, we shall delve into this issue later after considering the other submissions. We however, observe that if we uphold the appellant on the issue of non-compliance with the requirement to issue statutory notice, then this appeal will be determined on that issue only. If we find otherwise, then we shall proceed to consider the other germane issues raised in the appeal.

This brings us to the second cluster of the appellant's grounds of appeal. On ground 5, the learned Judge is faulted for failing to find that the 1st respondent did not make his claim within one month of service within the meaning of **Section 200 of Cap 472**. The contents of this provision are not in dispute. Where the goods are seized, the Notice of Seizure should be given within one month of seizure. It was not disputed either, that the law (**section 200 (4)**) requires that the notice of claim if any be given within one month. It was learned counsel's submission that in this case, the 1st respondent admitted that he was aware of these regulations but stated that he only 'learnt' of the seizure after one month. He urged that the first letter of claim from the 1st respondent was dated 27th November, 1998 and was received on 30th November, 1998. The seizure notices were issued on 28th October 1998. The appellant's argument is that the letter in question was written outside the one month and was not therefore valid.

- For the 1st respondent, it was urged that even if the court were to find the said notices valid, which the 1st respondent insists they were not, the letter of claim was made within one calendar month, and therefore the appellant's contention would still not hold water. We shall revert to this issue later.

On the 3rd cluster, which was made up of grounds 8, 9, 10, 12 and 15, counsel faulted the learned Judge for finding that a police officer acting within Cap 84 (the Police Act) has no role in enforcing the provisions of Cap 472, and that enforcement of that Act is exclusive to customs officer. Counsel referred the court to **Section 2 of Cap 472** which defines an officer under the Act.

The Act defines an 'officer' to include,

> *"any person, other than a labourer, employed in the service of the customs for the time being performing duties in relation to the customs."*

According to the first respondent, ordinary police officers in the normal course of their duties cannot enforce the provisions of Cap 472.

The 4th issue was on the award of special damages, which is covered under ground one. According to the appellant, there was no claim for special damages and none were proved, and that the figures awarded had not been pleaded. As countered by learned counsel for the 1st respondent, the said figures are pleaded and prayed for under paragraph 9 of the plaint, as appears in our summary of the evidence earlier on in his judgment. We shall revert to this issue later.

According to the appellant, the learned Judge had misdirected himself in awarding damages for the period after the *nolle prosequi* had been entered. From the record however, even after the *nolle prosequi* was entered, the appellant continued detaining the trucks in question until the 1st respondent had to seek orders of release from the Court. Those proceedings, the release order and the execution of the same are clearly on the Court record and we do not need to belabor them.

It was counsel's submission also that under **Section 212(3) of Cap 472**, neither general damages nor costs are recoverable against the 1st respondent.

Lastly, the appellant pointed out several inconsistencies in the 1st respondent's evidence and that of his witness **(PW2)** particularly in computation of damages. In our earlier summary, we highlighted the

inconsistency in figures referred to, which we find was sufficiently explained. Counsel summed up his submissions by urging us to reconsider and re-assess the evidence on record, but directs us to only one conclusion i.e that the learned judge erred in his findings and we should therefore allow the appeal and set aside the judgment.

Indeed, we are alive to our duty to re-analyse and re-evaluate the entire evidence adduced before the trial court as commanded by **Rule 29(1) of this Court's Rules.** That is a sacrosanct duty which we have observed through the years as manifested in cases like **Selle vs Associated Motor Boat Company Limited**, **Mwangi vs Wambugu (1984) KLR 453** and a litany of many others.

What learned counsel fails to say however, is that having re-analysed this evidence, we are supposed to arrive at our own independent decision which may or may not agree with the judgment of the High Court; or which would agree only in part with the said judgment.

In his oral highlighting of the written submissions, learned counsel amplified the grounds as summarised above and referred us to his list of authorities which we shall advert to later. He took us through the law and the procedure to be followed after goods have been seized. He asserted that the claim was not filed in time. He nonetheless was unable to find any notification from the commissioner of customs informing the owner to file suit within two months of filing his claim, after the claim failed.

8. **Respondents' submissions**

The 1st respondent's submissions were filed in court on 9th December 2014 in response to the appellant's submissions.

On his part, Mr. Waigi Kamau, learned counsel for the 2nd respondent, only wished to challenge the grounds of appeal – namely 8, 9, 10, 12 and 15 which seek to apportion liability between the two respondents. It was the appellant's contention that the trucks were seized by the appellant at the behest and instance of the 2nd respondent, and therefore if the court finds the appellant culpable, then such culpability should be shared between the appellant and the 2nd respondent.

The 2nd respondent denies any culpability and relied on the exposition on the law on 3rd party proceedings as pronounced in the time honoured *locus classicus* case of **Birmingham and District Land Company vs London and North Western Railway Company [1986] 34 Ch D261** where Chitty J expressed himself as

follows:-

> *"…it is not enough that if a plaintiff succeeds, the defendant will have a claim for damages against the 3rd party, but the defendant must have against the third party a direct right to indemnify as such, which right must generally, if not always arise from contract, express or implied…"*

He also relied on the case of **Eastern Shipping Co. vs Quah Bang Kee [1924] AC 177.**

The pith and substance of counsel's submissions was that the 2nd respondent had not ordered the seizure and detention of the 1st respondent's trucks, but that the same was done by the appellant's officers. Learned counsel submitted that it was the duty of the appellant to satisfy itself that an offence had been committed before forwarding the matter to the 2nd respondent for prosecution. His position was that the police officers involved in the matter investigated and prosecuted the criminal case under the professional authority, direction and guidance of the appellant, and the appellant must therefore be held vicariously liable for the actions of the police officers who acted under the direction of the appellant.

He submitted further that indeed the 2nd respondent had entered a "*nolle prosequi*" in the

criminal case, which was within its constitutional mandate.

Thereafter, it was incumbent upon the appellant, who had the custody of the trucks to release them to the 1st respondent, but the appellant refused to do so.

In a nutshell, the 2nd respondent neither seized, nor detained the 1st respondent's trucks maliciously or otherwise and so there was no blame or liability on them to be apportioned. Wrapping up his submissions, learned counsel agreed with the trial Judge's findings that:-

> *"neither the Commissioner of Police nor the Attorney General has been proved to have done anything which can be considered as a cause of action against the appellant."*

The issue of indemnifying the appellant did not therefore arise. He urged us to dis miss the appeal.

9. **Appellant's reply to respondent's submissions**

In response to these submissions, Mr. Juma reiterated that the 1st respondent had not proved the special damages. He also maintained that there was really not much difference between the word "suspected" and "reasonable belief" used in the seizure notices. He entreated us to allow the appeal.

We have considered carefully all the evidence adduced before the trial court, the memorandum and entire record of appeal and the written and oral submissions of all counsel in this matter, and the list of authorities availed to us. As stated earlier on, we are enjoined by law to reconsider all this evidence afresh, and come up with our own independent decision. We shall then conclude whether the learned trial Judge arrived at the right decision or whether we shall need to upset his judgment, now impugned.

From all this material, we have narrowed down the pertinent issues for determination that are capable of determining this appeal as follows:-

1. *Were the proceedings before the trial court properly, regularly, and procedurally properly before the court?*

   Under this head, we shall deal with the issue of service of the statutory notices on the appellant under sections 3(2)(a) of the KRA Act; and on the Attorney General under Section 13A of the Government Proceeding Act – whether these provisions are unconstitutional as found by the trial court.

2. *Whether the Seizure Notices were valid and compliant with the relevant provision of Cap 472 Laws of Kenya – whether they were served on the 1st respondent as stipulated in the law.*

3. *Whether there was compliance with Sections 202(1) of Cap 472 (before the amendment by Act No. 4 of 2004; was the 1st respondent time barred in filing his claim?*

4. *The role of the 2nd respondent in the whole "saga" or case?*

   Was the Attorney General responsible for the arrest and detention of the 1st respondent's trucks? Did the police, on whose behalf the 2nd respondent acted, issue the seizure notice?

5. *This will naturally flow into the issue of whether the 2nd respondent was properly brought on board as a third party.*

   Was statutory notice necessary before joining the 2nd respondent as a third party?

6. *The 2nd respondent's culpability and whether liability ought to be apportioned between the*

respondents in the event the appeal fails.

7. *Lastly, the issue of damages. Were they specifically pleaded and proved*.

The resolution of these issues will determine the ultimate fate of this appeal.

10. **Statutory notices**

This issue is two pronged. The first prong is the one in respect of service on the Attorney General under **Section 13A of the Government Proceedings Act**. This was the issue which was raised before Mbaluto J. and which was dismissed at a preliminary stage. The preliminary objection was raised by learned counsel for the 2nd respondent claiming that the Attorney General had not been served with the 30 day statutory notice. The 1st respondent alleged that the notice had been served. The learned Judge after hearing both parties held, and rightly in our view, that the issue of whether notice had been served or not was not conceded and was subject to proof by way of calling evidence.

In that case therefore, the preliminary objection fell outside the parameters set out in the *locus classicus* case of **Mukhisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**.

Unfortunately, before the issue could be canvassed at the hearing as had been anticipated by Mbaluto J, the dynamics changed and the 2nd respondent was removed from the proceedings. The opportunity for the 1st respondent to prove service was therefore not availed. What is interesting however is that the appellant brought back the 2nd respondent into the proceedings as a third party without having itself served the notice under **Section 13A of Cap 40**. This in our view was a tacit admission by the appellant that the requisite statutory notice on the A.G. had been served.

From the 1st respondent's plaint, it is clear that the Attorney General who was the 2nd defendant was sued as the *"state legal officer who is authorised and in whose office all litigations (sic) involving the Government or its employees are vested, prosecuted and defended…"*

Though not perfectly drafted or articulated, it is clear that the 1st respondent was suing the Attorney General in his capacity as the legal advisor/ representative for the Government in Legal Proceedings, more particularly as provided under **Section 26 of the retired Constitution**, which the learned Judge referred to in his judgment. The 2nd respondent was sued as the legal representative of the appellant. That being so, the only inference the court can make is that indeed the Attorney General had been served.

From the plaint, it is clear that there was no claim made against the Commissioner of Police. The claim was against the appellant who according to the 1st respondent were solely responsible for seizing and detaining his trucks. As submitted by learned counsel for the 1st respondent, it was expected that the appellant would be represented in the proceedings by the 2nd respondent. That ideally is the rationale behind serving the Attorney General under **Section 3(2) (a) of Cap 472.**

Instead of acknowledging this, the appellant went ahead and instructed the firm of Twahir Alwi Mohammed, who filed a defence on 19th March 2001, on their behalf. This was contrary to the letter, intent and spirit of **Section 3(2) (a) of Cap 472,** and left 2nd respondent with no role to play in the proceedings, hence rendering its continued presence in the proceedings superfluous. This course ultimately led to the application of its withdrawal from the proceedings as indicated earlier on. According to Mr. Mbiriri, the statutory notice on the Attorney General had been issued in the manner required under **Section 13A** of the Government Proceedings Act.

What was not clear from the appellant's submissions is why, in spite of compliance with the notice and the Attorney General entering appearance, they decided to instruct another counsel to represent them in these proceedings even after the Attorney General, had been sued pursuant to section 3(2) (a) of Cap 469. From the foregoing, our finding is that the requisite notice had been served on the Attorney General as

submitted by the 1st respondent. That notwithstanding however, it is important to address the constitutionality of **Section 3(2) (a) of the KRA Act**, given the confusion it brought into this matter.

The learned Judge found the said provision unconstitutional. According to the Judge, and we agree with him, the appellant is a body corporate with capacity to sue and be sued, and it has its own corporate seal different from that of the Government of Kenya. If therefore it had capacty to sue and be sued, why would it want to drag the Attorney General into its proceedings every time there is an alleged breach of the law on its part? The learned Judge found the issuance of the 30 day statutory notice to KRA before one can institute suit anti-business and oppressive. The learned Judge gave some practical examples as to why such a law is oppressive. We do not wish to revisit these examples, but we agree that due to the nature of work, and responsibilities bestowed on the appellant, and the immense discretion the Commissioner of the appellant has, it is necessary that a party who finds itself on the wrong side of the appellant would be greatly prejudiced if they are shackled from accessing justice for a minimum of 30 days.

There is no better example than the one presented in this case. Seizure Notices are issued (whether valid or not); trucks are impounded; letters for their release are sent to the appellant and the same are not even acknowledged; the 1st respondent even offered to deposit security for the release of the trucks, but the appellant remained mute; yet even then, he must give 30 days' notwithstanding that the breach by the appellant was continuous?

What was the intention of the legislature when it enacted **Section 13A** of Cap 40? This was succinctly spelt out by this Court in **Civil Appeal No. 308 of 2005, Kenya Revenue Authority, Customs and Excise Department vs Euroleaf Corporation** as

follows:-

> *"Notice under Section 13A(1) of the Government Proceedings Act enables the Attorney General to determine which Ministry of Government Department is complained against so that he can seek an explanation and perhaps remedy the situation and obviate Court Action which would otherwise be costly to the Government."*

We are only borrowing this explanation from the Euroleaf case, because those words were relevant in 1998 as they are today.

There is only one Kenya Revenue Authority. If the Commissioner or any other of its officers or employees breaches the law, clearly, the aggrieved party knows who to sue. There cannot be any confusion. There would therefore be no need to serve the Attorney General for him to forward the complaint or statement of claim to KRA.

We hold the view that the Kenya Revenue Authority is not an organ of the Government as contemplated under the Government Proceedings Act.

There are three arms of Government, and they are clearly defined and recognized universally over the ages. We do not need to redefine them here. Kenya Revenue Authority collects taxes for the Government, and they do a good job of it. It is nonetheless an autonomous, corporate, statutory body specifically with power to sue and be sued. The appellant cannot hide behind the cloak of the Attorney General when it is accused of breaching the law or otherwise violating people's rights purely in order to take advantage of the 30 days statutory notice!

It would be ridiculous, nay, fallacious even, for one to imagine that KRA would be immunized, or shielded by the law against issuance of injunctive orders against it, even where such orders are merited and may be necessary for preservation of property, and protection of peoples' fundamental rights as happens many times.

We cite with approval the words of Mbogholi Msagha J in **Gurdoba Enterprises Limited vs Kenya Revenue Authority** (civil case No. 676 of 1998), where he opined that;

> *"Kenya Revenue Authority …must submit itself to the rigors of litigation and stop operating under the shadow of the Government when it comes to legal proceedings."*

Ojwang J (as he then was) faced with a similar situation in **Menginya Salim Murgani vs Kenya Revenue Authority,** HCCC No. 1139 0f 2002) was of similar persuasion when he stated in reference to the appellant:

> "*the body parliament intended was a responsible and accountable one , empowered to discharge its legal obligations without resorting to reserved privilege when obligations fall upon it*".

These two decisions, together with Osiemo J's impugned decision, though coming from the High Court are good law, which we hereby endorse.

In our view, **Section 70 of the Finance Act 1998** is mischievous, and only meant to enable the appellant steal a match against persons who have claims against it. The provision is not unconstitutional by virtue of the enactment of the Constitution of Kenya 2010, or because this Court said so in the Euroleaf Case (supra). The same was unconstitutional even before as it trampled on the rights of those who found themselves on the opposite/wrong side of the appellant. It carried with it unmitigated prejudice and discrimination as explained by the learned Judge in his judgment. The learned Judge envisioned the right of unfettered and speedy right to justice, even before the same was codified in the Constitution of Kenya 2010.

Even though we are satisfied that the requisite statutory notice was served, we do not fault the learned Judge on his finding that the said provision was unconstitutional. We therefore come to the inevitable conclusion that the proceedings before the High Court were regular, procedural, and properly before the Court.

11. **Validity of the seizure notices**

This brings us to the second issue. From the evidence adduced before the trial Court, throughout the pleadings, evidence and the judgment, we find that there is no definite answer as to whether the goods transported by the 1st respondent's trucks had any link with those seized at Eldoret. **TPW1** Julius Kamau in his evidence states that some second hand clothes were offloaded by some trucks at his godown at Kamandura and the seals cut from the containers were found in his compound. When this information was received by **TPW4,** Zebedeo Onguti, a Senior Deputy Commissioner II, he deployed **TPW6,** CI Peter Mabea, to conduct investigations. He proceeded to Western Kenya and at Eldoret found four locally registered lorries on 26th October, 1998 with 666 bales of mitumba which he impounded on suspicion of transporting transit goods.

In his judgment the learned Judge of the High Court addressed this issue and after considering the evidence before him, concluded that the seals found at the godown of **TPW1,** Julius Kamau, at Kamandura tallied with the seals used on the containers loaded on the trucks held at the Kabete Police Station. This conclusion notwithstanding, we find that the lorries and second hand clothes seized by TWP6 CI Mabea were the subject of the criminal case at the magistrate's court in Kiambu which, as stated earlier, was terminated by the Attorney General entering a *nolle prosequi* dated 18th May, 1999.

In his evidence **DW5,** Samwel Macharia, the appellant's investigating officer who seized the 1st respondent's trucks, confirmed that at the time he seized the trucks on 28th October 1998, the seals on both containers loaded on the trucks were still in place confirming that the seals found at **TPW1**'s godown have no relation with the seals relating to the containers transported by the 1st Respondent. Further, Samwel Otieno Oyoo confirmed that the 1st Respondent's trucks crossed the border intact and were recorded in the register as required. This evidence has not been controverted.

TPW4, Zebedeo Onguti, personally travelled to Isebania on investigation to ascertain whether the 1st

respondent's trucks indeed crossed the border and confirmed that the trucks crossed the border with the cargo intact. The appellant also later certified that the 1st respondent's trucks had crossed the border at Isebania customs border point.

From the foregoing facts and evidence on record which is uncontroverted, we find there is no nexus or any connection between the second hand clothes transported by the 1st respondent's trucks and those seized at Eldoret. Therefore, there is certainty that the 1st respondent's trucks transported the cargo in a manner required under the law and hence were not liable for seizure as they did not at the material time transport uncustomed goods.

In this case, as explained earlier on, the evidence before officers of the appellant showed that the goods had crossed the Isebania boarder. They only "suspected" that the trucks had ferried uncustomed goods but had no reasonable basis to conclude so. Indeed, the seizure notices themselves use the word "reasonable grounds to believe". This was a clear admission by the appellant that there were no reasonable grounds to cause them issue the notices. It appears that they did so in haste without considering the repercussions or ramifications these seizures would have on the owner. There was evidence also that when they were opened, they were found to be empty. There was evidence (as we have analysed earlier) that documents were produced in Court as evidence that the goods had crossed the Isebania Boarder. Samuel Pritt Otieno Oyoo, an officer of the appellant, denied that the documents were forged.

The appellant cannot be allowed to run away from its own documents as under Section **208 (e),**

> "*the production of a document purporting to be signed or issued by the Commissioner or any person in the service of the Government shall be prima facie evidence that the document was so signed or issued."*

Section **208(f)** is also instructive as the documents relied upon to show that the goods had exited through the Isebania boarder were all signed by officers of the appellant and kept in their custody.

As submitted by learned counsel for the 1st respondent, the trucks were seized merely on 'suspicion' of being used to convey uncustomed goods. Learned counsel for the 1st respondent faulted the notices saying that seizure notices can only be issued when there are reasonable grounds and not on suspicion as was the case here.

Mr. Juma, for the appellant seemed to suggest that there is no difference between "reason to suspect" "and reason to believe" when it comes to seizure. The 1st respondent however made heavy weather of it and cited to us some two authorities from the Supreme Court of India.

We have considered the said authorities, for their persuasive value. The terms may appear similar and their effect non-consequential. In legal connotations however, they are not quite the same. Reason to suspect carries a lighter weight than reasonable grounds to believe. When it comes to seizure, it comes with deprivation of property, which if unlawfully done violates a person's fundamental right to own property. Before one's property is taken away from him/her therefore, the authority seizing the same must be satisfied that there is some breach of the law committed, and not mere suspicion.

To that extent therefore, we find that the seizures were not compliant with **Section 199(1) of Cap 472.**

This brings us to the issue of service. This was not seriously contested. After the notices were issued, they were left with the OCS Tigoni Police Station. We touched on this issue earlier. It is not disputed that the seizure notices were issued on 28th October, 1998. It is not contested that they were left at the Police Station. There was actually no attempt made to serve the owner.

Under Section **200(1)** (before the amendment), the person seizing the item **must** serve the notice within one month of the seizure. The procedure on service of the seizure notice to be followed upon seizure, is clearly articulated in section **222 (2)** of **Cap 472.** There was no compliance whatsoever with those

requirements. It was the 1st respondent's evidence that he was not served and only got the notices when he presented himself to the police station, much later to enquire as to why his trucks had been seized.

After he got the notices, he wrote the first letter of claim to the appellant and the 2nd respondent on 28th November 1998, but received no response. It is not clear when the 1st respondent got these notices but that in our view is not important since non-compliance with the law pertaining to service is stipulated/ acknowledged. It is clear also that even after receiving the said letter, the appellant never wrote to the 1st respondent as required under the law as it was then, to inform him that his claim had not succeeded, and therefore require him to institute suit or institute the suit itself as required under **Section 202(2) of the Cap 472.**

We therefore find that the Seizure Notices were not served on the 1st respondent as by law required.

This Court, in upholding the decision of Lenaola, J in **Kenya Revenue Authority vs Rajendra Sangeni [2006] eKLR,** reiterated that where the comissioner of the appellant fails to comply with these provisions, then the seized items must be released to the owner. Clearly, these trucks should have been released to the appellant two months after 28th November, 1998.

The appellant may argue that there was a criminal case in which the trucks were required as Exhibits. That did not absolve the appellant from responding to the 1st respondent's claim as provided for in law. Indeed, in all fairness, the least the appellant could have done was to release them after the criminal case was terminated. It did not have to take court intervention, four years down the line to have the trucks released.

12. **Role of second respondent**

On the role of the 2nd respondent in the seizure, we hold that the seizure notices were issued by the appellant's officer Mr. Macharia, and not by the police officers.

The 2nd respondent is not therefore, culpable in this case. Indeed, as stated earlier, the joinder of the Attorney General as a 3rd party was most unprocedural, given that the Attorney General had been sued in compliance with **Section 3(2) (a) of Cap 40**. The issue of apportionment of liability does not therefore arise.

13. Award of damages

This brings us to the last issue on the question of damages. Were they specifically claimed and proved?

As observed earlier on the damages were pleaded in the body of the plaint at paragraph 9, where the 1st respondent claimed 60,000 US dollars. In his testimony in court, the 1st respondent and his witnesses explained how they came about the said figures. Their testimony was that each truck used to make US $ 11,150 per trip but after deducting the expenses, and nett profit of US $ 7500 would be left for the 1st respondent. Each truck used to make four tips in a month and so the two trucks used to make US $ 60,000 net.

In their testimony, they said that the lorries used to ferry back spices and other items to Rwanda at US$ 1,200 per truck per month – amount to an extra US $ 24,000 per month. This is the figure the learned Judge added to the 60,000 US dollars pleaded in paragraph 9 and awarded.

Before we go further, we find that this amount having not been pleaded ought not to have been allowed. This is in line with the case of **Hahn vs Singh [1985] KLR 716,** cited by learned counsel for the appellant, and many other decisions of this Court.

As rightly submitted by counsel for the appellant however, in recent times, courts have adopted a more

lenient approach and allow special damages to be proved provided that the existence of such a claim is manifest from the pleadings. In this case, the US$ 60,000 was clearly pleaded and so the appellant was not ambushed. The extra amount of US $ 24,000 which was not pleaded is what could have ambushed the appellant and we have disallowed that claim.

The contradiction in the figures was explained and resolved earlier on and we do not need to repeat it. There was a contract agreement produced in court to illustrate the amount of money the 1st respondent's trucks used to earn per trip. The same was dated 5th June 1998, and was to be valid for one year. Learned counsel for the appellant has submitted that it was wrong for the court to consider the same as it pre-dated the seizure of the truck.

We note however, that the said agreement was meant to be valid for one year and so it was still valid in October when the 1st respondent's trucks were seized. We hold the view that the same was relevant and the learned Judge was in order to accept

it as proof of the amount claimed.

Counsel for the appellant also submitted that the trial court erred in awarding damages for the period before the *nolle prosequi* was issued, saying that the trucks were lawfully held during the pendency of the criminal case. We have found that the seizure itself was in flagrant breach of the law, and totally unjustified. This being so, the learned Judge was right in considering that period.

On whether the appellant can be condemned to pay damages and costs, the Court notes that **Section 212(3) of Cap 472** is not a licence for the appellant to run roughshod on individuals, while blatantly disregarding their rights, and stripping them of their means of livelihood without regard to the law. The section protects the appellant only when it has acted within the confines of the law.

The provision provides as follows:-

Section 212 (3)

> *"Where proceedings are brought against an officer on account of an act done, whether by way of seizure or otherwise in the execution or intended execution of his duty under this Act, and judgment is given against the officer, then, notwithstanding that in proceedings referred to in sub section (1), a court has not found that there were reasonable grounds for the act, <u>if the court before which the proceedings are heard is satisfied that there were reasonable grounds for the act,</u> the plaintiff shall be entitled to recover anything seized, or the value thereof , but shall not otherwise be entitled to damages and no costs shall be awarded to either party."* (Emphasis supplied)

It is clear from the above provision that the appellant cannot seek solace for its actions under this provision, as the court has found that there were no reasonable grounds whatsoever for the appellant's actions. That section does not assist the appellant at all. The appellant's actions were not reasonable both during the seizure and thereafter as is clear from the record of this appeal. Infact, the appellant acted with arbitrariness and a sense of impunity.

We are of the view that where the legislature has enacted law providing discretion, imposition of fines, penalties for violations and power to compound offences as in the current case, the regulator is required to use these tools to ensure compliance, expediency and deterrence. In this case the appellant acted with impunity and misused the discretion provided by the statute. Such a statute could not have been intended or envisaged to be used to deprive, withhold or detain a person's property for an inordinately long period where the statute provides recourse, but to facilitate trade and generation of revenue, while at the same time ensuring that the necessary taxes have been collected. The actions of the appellant can only have been grossly negligent and could not have been in good faith.

The regulator must exercise its discretion within the scope of the powers given and only for the purpose

for which the discretion is conferred by the statute. The statute imposes a duty upon the regulator to make its decisions in good faith and for proper purposes. The regulator exercising statutory powers must keep within the limits of the authority and discretion committed to it. It must act in good faith and it must act reasonably. In fact, in our considered view, had the appellant considered the circumstances of this case with sobriety, it would have come to the conclusion that the 1st Respondent's trucks were not liable for seizure as there was no reasonable ground to believe that the vehicles were liable to forfeiture, and therefore the Commissioner should have exercised his powers under section **199 (3)** to release and return them to the 1st respondent at the earliest opportunity.

Monetary fines and penalties serve two purposes. First is to facilitate immediate enforcement of the governing law. Without monetary penalties the only way to deal with operational and compliance violations under the Act would be the normal expensive and time consuming litigation, which is not conducive to the intentions of the legislature of vesting the Commissioner, as the regulator, with wide discretionary power for compounding offences.

The second purpose is, of course, deterrence that is, to discourage future violations and to ensure timely resolution of disputes and immediate correction. Without appearing to intrude in the internal affairs as to how the appellant should treat actual, or otherwise perceived violators of their laws, we think the appellant should pursue this recourse more often in order to avoid long protracted litigation like the one before us, where it may end up losing more than it would have collected, had it followed the compounding option. We nonetheless leave that to its good judgment.

In the present matter for instance ,the fine that would have applied under the Act was Kshs 100,000/= at the time, and the 1st respondent offered a security of Kshs 20 million to have his trucks released, which the appellant neglected and or refused to accept. This cannot have been in good faith, only be construed to have been in bad faith, and the Act cannot have been intended for the purpose that the appellant used it.

Conclusion.

We cannot conclude without acknowledging and expressing our gratitude to all counsel herein for leading us through the maze that is **Cap 472**, with all its mind boggling amendments over the years since 1998 when the cause of action herein arose. This made our task of preparing this judgment, considerably lighter.

In conclusion, we find that the appellant's appeal succeeds partially, but fails to a large extent. We allow the same only to the extent that we set aside the award of the learned Judge in respect of the US $ 24,000 which was not pleaded in the plaint, leaving an award of US $ 60, 000, and also adjust the order on costs.

We therefore set aside the final orders of the High Court, and in lieu thereof substitute the following orders;

Appellant is ordered to pay the 1st Respondent the following;

1. *US$ 60,000 per month or its equivalent in Kenya shillings with an*

   exchange rate for the dollar to the shilling as per the date of the judgment of the High Court calculated from the 28th October 1998 to August 2002 when the trucks were released;

2. *The award of 5,000,000 is left undisturbed given that the 1st respondent had not claimed any punitive or exemplary damages, which would have been merited given the circumstances surrounding this matter.*

3. *Order 1 shall attract interest at 18% from the date of filing the suit till payment in full;*

4. *Order 2, to attract the same interest of 18% with effect from the date of judgment of the High Court, until payment in full.*

5. *The appellant will pay the 1st Respondent 70% of the costs of this appeal and before the High Court.*

6. *The appeal against the 2nd Respondent is dismissed in its entirety with costs to the 2nd Respondent.*

Dated and delivered at Nairobi this 31st day of July, 2015.

W. KARANJA

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JUDGE OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

F. AZANGALALA

……

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR