Kenya Revenue Authority v Export Trading Company Limited (Petition 20 of 2020) [2022] KESC 31 (KLR) (17 June 2022) (Judgment)

Neutral citation: [2022] KESC 31 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 20 OF 2020

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

JUNE 17, 2022

BETWEEN

KENYA REVENUE AUTHORITY ..... APPELLANT

AND

EXPORT TRADING COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal, (Ouko (P), Kairu & Sichale, JJ) at Nairobi in Civil Appeal No. 180 of 2019 dated 23rd October, 2020)

A demand for short levied duty almost 4 years after the initial assessment and payment of the duty was unreasonable and a violation of the right to fair administrative action.

Reported by John Ribia

Tax Law *– Kenya Revenue Authority – duty - short levied duty – power to demand short levied duty after an audit – where KRA had demanded short levied duty and the same had been paid but later after an audit KRA made a further demand for short levied duty - whether the actions of the Kenya Revenue Authority to demand short levied duty almost 4 years after the initial assessment and payment of the duty were unreasonable - East African Community Customs Management Act, 2004, section 135(1).*

Constitutional Law *– fundamental rights and freedoms – right to fair administrative action – power of the Kenya Revenue Authority to demand short levied duty - where KRA had demanded short levied duty and the same had been paid but later after an audit, KRA made a further demand for short levied duty - whether the actions of the Kenya Revenue Authority to demand short levied duty almost 4 years after the initial assessment and payment of the duty was a violation of the respondent's right to fair administrative action – Constitution of Kenya, 2010, article 47.*

Administrative Law *– legitimate expectation – power of the Kenya Revenue Authority to demand short levied duty - where KRA had demanded short levied duty and the same had been paid but later, after an audit, KRA made a further demand for short levied duty - whether the actions of the Kenya Revenue Authority to demand short levied duty almost 4 years after the initial assessment and payment of the duty created a legitimate*

expectation in favour of the respondent that KRA was not to levy taxes - East African Community Customs Management Act, 2004, section 135(1).

Civil Practice and Procedure *– costs of the suit – principle that costs followed the event – application for costs against a parastatal/governmental institution – what was the purpose of levying costs against a party in a judicial action – what were the exceptions to the principle that costs followed the suit – under what circumstances would costs of the suit be levied against parastatals/governmental institutions.*

Words and Phrases *– legitimate expectation – definition of - a person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he had no legal right in private law to receive such treatment. The expectation could arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice - Halsbury's Laws of England, 4th Edition, Vol. 1 (1), page 151, paragraph 81.*

Words and Phrases *– public interest – definition of - the general welfare of the public that warranted recognition and protection, something in which the public as a whole had stakes, especially that justified governmental regulation. In litigating matters of general public importance, an understanding of what amounted to public or public interest was necessary. Public was thus defined: as concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land - The Black's Law Dictionary, 9th Edition.*

Brief facts

In the years 2008 and 2009, the respondent imported various consignments of rice from Burma, Vietnam, and Thailand. The appellant, the Kenya Revenue Authority, via its Tradex Simba System, an automated tax collection and import clearance system, levied a duty of 35% on the imported rice, which duty, the respondent paid in full.

Subsequently, in 2013, about four years after the initial tax was assessed, demanded, and paid, KRA conducted a post-clearance audit. The audit revealed that the applicable import duty rate on the consignment was 75% and not 35%. KRA attributed the error to human and system errors in undercollecting import duty at the rate of 35%. Subsequently, KRA demanded payment of short levied duty amounting to Kshs. 378,016,680/- as income due from the respondent for rice imported.

Aggrieved, the respondent filed a constitutional petition challenging the appellant's second demand for tax, where the High Court held that the demand for taxes by the appellant was unreasonable and a breach of the respondent's right to fair administrative action. Aggrieved by the decision of the High Court, the appellant filed an appeal at the Court of Appeal. The Court of Appeal upheld the decision of the High Court by finding that the appellant's actions were irrational, arbitrary, and capricious and holding that the court's discretion was well exercised.

Further aggrieved, the appellant (KRA) filed the instant appeal in which they sought to overturn the decisions of the Court of Appeal and the High Court on grounds that the courts misapplied the law in finding that its actions were irrational and a breach of fair administrative action. They sought for the Supreme Court to interpret the law as strictly constructed and to hold that legitimate expectation could not operate contrary to statutory provisions and that it was wrong for the Court of Appeal to fail to appreciate that any post-clearance audit would necessarily have follow-up actions.

Issues

i. Whether the actions of the Kenya Revenue Authority to demand short-levied duty almost 4 years after the initial assessment and payment of the duty were a violation of the respondent's right to fair administrative action.

ii. What was the definition and applicability of the principle of legitimate expectation?

iii. Whether the actions of the Kenya Revenue Authority to demand short-levied duty almost 4 years after the initial assessment and payment of the duty created a legitimate expectation in favour of the respondent that KRA was not to levy the taxes.
iv. Whether the actions of the Kenya Revenue Authority to demand short-levied duty almost 4 years after the initial assessment and payment of the duty were unreasonable.
v. What was the purpose of levying costs against a party in a judicial action?
vi. Whether there were any exceptions to the principle that costs followed the event?
vii. Under what circumstances would the costs of the suit be levied against parastatals/governmental institutions?

Relevant provisions of the Law

East African Community Customs Management Act, 2004

Section 135 - Short levy or erroneous refund

(1) Where any duty has been short levied or erroneously refunded, then the person who should have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.

Held

1. Section 135(1) of the East African Community Customs Management Act, 2004 (EACCMA) granted the appellant power to conduct a post-clearance audit and demand the short levied duty. The appellant acted unfairly in demanding the alleged short-levied duty almost 4 years after the initial assessment, and payment of the duty so assessed was irrational and did not accord the respondent its right to fair administrative action.
2. A person could have a legitimate expectation of being treated in a certain way by an administrative authority even though he had no legal right in private law to receive such treatment. The expectation could arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice. A legitimate expectation arose where a person responsible for making a decision induced in someone a reasonable expectation that he would receive or retain a benefit or advantage.
3. Legitimate expectations could take many forms. It could take the form of an expectation to succeed in a request placed before the decision maker, or it could take the objective form that a party may legitimately expect that, before a decision that could be prejudicial was taken, one was to be afforded a hearing.
4. The question of whether a legitimate expectation arose was more than a factual question. It was not merely confined to whether an expectation existed in the mind of an aggrieved party, but whether, viewed objectively, such expectation was, in a legal sense, legitimate.
5. Legitimate expectation would arise when a body, by representation or by past practice, had aroused an expectation that was within its power to fulfill. For an expectation to be legitimate, therefore, it had to be founded upon a promise or practice by a public authority that was expected to fulfill the expectation. The emerging principles of legitimate expectation were that;
    1. there had to be an express, clear, and unambiguous promise given by a public authority;
    2. the expectation itself had to be reasonable;
    3. the representation had to be one that was competent and lawful for the decision-maker to make; and
    4. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.
6. A legitimate expectation arose since the appellant failed to collect duty at the applicable rate, having applied the rate of 35% in their Tradex Simba System. It was also incomprehensible how the appellant,

four years after the assessment of duty, demanded payment of extra duty when it sat on its laurels having itself assessed the duty payable. That act was unreasonable for the reason that, first, it was irrational and unreasonable to require the respondent to carry the burden of being aware of any mistakes made by the Tradex Simba System, a system run by the appellant. It was also incomprehensible how the respondent should be made to suffer the consequences of the actions of the appellant of failing to input the correct rate in a system it had full control over. That line of reasoning was misguided. It missed the point that judicial review is not concerned with the merits of the case but the decision-making process.

7. The appellant indicated that the respondent had already paid all taxes due to it. From the record, the respondent had also been categorical that it never mis-declared the country of origin of the rice. Even after declaring that the rice was not imported from Pakistan, the system went on to apply the rate of 35%, after which the respondent paid the relevant duty.
8. The actions of the appellant in failing to respond to the respondent's letter seeking clarification on the demanded duty amounted to an expectation that the respondent had paid the correct duty. The expectation was not unreasonable. There was absolute reason given to the respondent to expect that there would not be a further claim for the duty they paid almost four years to the date of importation of the rice.
9. It was unacceptable that the respondent adopted the view that it did not matter whether there was a misdeclaration, underdeclaration, or system error and that the appellant was entitled to demand any levies discovered following the carrying out of a post-audit at any given time. Anyone who decided anything affecting the right or interest of another person if the person, body, or authority against whom it was claimed exercised a quasi-judicial function that was likely to infringe on their right to fair administrative action was entitled to remedies for judicial review.
10. Ordinarily, costs followed the event. However, costs should not be used to penalize the losing party but to compensate the successful party for the trouble taken in prosecuting or defending a suit.
11. An award on costs must be judiciously exercised by invocation of the discretion of the court on a case-by-case basis, and it was the practice that, where suits involved genuine public interest, courts were slow to award costs as against the losing party. Condemning an unsuccessful party to pay costs in genuine public interest litigation can act as a deterrent factor preventing parties from instituting proceedings that benefit the public generally for fear of being condemned to pay costs. The general rule on costs was therefore not immutable, and although deeply entrenched, certain specific circumstances and considerations may necessitate non-application of the principle.
12. Public bodies and organizations such as parastatals, which ordinarily existed to serve a country's government by participating in proceedings, acted purely in a regulatory capacity. Such government organizations acting within their mandate need not be condemned to pay costs where such an entity had brought or defended proceedings while acting purely in that regulatory capacity. An award of costs against such entities should only be made where such an entity has acted unreasonably or in bad faith.
13. Public interest litigation exists to serve the purpose of protecting the rights of the public at large. Therefore, public bodies instituting or defending proceedings were performing their public function, which fell under public interest.
14. The case raised constitutional issues that were public in nature, and while the appellant may have acted unreasonably, no bad faith had been exhibited, and in the totality of matters, discretion would tilt in its favour. In the circumstances and the public interest, each party was to bear its costs.

Appeal dismissed, decision of the Court of Appeal upheld.

Orders

Each party was to bear its costs.

Citations

Cases

Kenya

1. *Aryuv Agencies Limited v Kenya Revenue Authority* Judicial Review 5 of 2013; [2019] KEHC 7892 (KLR) - (Applied)
2. *Commissioner Customs & 2 others v Amit Ashok Doshi & 2 others* Civil Application Nai 94 of 2007 (UR 61/07) - (Applied)
3. *Communication Authority of Kenya & 5 others v Royal Media Services & 5 others* Petition No 14 of 2014; [2014] eKLR - (Followed)
4. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Explained)
5. *Ericsson Kenya Limited v Attorney General & 3 others* Petition 506 of 2013; [2014] KEHC 6291 (KLR) - (Mentioned)
6. *Hussein, Noor Malim & 4 others v Minister of State of Planning, National Development and Vision 2030 & 2 others* Miscellaneous Civil Application 309 of 2010; [2012] KEHC 4225 (KLR) - (Mentioned)
7. *Judicial Service Comission v Mbalu Mutava & another* Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Mentioned)
8. *Keroche Industries Limited v Kenya Revenue Authority & 5 others* 743 of 2006; [2007] KEHC 2517 (KLR) - (Mentioned)
9. *Krish Commodities Limited v Kenya Revenue Authority* Civil Appeal 67 of 2017; [2018] KECA 415 (KLR) - (Mentioned)
10. *Matemu, Mumo v Trusted Society of Human Rights Alliance & 5 others* Civil Application 29 of 2014; [2014] KESC 6 (KLR) - (Explained)
11. *Rai & 3 others v Rai & 4 others* [2014] 2 KLR 253 - (Explained)
12. *Republic v Commissioner of Co-operatives, Kirinyaga Tea Growers Co-operative & Savings & Credit Society Ltd* [1999] 1 EA 245 - (Mentioned)
13. *Republic v Commissioner General Kenya Revenue Authority ex-parte Mount Kenya Bottlers Ltd & another* Miscellaneous Civil Application 170 of 2010; [2016] KEHC 5170 (KLR) - (Mentioned)
14. *Republic v Kenya Revenue Authority ex parte Cooper K- Brands Limited* Miscellaneous Application 458 of 2013; [2013] eKLR - (Mentioned)
15. *Wanderi, Martin & 106 others v Engineers Registration Board & 10 others* Petition 19 of 2015 & 4 of 2016; [2018] eKLR (Consolidated) - (Explained)

United Kingdom

1. *Competition Markets Authority v Flynn Pharma Limited & 3 others* C3/2019/1293; [2020] EWCA Civ 617 - (Explained)
2. *Council of Civil Service Unions and Others v Minister for the Civil Service* [1983] UKHL 6; [1984] 3 All ER 935; [1985] AC 374; [1984] 3 WLR 1174 - (Explained)

India

Commissioner of Customs (Import) v M/S Dilip Kumar and Company [2018] 9 SCC 1 - (Mentioned)

Canada

Chandler v Alberta Association of Architect 1989 XanLII 41 (SCC), [1989] 2 SCR 848 - (Explained)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edition
2. Hogg, QM (Lord Hailsham) et al (Eds) (1995), *Halsbury's Laws of England* London: Butterworth 4th Edn Vol 1 (1) p 151
3. Woolf, H., (Lord) et al (Eds) (2007), *De Smith's Judicial Review of Administrative Action* London: Sweet & Maxwell 6th Edn p 609

Statutes

Kenya

Constitution of Kenya articles 10, 24(1); 47; 50; 94; 163(4)(a); 209; 210 - (Interpreted)

Regional Court

1. East African Community Customs Management Act, 2004 sections 135(1)(3); 229; 235; 236 - (Interpreted)
2. Treaty for the Establishment of the East African Community Act, 2000 (Act No 2 of 2000) article 8 - (Interpreted)

Advocates

None mentioned

JUDGMENT

A. Introduction

1. Before the court is a petition of appeal dated and filed on December 2, 2020. It is brought pursuant to article 163(4)(a) of the *Constitution*, challenging the entire Judgment and orders of the Court of Appeal (Ouko (P), Kairu & Sichale, JJA) delivered in Civil Appeal No 180 of 2019. The Court of Appeal upheld the decision by the High Court (Okwany, J) in Constitutional Petition No 148 of 2013.

B. Factual Background

2. The respondent, Export Trading Company Limited, is a limited liability company that trades in commodities by importing them into Kenya. One of the commodities it trades in is rice, which it imports for resale to other traders. The dispute in question concerns various consignments of rice that were imported by the respondent from three countries; Burma, Vietnam and Thailand.

3. It was claimed that around July 2005, the East African Community (EAC) promulgated the Common External Tariff (CET) in accordance with the provisions of the *East African Community Customs Management Act*, 2004 (EACCMA). The purpose of the CET was to set out the import duty rate for rice imported from outside the East Africa Community, which was set at 75%. The appellant, Kenya Revenue Authority, then proceeded to effect that rate on its Tradex Simba System, an automated tax collection and import clearance system implemented in 2005. However, the Council Ministers of EAC issued Legal Notice No 1 of 2005 which stayed the application of the 75% import duty rate on rice imported from Pakistan for two years from 1st July 2005 to 30th June 2007. The appellant thus applied an import duty rate of 35% in the Tradex Simba System for all rice imports regardless of origin.

4. At the expiry of the two years, the Council of Ministers of the EAC issued Legal Notice No EAC/10/2007 that again stayed the application of the import duty rate of 75% on rice imported from Pakistan for another two years from June 1, 2007to June 18, 2009. The respondent claims that the appellant maintained the rate of 35% in its Tradex System which was still the rate that applied to all rice importers regardless of the origin of the rice until 26th June 2009. On this date, the appellant put up a message on the Tradex Simba System informing importers that the import duty rate of 35% would only be applied to rice imported from Pakistan upon submitting a certificate of origin, amongst other documents.

5. Between the years 2008 and 2009, the respondent imported various consignments of rice from Burma, Vietnam and Thailand. It was the respondent's claim in that regard that, the appellant as the government agency that is responsible for the assessment, collection and receipt of revenue assessed the imported rice and found that the rate of duty applicable for the imported rice was 35%, which duty, the respondent paid in full. The respondent claims that the appellant later alleged that the applicable

import duty rate on the consignment was 75% and not 35% after the appellant claimed that it had made a 'human and system error' in under-collecting import duty at the rate of 35%.

6. The respondent further claimed that the appellant, in a letter dated February 27, 2013, proceeded to demand a sum of Kshs 378,016,680/- being the revenue due as a result of misapplication of import duty. The respondent in addition claims to have applied for a review of the said decision, but the appellant never communicated its decision on the application for review to the respondent as required under section 229 of the *EACCMA Act*, 2004. It is this act of demanding the alleged underpaid duty for rice sold four years after its payment later that led to the respondent instituting proceedings against the appellant challenging the recovery of the said demanded sum.

C. Litigation Background

i. At the High Court

7. The respondent filed a constitutional petition challenging the appellant's acts of demanding the sum of Kshs 378,016,680/- that constituted unpaid taxes by the respondent four years after having paid duty. The respondent claimed that in doing so, the appellant violated the principle of legitimate expectation and that its actions were unreasonable, irrational, done in bad faith and were in contravention of the provisions of articles 40, 47 and 50 of the *Constitution* and went on to seek declaratory, judicial review and injunctive orders against the appellant.

8. Upon considering the pleadings and the evidence, the learned Judge of the High Court (Okwany, J) discerned one main issue for determination which was whether the respondent's demand was reasonable, rational and in accordance with articles 10 and 47 of the *Constitution*. In allowing the petition, the trial court found that the appellant did not act fairly, reasonably and in an expeditious manner by failing to offer a satisfactory explanation on why the post clearance audit and the subsequent demand for the short levied duty was made almost four years after the initial assessment of the payable duty.

9. On the merits of the petition, the learned judge found that the EACCMA is a valid law that derives its force from the provisions of article 8 of the *Treaty for the Establishment of the East African Community*, 2000 and that section 135(3) of EACCMA empowers the appellant to carry out post clearance audits and demand for short levied duty within 5 years. It was however the learned Judge's finding that there ought to be sufficient reason(s) as to why such an audit and demand is made late and towards the tail end of the given period and that the appellant could not stand behind the time limit given to justify the conduct of demanding the short levied duty in question four years later.

10. On the issue of the identification of the applicable rate of duty and assessment thereof duty payable vide the Tradex Simba system, the High Court found that the system was owned and controlled by the appellant and therefore, the respondent had no role in declaring or setting the rate to be applied. The learned Judge also found that it was unreasonable for the appellant to turn around and pass the blame to the respondent by contending that the respondent was aware of its rights under Legal Notice No EAC/10/2007 more so considering that the appellant's own officers verified the entries made and even inspected the consignments. The court consequently granted the following declarations and orders:

    a. A declaration that the demand of taxes by the appellant constitutes an infringement of the respondent's rights under article 40 and 47 of the *Constitution*,

    b. An order of *certiorari* to bring to this court and quash the decision to demand and the demand contained in the letter dated February 27, 2013

c. A permanent injunction restraining the respondent whether by itself, its officers, employees and/or agents from commencing, instituting or proceeding with any enforcement or prosecution against the respondent or its directors and/or officers in relation to or on account of the disputed taxes in the sum of Kshs 378,016,680/- and the interests and penalties claimed therein.

ii. At the Court of Appeal

11. Aggrieved by the decision of the High Court, the appellant filed Nairobi Civil Appeal No 180 of 2019 listing eight (8) grounds of appeal claiming that the learned Judge erred in; failing to appreciate that the appellant acted within the provisions of section 235 of the EACCMA which allows the appellant to carry out post clearance audits within five years of the date of importation; finding the appellant's actions of carrying out the post clearance audit nearly four years post importation of the rice was irrational and unreasonable; holding that the respondent's right to fair administrative action pursuant to articles 10 and 47 of the *Constitution* were infringed by the appellant's action of demanding the short levied taxes that were due and payable by the respondent; failing to consider that Legal Notice No EAC/10/2007 which prescribed the duty rate of rice from Pakistan at 35% and rice from any other part of the world at 75% was a public legal document that the respondent was aware of; failing to appreciate that the Tradex Simba System, a technological platform erected to facilitate efficient clearance of the goods did not oust the application of the provisions of *EACCMA* and Legal Notice No EAC/10/2007; failing to appreciate that the appellant can demand any short levied taxes even where the same is due to a miscalculation by the Tradex Simba System so long as the post clearance audit is done within 5 years as provided for under section 235 as read with section 236 of *EACCMA*; holding that a legitimate expectation arose in favour of the respondent and; failing to appreciate that the appellant's action of demanding the short levied taxes was lawful, reasonable and justifiable.

12. Upon the hearing and consideration of the appeal, the appellate court noted that the main issue in contention was the appellant being aggrieved by the outcome of the respondent's judicial review application challenging the appellant's decision to demand additional duty on rice that had been cleared four years prior to the demand notice.

13. In a Judgment delivered on October 23, 2020, the Court of Appeal upheld the decision of the High Court by finding that the appellant's actions were irrational, arbitrary and capricious and held that the learned Judge's discretion was well exercised.

14. On the issue of whether there was a mis-declaration of the country of origin of the rice by the respondent or whether there was under-collection of import duty occasioned by human and system error on the part of the appellant, the learned Judges opined that there was lack of candour by the appellant by placing blame on the respondent for mis-declaring the country of origin and by attributing the under-assessment of duty to its Tradex Simba System. The appellate court then went on to find that though technological and human errors are possible, it is unfair and unreasonable for the appellant to have demanded the shortfall of duty four (4) years down the line.

15. The Court of Appeal further held that since rice is a perishable commodity, the respondent could not be expected to keep the rice in its warehouse awaiting the statutory period of 5 years within which the respondent under *EACCMA* is permitted to carry out a post clearance audit to ascertain duty chargeable. The appeal was therefore dismissed.

iii. At the Supreme Court

16. Dissatisfied by the Court of Appeal Judgment, the appellant has now moved this court, citing seven (7) grounds of appeal claiming that the learned Judges of appeal erred in law and fact in;

    i. Ignoring the principle in taxation that when it comes to interpretation of tax legislation, the language imposing tax must receive a strict construction.

    ii. In finding that the appellant acted within the provisions ofsection 235 of the EACCMA Act, 2004 which permits the applicant to carry out the post clearance audit within 5 years of importation and therefore such an action could not be declared to have infringed on the Respondent's rights.

    iii. In misdirecting themselves by finding that carrying out the post clearance audit nearly four years post importation of the rice was irrational and unreasonable.

    iv. In failing to appreciate the legislature does not make the law in vain or by mistake and that Parliament was deliberate in providing for post clearance audits be conducted within 5 years having understood the customs clearance process, the time and challenges faced in conducting such audits.

    v. In failing to appreciate the provisions of article 24(1) of the *Constitution* that allows a law to limit the rights of a person where the limitation is reasonable and justifiable in an open and democratic society.

    vi. In failing to apply the objective test of suitability, necessity and proportionality when arriving at the conclusion that an action taken by the appellant within statutory timelines violated the principles of article 47.

    vii. In failing to find that the appellant's action was in line with the taxing statute enacted by Parliament empowered by article 94 of the *Constitution* in pursuit of effecting article 209 and 210 and therefore could not be said to have led to an infringement of the respondent's rights.

17. Consequently, the appellant seeks the following reliefs from thecourt;

    i. That the judgment of the Court of Appeal given in Civil Appeal No 180 of 2019 on October 23, 2020, together with all other consequential orders be and is hereby set aside and the appeal be allowed as prayed in the memorandum of appeal at the Court of Appeal.

    ii. The judgment of the High Court given in High Court Constitutional Petition No 148 of 2013 be dismissed.

    iii. The respondent bears the costs of the appellant in the High Court, Court of Appeal and costs of the appellant in this appeal.

D. Parties' Respective Cases

i. The appellant's

18. The appellant's written submissions are dated March 3, 2021and filed on March 4, 2021. On the issue of whether the court has power to interfere with the Appellant's discretion to carry out post clearance audits carried out at the tail end of the five years provided under section 235 of the *EACCMA Act*,2004, it is the appellant's case that the Court of Appeal erred in finding that the carrying out of the post clearance audit almost four years post importation of the rice was irrational and unreasonable; that

the provisions of section 235(1) of *EACCMA Act* allows for post clearance audits which is one of the appellant's mandate and; that the demand for unpaid taxes was done within five years of importation, hence the appellant acted within the ambit of the law. The High Court case of *Ericsson Kenya Limited v Attorney General & 3 others* [2014] eKLR was relied on in that regard.

19. The appellant further submits that it did not have powers to alter the law since the appellant was pursuing its statutory mandate and therefore the respondent's rights could not be said to limit the appellant's rights and mandate. The appellant furthermore urges thecourt to give due regard to the provisions of section 235 of the *EACCMA Act* allowing the appellant to undertake post clearance audits which was not unreasonable since the law provided for them to do so. The appellant maintains that its actions of conducting the post clearance audit were within the law and faulted the Court of Appeal for finding that the appellant's actions amounted to an infringement of the respondent's rights, a finding which they submitted meant that section 235 of the *EACCMA Act* was in conflict with the *Constitution*.

20. In response to the above submission, the appellant argues that, to the contrary, the Court of Appeal failed to apply the objective test of suitability, necessity and proportionality when arriving at the conclusion that though the appellant's actions were done within the provided statutory timelines, their actions violated the principles of article 47 of the *Constitution*. The appellant submits that the Court of Appeal erred in relying on the finding of legitimate expectation, submitting that legitimate expectation cannot operate contrary to statutory provisions and that it was wrong for the Court of Appeal to fail to appreciate that any post clearance audit would necessarily have follow up actions. The Supreme Court decision in *Communication Authority of Kenya & 5 others v Royal Media Services & 5 others*, Petition No 14 of 2014; [2014] eKLR which laid down the principles within which a public body can create legitimate expectation was relied on to buttress that point.

21. Regarding the issue of whether the appellant can collect short levied taxes attributed to errors by its officers when assessing tax or setting out of the rates of duty on the appellant's Tradex Simba System, the appellant submits that the respondent was well aware of Legal Notice No EAC/10/2007 of June 18, 2007 which provided that the applicable rate of duty for rice imported outside the EAC except from rice from Pakistan was 75% and not 35%, which was the erroneous rate reflected on its Tradex Simba System; that the respondent was not precluded from applying the rate of 75% having noticed the Tradex System was applying the rate of 35% and; that the respondent was at liberty to pay the required taxes manually , a procedure provided for undersection 135 of EACCMA. The appellant thus maintains that it can assess any short-levied taxes even where the same is as a result of a miscalculation by the Tradex Simba System and relies on the High Court decision in *Republic v Commissioner General Kenya Revenue Authority ex-parte Mount Kenya Bottlers Ltd & Another* [2016] eKLR and *Commissioner Customs and others v Amit Ashok Doshi & two others*, Civil Appeal No 157 of 2007 in support of this argument.

22. The appellant further urges that the Tradex Simba System being an administrative tool used by the appellant for ease of convenience during clearing of goods, was prone to human and technical errors, as the Court of Appeal rightly found, but faults the Court of Appeal for failing to find that a charge of duty rate at 35% as opposed to 75% did not oust the application of the provisions of the EACCMA and that the taxes not levied were to be paid, irrespective of the errors, further arguing that administrative errors cannot override the law. In support of this submission, the decision in the High Court case of *Aryuv Agencies Limited v Kenya Revenue Authority* [2019] eKLR was relied on where the court held that a demand to pay less tax charged due to an error on the Tradex Simba system did not offend the provisions of article 47 of the *Constitution*.

23. The appellant in addition strongly maintains that it derives its mandate from the provisions of articles 209 and 210 of the *Constitution* as well as section 235 of the EACCMA, hence the act of demanding for the non-paid taxes was in tandem with rectifying its errors while also acting within its statutory mandate. In support of this contention, the appellant cites the case of *Chandler v Alberta Association of Architects*, 1989 XanLII 41 (SCC), [1989] 2 SCR 848 where the Supreme Court of Canada recognized the importance of the judicial system making allowances in order to ensure that statutory or administrative bodies fully execute their mandate in accordance with their enabling statute.

24. It is also the appellant's argument that there is no equity in tax and relies in the case of *Keroche Industries Limited v Kenya Revenue Authority & 5 others,* HCMA No 743 of 2006; [2007] eKLR and the Supreme Court of India's decision in the case of *Commissioner of Customs (Import) v M/S Dilip Kumar and Company* (2018) 9 SCC 1 in support of this position.

25. The appellant also contends that the Court of Appeal erred in placing the blame for underpayment of taxes due to failure to respond to the respondent's letter dated July 26, 2007and maintains that it did respond to the respondent's application for review as the respondent was informed that the demand for extra revenue was valid and was to be paid.

26. The court was in conclusion urged to overturn the decision by the Court of Appeal and for the appellant to be allowed to collect the short levied taxes of Kshs 378,016,680/- and for the respondent to bear the costs of the appeal.

ii. Respondent's

27. The respondent in its submissions concurs with the appellant that sections 235 and 236 of EACCMA grant the appellant a five-year window to conduct post clearance audits on taxpayers, but argues that the provisions of section 235 aforesaid do not apply to the circumstances of this case since it was the appellant who erred in the misdeclaration of taxes and therefore, cannot attempt to rely on the five-year window on account of its own error.

28. The respondent thus argues that the main issue is not whether the appellant has power to conduct post clearance audits, but whether the exercise of this power violated the respondent's right to fair administrative action. The respondent further submits that article 47 of the *Constitution* grants any person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair arguing that the appellant, being an administrative body, must exercise its powers in a manner that does not violate the respondent's right to fair administrative action. The decisions in *Noor Malim Hussein & 4 others v Minister of State of Planning, National Development and Vision 2030 & 2 others* [2012] eKLR, *Republic v Commissioner of Co-operatives, Kirinyaga Tea Growers Co-operative & Savings & Credit Society Ltd* [1999] 1 EA 245 and *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR were submitted for our consideration in that context.

29. It is the respondent's other contention that the provisions of article 47 of the *Constitution* apply to the conduct of post clearance audit as was confirmed by Odunga, J in his decision in *Republic v Kenya Revenue Authority ex parte Cooper K- Brands Limited* [2016] eKLR where the learned judge held that the issue was not whether the petitioner was entitled to collect the tax but whether the process adopted in doing so was in accordance with articles 10 and 47 of the *Constitution*.

30. The respondent also submits that the appellant exceeded its statutory power unreasonably and acted inefficiently by failing to offer a rational explanation for the conduct of the post clearance audit and the issuance of a demand four years after duty was calculated; that despite seeking clarification on duty to be paid, the appellant failed to respond to this request; that the short fall in taxes was an error occasioned

by the appellant since the respondent had no control over the Tradex Simba Tax System and not a creature of a mis- declaration of the country of origin as alleged by the appellant hence the respondent ought not to be punished for the appellant's failure to perform its statutory duties. The respondent also maintains that the appellant's actions were irrational and unreasonable and therefore a violation of the respondent's right to fair administrative action. The Court of Appeal decision in *Krish Commodities Limited v Kenya Revenue Authority* [2018] eKLR was cited in that regard where it was held that the conduct of a post clearance audit and demand for short levied tax by the petitioner 4 years after the duty had been assessed without a reasonable explanation violated the right to fair administrative action.

31. The respondent in addition maintains that despite applying for a review of the demand of the post audit taxes, the appellant never communicated its decision to this application within thirty (30) days of lodging the application as provided for under section 229(5) of *EACCMA* and that failure to communicate its decision meant the application for review was allowed through the operation of the law.

32. On whether there arose a legitimate expectation, in the dispute it is the respondent's submission that the appellant's actions created a legitimate expectation that if it did all that it was required to do as a taxpayer, having followed the correct process, then the respondent would pay the correct importation taxes. It is their submission that the appellant's actions of failing to respond to the respondent when it sought a clarification on the rate of duty applicable, clearing the imported rice, applying the import duty rate and assessing the duty by verifying that the tax payer had made the correct declaration meant that the respondent, as a tax payer, had a legitimate expectation that it had settled the relevant taxes. The respondent also contends that, having created a legitimate expectation, the appellant is trying to benefit from its own mistakes, which it submits, is unjust and asks the court not to allow such an approach in tax matters.

33. In furtherance to the above submission, it is the respondent's contention that since the appellant failed to collect import duty at the applicable rate of 75% and applied the rate of 35%, then the appellant cannot now purport to turn around and ask for additional tax on the rice consignment that had already been cleared by its system on the ground of it being 'under collected duty'. In addition, since the appellant had full knowledge of the applicable duty, but failed to apply the correct duty in the Tradex Simba system, then it was estopped from raising any further/or additional taxes. For these reasons, it is the respondent's prayer that the appeal be dismissed.

E. Issues for Determination

34. Having considered the respective cases by the parties and submissions in support thereof, two issues arise for our determination viz:

    i. Whether the actions of the appellant constitute a violation of the provisions of articles 10 and 47 of the *Constitution*.

    ii. Whether a legitimate expectation arose.

F. Analysis

Whether the actions of the appellant constitute a violation of article 47 of the *Constitution*

35. As stated above, the substratum of this appeal lies with the actions of the appellant whereby it demanded payment of short levied duty amounting to Kshs 378,016,680/- as income due from the respondent for rice imported. This demand was made four years after the initial assessment and

payment of duty by the respondent. The respondent insists that the appellant is intentionally claiming that it mis-declared the origin of the rice to benefit from the lower rate of duty.

36. The appellant on the other hand, maintains that the respondent was well aware of the applicable rate of rice imported from outside the EAC other than Pakistan and which was charged at the rate of 75%. It is the appellant's submission in that regard that though the Tradex Simba system applied the wrong rate while calculating duty, the respondent, being aware of the correct rate to be charged, is obligated to pay the demanded short levied taxes of Kshs 378,016,680/-.

37. The appellant further urges this court to appreciate that the demand for the post clearance audit was done after four years, which was within the 5 years permitted by the EACCMA, arguing that it was right in demanding the short levied duty.

38. The respondent's case was set around infringement of its administrative rights under article 47 of the *Constitution*. Article 47(1) of the *Constitution* reads: - "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

39. Article 47 thus dictates that administrative actions that are dictated by statutes must meet the constitutional test of legality, reasonableness and procedural fairness. Article 47 of the *Constitution* also codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. So, was the respondent treated fairly and reasonably by the appellant? The High Court, in determining whether the appellant acted in a fairly, reasonably and expeditious manner held:

> "The main question in this petition is whether in the circumstances of this case, the respondent can be said to have acted fairly, reasonably and in an expeditious manner. I am afraid that the answer to the above question is to the negative. I say so because the respondent did not furnish this court with any satisfactory explanation as to why the post clearance audit and the subsequent demand for the alleged short levied duty was made almost 4 years after the initial assessment and payment of the duty so assessed. I further find that it was not in dispute that section 135(3) of the *EACCMA* allows the respondent to make such a demand within 5 years. However, that is not to say that the respondent should wait until the tail end of the said period before making such a demand. My humble view is that there ought to be sufficient reason(s) as to why such audit and demand is made too late and at the tail end of the given period."

40. The learned judge thus found that the actions of the appellant were irrational and not *in tandem* with the efficiency and expediency envisaged under article 47(1) of the *Constitution*.

41. The Court of Appeal on its part, rendered itself as follows:

> "28. Did the respondent act fairly and reasonably? We think not. There was no explanation as to why the post clearance audit and the subsequent demand for the alleged short levied duty was made about 4 years after the initial assessment and payment of the duty so assessed. Even, Mr Nyaga was at loss of words which could explain as to why it took such a long time. It is not in dispute that section 135(3) of the EACCMA allows the respondent to make such a demand within 5 years. However, that is not to say that the respondent should wait until the tail end of the said period before making such a demand. There ought to be sufficient reason(s) as to why such audit and demand is made at the tail end. In our minds, the respondent cannot simply stand behind the time limit given to justify its conduct of demanding the short levied duty in question about 4 years later."

42. It was thus the appellate court's finding that the absence of an explanation as to why the post clearance audit and resulting demand for short levied duty was made after a long time can only be perceived as irrational.

43. In the above context, section 135(1) of the *EACCMA* provides that ' Where any duty has been short levied or erroneously refunded, then the person who shall have paid the amount short levied or to whom the refund has erroneously been made shall, on demand by the proper officer, pay the amount short levied or repay the amount erroneously refunded, as the case may be; and any such amount may be recovered as if it were duty to which the goods in relation to which the amount was short levied or erroneously refunded, as the case may be, were liable.'

44. Section 135(1) indeed therefore grants the appellant power to conduct post clearance audit and demand the short levied duty as correctly argued by the appellant. However, in our view, the germane issue was the manner in which the decision to demand the short levied duty was made and whether the process followed was in conformity with article 47 of the *Constitution*.

45. In *Communications Commission of Kenya & 5 others v. Royal Media Services Limited & 5 others*, SC Petitions No 14, 14A, 14B and 14C of 2014; [2014] eKLR "*CCK* case" where Rawal, SCJ discussed the right to fair administrative action as provided for under article 47 of the *Constitution* by finding:

> "[404] The concept of legitimate expectation has been admirably captured in the main Judgment (paragraphs 256-291) and my intention is to capture its essence while considering its implication within our constitutional purpose, and the concept of its remedies through the administrative process stipulated under article 47 of the *Constitution*. A state under the rule of law is obliged to balance administrative action and the claims of legitimate expectation as has been claimed by the 1st, 2nd and 3rd respondents in this case. Article 47 in the circumstances is a deliberate step towards the attainment of a fair and dependable government advancing expeditious, efficient, lawful, reasonable and procedurally fair public policies. The doctrine of legitimate expectation requires the entrenchment of a duty to act fairly. A breach of article 47 attracts remedies in Judicial Review especially where an aggrieved person had cause to expect that the attendant aspects of fair administrative action would be adhered to. It is clear that the essence of article 47 is to protect a party's legitimate claim of entitlement that is, procedural solidity and not a mere promise of consideration. As such, the court can quash any decision arrived at un-procedurally or unfairly but reserves itself no right to engage in the administrative duties of the body in question. The court must remain a court." [Emphasis own]

46. The two superior courts, in considering whether the appellant acted reasonably and fairly, while acknowledging that *EACCMA* empowers the appellant to demand short levied duty, reminded themselves that they should not be concerned only with the power granted to the appellant. The superior courts concerned themselves with ensuring that the process of demanding the duty was fair and whether the appellant acted fairly or not. It was the findings that if fair procedure was not followed, every court is bound to come to the assistance of an aggrieved party irrespective of the merits of the allegations against a party, as the High Court and Court of Appeal did.

47. This court in *Martin Wanderi & 106 others v Engineers Registration Board & 10 others,* SC Petition No 19 of 2015; [2018] eKLR found that the question of legality or the lawfulness of an act lies at the core of article 47(1) by finding:

> "[126] In examining article 47(1) of the *Constitution*, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that

> authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was ultra vires the mandate of the administrative entity, the act is void ab initio and the inquiry stops there as there is an outright violation of the *Constitution*. The question of legality or the lawfulness of an act lies at the core article 47(1)."

48. We reiterate the findings by the High Court and Court of Appeal and hold that the appellant acted unfairly in demanding for the alleged short levied duty almost 4 years after the initial assessment and payment of the duty so assessed were irrational and did not accord the respondent its right to fair administrative action and we shall explain why.

Legitimate expectation: Does it arise?

49. The appellant claims that it is not only simplistic but also self-serving for the respondent to claim that the deficiencies of the Tradex Simba system created a legitimate expectation as the respondent was solely responsible for the short levied taxies whilst the law was clear that the applicable rate for the rice imported was 75%. It is its submission that there cannot be a legitimate expectation that is in contradiction to the law and that the error on the Tradex Simba system cannot oust the law. It thus urges that the findings by both courts did not meet the threshold for the application of the doctrine of legitimate expectation.

50. In the 4th Edition, Vol 1 (1) At page 151, paragraph 81 of the *Halsbury's Laws of England*, legitimate expectation is described as follows:

> "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation may arise either from a representation or promise made by authority, including an implied representation, or from consistent past practice".

51. Further according to *De Smith Woolf & Jowell, "Judicial Review of Administrative Action*" 6th Edn Sweet & Maxwell page 609;

> " A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage."

52. As can be discerned from these two definitions, legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.

53. Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate.

54. This is the position taken by thiscourt in the *CCK* Case where it was held that legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfill. For an expectation to be legitimate therefore, it must be founded upon a promise

or practice by a public authority that is expected to fulfill the expectation. We then went on to find the emerging principles on legitimate expectation to be that;

> "a. there must be an express, clear and unambiguous promise given by a public authority;
>
> b. the expectation itself must be reasonable;
>
> b. the representation must be one which it was competent and lawful for the decision-maker to make; and
>
> (d) there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

55. We also note that in the English case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1983] UKHL6; [1984] 3 All ER 935, it was held by the House of Lords, *inter alia* that:

> "An aggrieved person was entitled to invoke judicial review if he showed that a decision of a public authority affected him by depriving of some benefit or advantage which in the past he had been permitted to continue to enjoy and which he could legitimately expect to be permitted to continue to enjoy either until he was given reasons for its withdrawal and the opportunity to comment on those reasons or because he had received an assurance that it would not be withdrawn before he had given the opportunity of making representations against the withdrawal."

56. Taking into account the above expressions of the law, we must agree with the Court of Appeal that a legitimate expectation arose since the appellant failed to collect duty at the applicable rate, having applied the rate of 35% in their Tradex Simba system. It is also incomprehensible how the appellant, four years after the assessment of duty, demanded for payment of extra duty when it sat on its laurels having itself assessed the duty payable. This act is unreasonable for the reason that, first, it is totally irrational and unreasonable to require the respondent to carry the burden of being aware of any mistakes made by the Tradex Simba system, a system run by the appellant. Second, it is also incomprehensible how the respondent should be made to suffer the consequences of the actions of the appellant of failing to input the correct rate in a system it had full control over. This line of reasoning, is with respect, misguided. It misses the point that judicial review is not concerned with the merits of the case but the decision making process.

57. To our minds, the appellant did indeed give indication that the respondent had already paid all taxes due to it. From the record, the respondent has also been categorical that it never mis-declared the country of origin of the rice. Even after declaring that the rice was not imported from Pakistan, the system went on to apply the rate of 35% after which, the respondent paid the relevant duty.

58. In further agreeing with the findings of the two superior courts, we note that the actions of the appellant of failing to respond to the respondent's letter seeking a clarification on the demanded duty amounted to an expectation that the respondent had paid the correct duty. The expectation, in our view, is not unreasonable. There was absolute reason given to the respondent to expect that there would not be a further claim for the duty they paid almost four years to the date of importation of the rice.

59. It is furthermore unacceptable to us that the respondent adopted the view that it did not matter whether there was a mis-declaration, under- declaration or a system error and that the appellant is entitled to demand for any levies discovered following the carrying out of a post-audit at any given time. To our minds, anyone who decides anything affecting the right or interest of another person if the person, body or authority against whom it is claimed exercised a quasi-judicial function of function

that is likely to infringe on their right to fair administrative action, is entitled to remedies for judicial review. For these reasons, we find no difficulty in upholding the judgment of the Court of Appeal.

60. Consequently, the appeal is dismissed.

G. Costs

61. The legal principles that guide the grant of costs have been well settled by this court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others,* Sup Ct Petition No 4 of 2012; [2014] eKLR where we held that, ordinarily, costs follow the event. However, we further went on to hold that costs should not be used to penalize the losing party, but to compensate the successful party for the trouble taken in prosecuting or defending a suit. It was our finding in that regard that:

> "... there is no prescribed definition of any set of "good reasons" that will justify a court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, thecourts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question, shows that, as an example, matters in the domain of public-interest litigation tend to be exempted from award of costs."

62. It is also trite law that an award on costs must be judiciously exercised by invocation of the discretion of the court on a case by case basis and it is the practice that, where suits involve genuine public interest, courts are slow to award costs as against the losing party. Courts have, in addition, found that condemning an unsuccessful party to pay costs in genuine public interest litigation can act as a deterrent factor preventing parties from instituting proceedings that benefit the public generally for fear of being condemned to pay costs. The general rule on costs is therefore not immutable and although deeply entrenched, certain specific circumstances and considerations may necessitate non application of the principle.

63. Similarly, public bodies and organizations such as parastatals, which ordinarily exist to serve a country's government, by participating in proceedings, act purely in a regulatory capacity. We are of the view that such government organizations acting within their mandate need not be condemned to pay costs where such an entity has brought or defended proceedings while acting purely in that regulatory capacity. The instant matter provides an opportunity for us to determine that an award of costs against such entities should only be made where such an entity has acted unreasonably or in bad faith and we shall explain why.

64. In the English case of *Competition Markets Authority v Flynn Pharma Limited & 3 others,* C3/2019/1293; [2020] EWCA Civ 617 the court stated:

> 104. As I have said, although 'costs follow the event' is not the starting point in an infringement appeal at first instance, I do not consider that BT v Ofcom endorses the Principle as originally formulated by the CMA. It is not the case that the only circumstances in which an order for costs can be made against the CMA is a case in which it has acted unreasonably or in bad faith...
>
> 105. Rather, in my judgment, the starting point or default is that no order for costs should be made against a regulator who has brought or defended proceedings in the CAT acting purely in its regulatory capacity. That starting point may be departed from for good reason; but the mere fact that the regulator has been unsuccessful is not enough.
>
> As this Court recognized in BT v Ofcom at [86], it is for the CAT to develop its own approach to an award of costs. The approach can, no doubt, include the degree of success or failure

achieved by a party as one of the relevant factors as envisaged by rule 104 itself. It may also include consideration of what (if any) hardship would be suffered by a successful appellant if an order for costs was not made (which would not be a relevant consideration under the CPR). In considering hardship, the CAT could take into account, in an appropriate case, the level of irrecoverable costs that the successful party had borne in the administrative stage of the investigation. The conduct of the parties would also be a relevant consideration as the rule again envisages. It may be that if the CMA were to pursue a small or medium-sized enterprise as a test case, that would justify a departure from the starting point. But whatever approach is adopted the CAT must also put into the scales the fact that the CMA is a public body carrying out functions in the public interest: and that there is a public interest in encouraging public bodies to exercise their public function of making reasonable and sound decisions without fear of exposure to undue financial

prejudice, if the decision is successfully challenged."

[Emphasis own]

65. We align ourselves with this finding. Public interest litigation exists to serve the purpose of protecting rights of the public at large. Therefore, public bodies instituting or defending proceedings are performing their public function which falls under public interest. The *Black's Law Dictionary*, 9th Edition defines 'public interest' as;

> "...the general welfare of the public that warrants recognition and protection, something in which the public as a whole has stakes, especially that justifies Governmental regulation". In litigating on matters of "general public importance", an understanding of what amounts to 'public' or 'public interest' is necessary. "Public" is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land."

66. Njoki Ndungu, SCJ in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others,* SC Civil Application No 29 of 2014; [2014] eKLR in her concurring opinion discussed the essence of public interest litigation by holding:

> "(89) Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the *Constitution*'s aim in enlarging *locus standi* in human rights and constitutional litigation. *Locus standi* has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the court has discretion on a case by case basis, to evaluate the terms and public nature of the matter *vis a vis* the status of the parties before it. This discretion is drawn from the command of article 259(1), to interpret the *Constitution* in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance."

67. We reiterate that finding and would therefore hold that this case is one that raises constitutional issues which are public in nature and while we have found that the appellant may have acted unreasonably, no bad faith has been exhibited and in the totality of matters placed before us, discretion would tilt in its favour. In the circumstances and in the public interest, each party should bear its costs.

68. Flowing from above, the final orders are that:

i. Thepetition of appeal dated and filed on December 2, 2020 is hereby dismissed.

ii. Each party shall bear its costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JUNE, 2022.

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA